

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

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

**COMMENTS OF BELO CORP.**

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Belo Corp. (“Belo” or “the Company”)<sup>1</sup> hereby submits its Comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) *Notice of Proposed Rulemaking* seeking comment on proposals to change the rules governing the retransmission consent process.<sup>2</sup> The retransmission consent rules have provided a reliable and market-based mechanism for determining the appropriate value for carriage of broadcast signals with only minimal disruption to consumers. Accordingly, as discussed more fully below, Belo respectfully urges the Commission not to take any actions that could disrupt a system that has produced many thousands of successful retransmission consent negotiations since its inception in 1992.

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<sup>1</sup> Belo, one of the nation’s largest pure-play, publicly-traded television companies, owns and operates 20 television stations, reaching more than 14 percent of U.S. television households in 15 markets. Belo stations consistently deliver distinguished journalism for which they have received significant industry recognition, including 13 Alfred I. duPont-Columbia Silver Baton Awards; 12 George Foster Peabody Awards, and 30 national Edward R. Murrow Awards, all since 2000, more than any other commercial station group in the nation. Additionally, the Company has created regional cable news channels in Texas and the Northwest, increasing its impact in those regions.

<sup>2</sup> *Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, FCC 11-31 (Mar. 3, 2011) (“NPRM”).

Belo's experience in completing hundreds of retransmission consent agreements demonstrates the value of the Commission's statutorily mandated light-touch approach. The existing "good faith" standard provides negotiating parties with the flexibility to pursue creative solutions that are uniquely tailored to each negotiation. Additional FCC involvement will only serve as a barrier to successful completion of these negotiations, providing an incentive for parties to establish litigation positions rather than pursue mutually beneficial results.

Belo believes that the Commission should be especially sensitive to the potentially detrimental effects of altering the existing network non-duplication and syndication rules. These rules not only provide an efficient mechanism for enforcing privately negotiated rights, but they also serve as an important cornerstone of Congress' carefully balanced approach to program carriage. Any alteration of the network non-duplication and/or syndicated exclusivity rules could disrupt this delicate balance and hinder the ability of local broadcasters to do their part to fulfill the FCC's localism mandate.

## **I. INTRODUCTION AND SUMMARY**

Belo appreciates the opportunity to submit these comments supporting the Commission's long-standing and carefully balanced approach to program carriage. The Commission initiated this proceeding in response to a petition for rulemaking supported by several large MVPDs, who argued that "changes in the marketplace justify revisions to the Commission's rules governing retransmission consent."<sup>3</sup> Belo believes that this position is fundamentally flawed. The primary change in the 20 years since Congress

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<sup>3</sup> *Id.* at ¶ 13.

granted broadcasters the right to consent to retransmission of their signals is increased competition both among MVPDs and programmers that has resulted in a more competitive programming marketplace. Indeed, today's marketplace better reflects Congress' vision for the industry than ever before.

In granting broadcasters the right to consent to retransmission of their signals, Congress anticipated that many broadcasters would receive cash compensation from MVPDs.<sup>4</sup> What is most surprising is not that broadcasters are receiving cash compensation in exchange for retransmission consent, but that this development has taken so long.

As the Commission has recognized, retransmission consent, network non-duplication, and syndicated exclusivity rules “are part of a mosaic of . . . regulatory and statutory provisions . . . to implement key policy goals.”<sup>5</sup> Broadcasters like Belo play an important role in achieving these goals, heeding the Commission's call to “serve the needs and interests of their local communities.”<sup>6</sup> This approach has served the public interest well, providing broadcasters with the resources to procure and develop content to serve the needs of their communities.

While noting a handful of recent retransmission consent disputes that have garnered media attention, either because they have occurred in large media markets or because of attempts to exploit the disputes for political gain, the Commission cites no

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<sup>4</sup> See 138 Cong. Rec. H8649 (daily ed. Sept. 17, 1992) (statement of Rep. Markey) (“If they have to . . . pay some of these other channels a little less in order to get revenues over to Channel 4, 5, 7, and 9 so that the local children's programming, the local news and public affairs programming that the rest of us watch on free television is there, fine.”).

<sup>5</sup> *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer and Reauthorization Act of 2004* ¶ 10 (Sept. 8, 2005) (“2005 Report to Congress”).

