McGraw-Hill
BROADCASTING

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Ms. Marlene H. Dortch, Esq.
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Amendment of the Commission's Rules Related to Retransmission Consent
<u>MB Docket No. 10-71</u>

Dear Ms. Dortch:

On March 3, 2011, in response to a Petition for Rulemaking filed by a coalition of multichannel video program distributors ("MVPDs") and other interest groups, the FCC released a Notice of Proposed Rulemaking seeking comment on proposed changes to its rules governing the process by which television stations and MVPDs negotiate retransmission consent. McGraw-Hill Broadcasting Company, Inc. ("McGraw-Hill") fully supports the positions taken by the National Association of Broadcasters ("NAB") in its comments on the Petition for Rulemaking and in *ex parte* meetings with the Commission. Specifically, McGraw-Hill agrees with NAB that the only possible conclusion the Commission could reach after reviewing the record in this proceeding is that it lacks authority under the Communications Act to mandate carriage without consent or to force parties to submit to arbitration.

I write separately to share McGraw-Hill's own retransmission consent experiences and to ensure that those experiences are accurately reflected in the record. McGraw-Hill is involved actively in broadcast organizations, including NAB, Mobile 500, state broadcast organizations, and the ABC network affiliate association. Based on this extensive involvement and our contacts throughout the television broadcast industry, I am confident that McGraw-Hill's experience negotiating thousands of retransmission consent agreements across the country is representative of the broadcast industry as a whole.

McGraw-Hill owns four full-power television stations: KMGH-TV in Denver, KGTV(TV) in San Diego, WRTV(TV) in Indianapolis, and KERO-TV in Bakersfield. Each station is affiliated with the ABC Television Network and a leader in its market. The successes enjoyed by these stations are based in large part on the truly local service they provide their audiences, with a particular emphasis on local news. Many also produce and air extensive coverage of local events (*e.g.*, political campaigns, emergency weather reports, parades, special events).

McGraw-Hill's television stations reach the majority of the nearly 4 million television households in our four markets through the retransmission of their broadcast signals by several hundred cable systems, both nationwide direct broadcast satellite systems, and other multichannel video program distributors ("MVPDs") of all sizes – from multibillion-dollar, diversified media companies like

AT&T and Comcast to local co-operatives and municipally-owned telephony-based systems. To ensure carriage on the largest systems in any particular market, McGraw-Hill must negotiate retransmission consent with companies substantially larger than McGraw-Hill. Indeed, McGraw-Hill estimates that just four entities control the overwhelming majority of the MVPD homes served by McGraw-Hill's television stations.

To an overwhelming extent, our experiences demonstrate that the market-based approach to retransmission consent continues to function well. The existing system has allowed carriage agreements to continuously adapt to an ever-changing media marketplace. While our negotiations with MVPDs have been challenging at times, they have occurred – and concluded successfully – without government intervention or intrusion. In fact, in the nearly two decades since enactment of the 1992 Cable Act, our television stations rarely have been removed from a cable or satellite system as a result of a retransmission consent dispute. Despite the complexity of the issues involved, and the often outsized leverage that we face in negotiating with much larger companies with substantially more retransmission consent experience than us, McGraw-Hill has managed to resolve virtually every one of its retransmission consent negotiations without any public hint that the negotiations even occurred.

It is no secret that the market value for retransmission fees for local broadcast programming has increased in recent years. Nor should this be a surprise. Local broadcasters consistently and overwhelmingly deliver the most popular programming available on any MVPD's platform. Yet, until 2005, few broadcasters were obtaining carriage fees for their popular programming. Meanwhile, national cable networks like ESPN, FOX News, TNT, and USA – which garner a mere fraction of the ratings of local broadcast stations – were able to charge license fees from anywhere between $0.50 to more than $4.00 per subscriber (according to data submitted by the cable industry). This imbalance was unsustainable, and beginning in 2005 broadcast retransmission fees slowly began to catch up to the lowest rated national cable networks. The fees paid by those who retransmit (and resell) McGraw-Hill's programming has provided the crucial resources that McGraw-Hill has reinvested in its stations, its local employees, and its local newsgathering operations. Even today, however, the average subscriber fee for the most popular local broadcast station in a market remains a tiny fraction of the fee that MVPDs pay nationwide cable networks that do not offer the most popular programming; do not offer any local programming; and do not have any local employees, any community involvement, or any nexus to local consumers.

The increasing value of broadcast retransmission fees has changed the dynamics of negotiations with MVPDs, and, in turn, that admittedly has led to more public retransmission consent disputes than in years past. Rather than adjust to the changing marketplace – as broadcasters have done in countless circumstances – certain MVPDs are instead turning to government intervention in private retransmission consent negotiations.

Greater government intervention is bad public policy and would produce poorer choices for consumers. In McGraw-Hill's experience, the mere threat of FCC rule or policy changes regarding retransmission consent negotiations has had the perverse effect of stalling and discouraging negotiations by certain operators. Efforts to gain the favor of key government regulators necessarily distracts both sides from the most important task at hand: negotiating with each other in good faith.