<sup>6</sup> *Id.* at ¶ 50.

evidence for its suggestion that “the actual and threatened service disruptions resulting from increasingly contentious retransmission consent disputes presents a growing inconvenience and source of confusion for customers.”<sup>7</sup> On the contrary, market-based mechanisms provide for the most efficient and effective resolution of retransmission consent negotiations, as evidenced by the overwhelming majority of negotiations—more than 99% in Belo’s experience—that produce successful resolutions without any disruption to viewers.<sup>8</sup> While Belo recognizes that, in some instances, retransmission negotiations can produce “uncertainty,” the existing process provides the necessary incentives for negotiating parties to find common ground. Accordingly, Belo submits that altering the Commission’s carefully balanced approach could lead to a greater incidence of carriage disruptions while handicapping the ability of broadcasters to fulfill the FCC’s localism goals.

Of particular concern to Belo is the Commission’s discussion regarding the network non-duplication and syndicated exclusivity rules that the Commission previously has recognized as “integral to achieving Congressional objectives.”<sup>9</sup> Belo pays millions of dollars every year to acquire exclusive rights for highly desired programming within the geographic area of its local stations. The program exclusivity rules provide an efficient mechanism for enforcing these market-based exclusivity rights with limited need for FCC involvement. More importantly, these rules help to foster localism by providing

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<sup>7</sup> NPRM at ¶ 20.

<sup>8</sup> See Julius Genachowski, Chairman, FCC, Statement on Fox/Cablevision Retransmission Consent Dispute (Oct. 16, 2010), *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-302232A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-302232A1.pdf) (“Each year, thousands of agreements between broadcasters and pay-TV providers are reached without interruption of customer viewing.”).

<sup>9</sup> 2005 Report to Congress at ¶ 50.

broadcasters with the incentive to secure content that is responsive to the needs of the communities they serve. This is consistent with the Commission's "longstanding policy favoring the provision of local broadcast service to communities."<sup>10</sup>

The Commission's rules represent a delicate balance between the sometimes divergent interests of broadcasters, content producers, and MVPDs. Belo urges the Commission to avoid the temptation to disrupt this carefully crafted and overwhelmingly successful balance.

## **II. BELO'S INTEREST IN RETRANSMISSION CONSENT.**

With roots tracing back to 1842, Belo is one of the nation's oldest publicly-traded media companies. Belo owns and operates 20 television stations reaching more than 14 percent of U.S. television households in 15 markets. Its 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 owns and operates two regional cable news channels (NorthWest Cable News and Texas Cable News) and two local cable news channels (Boise, Idaho and New Orleans, Louisiana). Belo's interactive operations include 25 websites, seven of which are among the 50 most-visited local television websites in the United States.

Belo's mix of national network television programming, regional news operations, and locally-originated content allows it to consistently deliver highly rated and award-winning programming to viewers. Of Belo's 20 full-power television stations, 15 produce original local newscasts, and most regularly offer 30 hours or more per week of local news programming on their primary channels. Since 2000, Belo's distinguished

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<sup>10</sup> *Id.*

journalism has received significant industry recognition, including 13 Alfred I. duPont-Columbia University Silver Baton Awards, 12 George Foster Peabody Awards, and 30 national Edward R. Murrow Awards, more than any other commercial station group in the nation. Viewers appreciate the quality of Belo's journalistic efforts, frequently making Belo's newscasts among the most highly-rated in their markets. In fact, the top-four rated channels in most markets are local, network-affiliated stations. This is exactly the type of content that MVPDs characterize as "must have" programming. The availability of this content substantially contributes to the value of MVPDs' for-profit offerings.

Retransmission consent provides an increasingly critical source of revenue to support the creation and purchase of this valuable content. Historically, broadcasters like Belo received compensation from networks to serve as their local market affiliates. Given significant changes in the marketplace, Belo and other broadcasters have begun making payments to the networks, essentially for programming rights. This shifting business model, driven by market forces, underscores the need for Belo to realize fair value for its programming. Thus, the rule changes proposed in the NPRM are of great concern to Belo.

Belo has been negotiating carriage agreements with MVPDs since the inception of the retransmission consent regime as part of the Cable Television Consumer Protection and Competition Act of 1992. As the Commission has recognized, in those initial negotiations, cable operators, which then controlled more than 95% of the MVPD

marketplace,<sup>11</sup> almost universally rejected efforts by broadcasters to receive cash compensation.<sup>12</sup> Accordingly, Belo focused at the time on maintaining carriage of its broadcast television stations on cable operators' systems with favorable carriage terms and on carriage of its regional news channels.

By the late 1990s, the market had begun to shift, and Belo was able to begin to recognize a portion of the value of its broadcast stations by obtaining carriage and other consideration. Among the consideration that Belo received was carriage of its two new regional news networks, NorthWest Cable News ("NWCN") and Texas Cable News ("TXCN"). These networks provided a new outlet for Belo to deliver its top quality news, weather, and public affairs programming to consumers on a 24-hour basis. At the same time, under the Satellite Home Viewer Improvement Act's local-into-local provisions, direct broadcast satellite ("DBS") operators began retransmitting the signals of local broadcast stations, including several of Belo's stations. Recognizing the value that consumers place on the ability to receive their local channels, including Belo's premium local content, DBS operators began paying a per-subscriber fee for the right to retransmit the signals of Belo's stations. Cable operators, which continued to control nearly 90% of the MVPD marketplace,<sup>13</sup> however, still refused to pay cash for Belo's broadcast signals.

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<sup>11</sup> See Cable Television Consumer Protection and Competition Act of 1992, S. Rep. No. 102-92, at 8 (1991) (noting that there were 52 million cable subscribers, approximately two million satellite subscribers, and 30,000 wireless cable subscribers).

<sup>12</sup> See 2005 Report to Congress at ¶ 10.

<sup>13</sup> See *Annual Assessment of Status of Competition in the Markets for the Delivery of Video Programming*, 13 FCC Rcd. 24284 ¶ 7 (1998).

This did not change from the late 1990's through 2005, despite the fact that cash compensation had become a regular part of Belo's retransmission consent agreements with DBS operators. At the same time, many Belo stations were among the first in their markets and the country to adopt DTV, providing another valuable service that consumers desired.

As a result, in 2006, Belo first began to receive cash compensation from cable operators for the right to retransmit its broadcast signals. While very little changed in terms of analog carriage, the dialogue between Belo and MVPDs was different with respect to digital. Because DTV, including high definition television, was a new product, cable operators were more inclined to provide direct compensation in exchange for the right to retransmit Belo's digital, high definition programming. This compensation took a variety of forms, including carriage of Belo's multicast signals and, for the first time from cable operators, subscriber fees.

Finally, in 2007, with the digital transition approaching, Belo began to obtain compensation based on the delivery of its programming to all subscribers, regardless of whether they received analog or digital signals.

The transition to digital television was not the only driving force behind the shift in cable operators' attitudes toward retransmission consent compensation. Increasing competition in the MVPD marketplace also played a significant role. In addition to the continued expansion of DBS, the entrance of new competitors, such as AT&T U-verse and Verizon FiOS, provided new competition to the incumbent cable companies. These new competitors recognized the great value that local broadcasters provide, and the need to pay for the right to retransmit broadcast signals. This marketplace competition has

helped realize Congress' goal of enabling broadcasters to recognize the value that they deliver to an MVPD's channel lineup.

As explained below, Belo's experience in negotiating carriage agreements with MVPDs shows that the existing system is both efficient and effective, with both sides able to reach fair, mutually acceptable arrangements for the retransmission of Belo's award-winning programming. Belo does not see the need for any further government intrusion into the program carriage marketplace, as proposed in the NPRM.

**III. AS BELO'S EXPERIENCE DEMONSTRATES, THE EXISTING MARKET-DRIVEN RULES SUCCESSFULLY GUIDE NEGOTIATIONS TO MUTUALLY AGREEABLE RESOLUTIONS.**

In stark contrast to the picture of "high profile retransmission consent disputes" resulting in "consumer harm"<sup>14</sup> painted by those seeking to bend the rules in their favor, Belo has successfully reached retransmission consent agreements with MVPDs of all types and sizes throughout the country. While negotiations with some MVPDs can be exacting and can come down to the wire, Belo and MVPDs have agreed to terms without any "hostage" holding, public "showdowns," or substantial loss of service. That is because both sides ultimately recognize that they gain by agreeing to carriage, and lose if negotiations fail. Thus, the current rules motivate both parties to get deals done.

Since 2006, Belo has successfully completed more than 250 retransmission consent agreements, ranging from single-station deals with some of the nation's smallest MVPDs (including those with fewer than 100 subscribers), to agreements covering retransmission rights for all of Belo's television stations with the country's largest MVPDs. Belo now has retransmission consent agreements in place with all of the largest

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<sup>14</sup> See *NPRM* at ¶¶ 15-16.

MVPDs in the nation that have systems in Belo's markets, all achieved without any viewer disruption. All told, Belo's retransmission agreements provide for the carriage of Belo's stations to nearly 15 million MVPD subscribers throughout the United States.

To account for the complexities involved in negotiating retransmission consent agreements tailored to the specific stations and systems involved, Belo generally contacts MVPDs several months in advance of the date that the existing agreement is set to expire. Belo enters into each negotiation with the goal of reaching a mutually acceptable agreement long before the end of the term. In Belo's experience, these lead times provide the parties with ample opportunity to renew carriage terms. In fact, in many cases, little time is needed.