Greater government intervention also would prove unworkable. A retransmission consent agreement reflects a complex arrangement of tradeoffs and concessions by both parties that are not appropriate for other parties facing different circumstances. In McGraw-Hill's experience, the most contentious issues are not always financial terms. Frequently, in fact, compensation issues are resolved relatively early in discussions, while other issues can take months to negotiate. These more difficult discussions can include confidentiality, technical carriage terms, multicast carriage, channel positioning, promotion and advertising, after-acquired systems or stations, and most-favored-nation provisions. Commission involvement in back-and-forth negotiations regarding such complex issues almost certainly would lengthen and complicate retransmission talks. Moreover, by holding out the hope of some alternative avenue to resolve these difficult issues, the FCC would remove the existing incentives encouraging focused, good-faith negotiations on both sides. This counterproductive result runs directly counter to the Commission's goals in this proceeding and, ultimately, would harm consumers.

In our experience, the best tool for encouraging good faith and earnest negotiations is a hard deadline. In any retransmission negotiation, both parties sincerely want to avoid a service blackout. Consequently, when a hard deadline approaches, the parties naturally focus their efforts on the most important issues at hand and spend less time posturing. Indeed, throughout our most difficult negotiations, we have learned that progress often cannot be made without the pressure of a looming deadline. When certain MVPDs come to believe that an extension of an expiring agreement is readily attainable or that the government might intervene in our negotiations, those MVPDs quickly evidence no incentive to compromise or avoid delay. If, however, both parties understand that the deadline is real, each party is more likely to seek common ground on less critical issues and to prioritize the negotiations in their schedules, thereby allowing the negotiations to progress to the most important areas of dispute – and resolution.

McGraw-Hill only sets a hard deadline as a last resort because service disruptions harm our stations, our viewers, and our advertising clients. When MVPD carriage lapses, a broadcaster immediately suffers as ratings and advertising revenue declines. Loyal viewers of local news stray – out of necessity – to other area stations. Local advertising clients also must look for alternative outlets for their advertising dollars. These broken relationships with audiences and advertisers are not repaired easily. In contrast, because of the substantial transaction costs involved with changing MVPD providers (including often hefty "early termination fees" charged by MVPDs), consumers are unlikely to seek to change providers unless a carriage dispute lasts for several weeks or more. In other words, removing our signals from an MVPD's system imposes immediate harm on consumers and immediate harm on the stations involved and relatively little immediate harm to the MVPD. Accordingly, no rational broadcaster would take the drastic step of suspending an MVPD's right to retransmit its station's signal unless it truly reached an impasse with the MVPD that could not be resolved privately. This has been our experience.

Because of the high stakes involved, McGraw-Hill has always conducted its negotiations with the utmost good faith, and, in the vast majority of its negotiations, McGraw-Hill believes the MVPD likewise has honored its good faith obligations. For example, we began and concluded a tough negotiation with one of the very largest distributors in the country in a matter of weeks last fall, all without any public announcements or even raised voices.

While this experience seems to be fairly common, we encountered completely different tactics this spring with another of the very largest distributors. In this more recent case, we reached out to the MVPD in February to begin negotiating the renewal of our retransmission consent agreement well before its expiration on April 30, 2011. We presented our proposal on March 3rd and repeatedly sought a response from the MVPD over the next several weeks. We met in person with the distributor's negotiating team at the April 2011 NAB Show. Despite repeated efforts to engage in substantive negotiations throughout March and April, we received the first *bona fide* response to our March 3rd proposal during the last week of April. Indeed, in our opinion, this distributor did not begin to negotiate in earnest with us until Thursday, April 28th, and, for reasons that are not clear to us, the distributor declined to entertain a short-term extension while we worked toward an agreement. Instead, we were compelled to continue the discussions through Saturday, April 30th. While we eventually reached a satisfactory agreement with this large MVPD, it appears that this particular distributor deliberately engaged in stalling tactics in an effort to compel our stations to accept unreasonable terms or face the lose of carriage within a matter of hours, all without having warned our viewers of the impending disruption or alternatives. In cases such as this, the Commission should stand ready to enforce its "good faith" negotiation rules within hours or days so that those requirements can serve their intended purpose effectively.

Revising established retransmission consent rules based on a few high profile disputes, which typically involve the same few large MVPDs, would compromise substantially McGraw-Hill's ability to continue our unbroken string of successful carriage negotiations. In fact, the revisions proposed in the Petition for Rule Making in this docket would only lead to more difficult negotiations, more incentives for declaring an impasse and ending negotiations, and therefore an increased likelihood of blackouts. The Commission can and should avoid this outcome by committing to act on any complaints alleging violation of existing rules on an expedited basis, and by closing this proceeding without revising any of the existing rules governing retransmission consent negotiations.

Respectfully submitted,

Darrell K. Brown
President
McGraw-Hill Broadcasting Company, Inc.

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