Of course, some negotiations are more difficult, and Belo has found that some MVPDs are unwilling or otherwise fail to begin negotiations until the carriage deadline is approaching. Nevertheless, despite negotiation windows that are sometimes incredibly short, Belo has a strong record of successfully reaching agreements without loss of service to consumers.

In the limited instances in which Belo finds itself at an impasse with MVPDs, financial terms are not always the only sticking point. For instance, MVPDs may seek the right to retransmit the signal of Belo stations in areas where, due to contractual limitations, Belo is not authorized to grant consent.<sup>15</sup> Resolution of this issue can involve reviewing the stations' existing agreements, and even attempting to renegotiate existing rights to accommodate the MVPD's interests.

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<sup>15</sup> As discussed more fully below, the ability of a broadcaster to obtain and enforce exclusive rights for syndicated and network programming is a critical component of the competitive broadcast marketplace.

In other cases, seemingly basic issues such as how Belo provides its signal to the MVPD's headends can become the sticking point in a negotiation. These headends can be scattered across a wide geographic area, and the cost of delivering a signal using fiber optics or other terrestrial distribution methods can be substantial.

Another common issue is the material that Belo includes in its signals and how such material interacts with the MVPD equipment. 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 the 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 at the forefront of the transition to digital and the development of industry-leading high definition services. At the same time, Belo has sought to accommodate the technical needs of MVPDs. In many instances, however, Belo has encountered 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 LiveWell television network, Spanish-language programming, and locally-originated news and weather services. In Belo's experience, MVPDs frequently refuse initially to retransmit multicast or other program services. Distribution is obviously critical to the success (or failure) of a program service, and the lack of distribution can put a station at a significant disadvantage, particularly if its competitors' multicast services receive preferred carriage.

Other non-monetary factors that may become significant issues in retransmission consent negotiations include the length of the agreement, 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, cross-promotion of the station's and MVPD's products and services, advertising commitments, and, increasingly, attempts to obtain Internet and multi-device distribution rights. Parties may also have to allocate legal risks and liabilities through representations, warranties, and indemnities. These are just some of the many complicated issues involved in our retransmission consent negotiations.

In recognition of the many difficult issues involved in each negotiation, and the potential disruption that lost carriage can cause to consumers, Belo regularly agrees to extend carriage as long as negotiations are progressing toward a resolution. It is not in the interest of Belo, or other broadcasters, to make it more difficult for viewers, the broadcasters' ultimate clients, to access a station's content. Belo invests considerable resources into producing high-quality local news and public affairs programming and acquiring network and syndicated programming, to build relationships with viewers in the communities that it serves. Belo takes its obligation to its viewers very seriously, and seeks to avoid any disruption of service. Accordingly, Belo always takes the interests of its viewers into account as retransmission consent negotiations come down to the wire.

This commitment to its viewers has led to Belo's impressive record in resolving retransmission consent negotiations without service disruptions. Despite the volume and complexity of these negotiations, and the variation in terms from one deal to another, Belo and MVPDs have had remarkable success in completing agreements on a timely and

efficient basis. In fact, of the more than 250 agreements that Belo has completed since 2006, Belo is aware of only *one* instance where carriage was temporarily disrupted. Specifically, in January 2008, a single cable headend with approximately 8,000 subscribers, dropped the signals of Belo's KREM(TV) (CBS) and KSKN(TV) (CW), licensed to Spokane, Washington, and KING-TV (NBC) and KONG(TV) (independent), licensed to Seattle, Washington, for approximately 14 days. Due to the location of the headend, this cable system continued to retransmit CBS and NBC network programming from competing stations. Nevertheless, 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 agreement within a reasonable period of time on terms comparable to those Belo negotiated with other similarly situated MVPDs.

**IV. THE NPRM'S PROPOSALS ARE UNNECESSARY AND COULD ULTIMATELY HARM CONSUMERS.**

Belo urges the Commission to proceed with extreme caution as it considers whether to modify the existing rules governing retransmission consent negotiations and other program-related issues. Any changes to the existing rules threaten to undermine the carefully balanced mosaic of rights governing program carriage. Moreover, adding to the list of *per se* violations would apply a rigid set of standards upon negotiations that are, by their very nature, creative and unique. As demonstrated below, such an approach would remove the flexibility that is often necessary to identify common ground. Additionally, eliminating the existing syndicated exclusivity and network non-duplication rules would remove an essential method for enforcing privately negotiated rights, compromising the Commission's long-stated interest in local broadcasting and significantly harming the

broadcaster's ability to acquire quality programming and maintain a reasonable business model.

**A. Expanding the Scope of Per Se Violations Unnecessarily Constrains Market-Based Negotiations.**

The Commission first proposes to “strengthen” the existing good faith negotiation standard by adopting additional *per se* rules to define what constitutes negotiating in good faith. In 2000, the Commission adopted a limited number of *per se* violations to identify tactics that would, in all circumstances, violate the statutory requirement to negotiate in good faith.<sup>16</sup> This approach was designed “to provide broad standards of what constitutes good faith negotiation but generally leave the negotiations to the parties.”<sup>17</sup> Despite recognizing that the Commission has found only one occasion where a negotiating party (in that instance, a cable operator) failed to negotiate in good faith,<sup>18</sup> the NPRM proposes to add additional actions that would constitute *per se* violations.

**1. The FCC Has Properly Recognized That It Has a Limited Role in Overseeing Retransmission Consent Negotiations.**

In the NPRM, the Commission properly recognized that, while Congress directed the Commission to adopt regulations governing retransmission consent negotiations, it also constrained the Commission's involvement in these negotiations to prohibiting exclusive contracts and ensuring that the negotiations are conducted “in good faith.”<sup>19</sup> In adopting Section 325(b), Congress made clear its intention “to establish a marketplace for

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<sup>16</sup> See *Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd. 5445 ¶ 14 (2000) (“Good Faith Order”).

<sup>17</sup> NPRM at ¶ 20.

<sup>18</sup> *Id.* at ¶ 12.

<sup>19</sup> *Id.* at ¶¶ 8-9; see 47 U.S.C. § 325(b)(3)(C).

the disposition of the rights to retransmit broadcast signals” without “dictat[ing] the outcome of the ensuing marketplace negotiations.”<sup>20</sup> Thus, the Commission has rightly held that it has “no latitude” 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.”<sup>21</sup> Similarly, the FCC has consistently rejected calls to oversee the terms of retransmission consent arrangements.<sup>22</sup> In short, the Commission has correctly determined that the Communications Act does not empower it to permit retransmission over the broadcaster’s objection or to intrude into the substance of private contracts for retransmission consent.<sup>23</sup>

Belo supports the FCC’s existing interpretation of its role as one of “develop[ing] and enforc[ing] a process that ensures that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process.”<sup>24</sup> This approach recognizes that the right Congress gave broadcasters to grant retransmission consent necessarily includes the right to withhold consent. Absent the broadcaster’s *power* to terminate consent, however rarely invoked, MVPDs would have enormous and unchecked bargaining leverage in retransmission consent negotiations. Thus, in Belo’s experience, the mere existence of

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<sup>20</sup> Cable Television Consumer Protection and Competition Act of 1992, S. Rep. No. 102-92, at 35-36 (1991).

<sup>21</sup> Good Faith Order at ¶ 60.

<sup>22</sup> *Id.* at ¶ 32 (“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.”).

<sup>23</sup> NPRM at ¶ 18.

<sup>24</sup> Good Faith Order at ¶ 24.

the right to withhold consent is an indispensable component of the broadcaster's ability to negotiate a fair deal, and is the primary reason that Belo and its MVPD counterparts reached agreement without incident in a remarkable 99+ percent of their negotiations.

Expanding the scope of *per se* violations would represent an unlawful change in the Commission's existing policy. Before adopting procedures that depart from an established status quo policy, the Commission must "supply a reasoned analysis for the change."<sup>25</sup> The FCC bears the burden not only of offering a rational explanation for establishing a *new* policy, but also of explaining "why it has come to the conclusion that it should now change direction" and why it should now "reject the considerations that led it to adopt that initial policy[.]"<sup>26</sup> The Commission "cannot simply disregard contrary or inconvenient factual determinations that it made in the past."<sup>27</sup>

The Commission has previously both considered and rejected proposals for more extensive *per se* rules.<sup>28</sup> In doing so, the Commission appropriately determined that, by "allowing the greatest number of avenues to agreement, [it] give[s] the parties latitude to

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<sup>25</sup> See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983); *Am. Tel. & Tel. Co. v. FCC*, 974 F.2d 1351, 1354 (D.C. Cir. 1992) ("[W]e will not uphold an agency's action where it has failed to offer a reasoned explanation that it is supported by the record.").

<sup>26</sup> *FCC v. Fox Television Stations*, 129 S.Ct. 1800, 1830-31 (2009) (Breyer, J., dissenting) (emphasis in original). Although Justice Kennedy joined the majority in *Fox*, he wrote a concurring opinion supporting the four dissenting justices' in adhering to the *State Farm* standard that an agency must carefully explain its rationale for departing from a settled course. See *Fox*, 129 S.Ct. at 1824 (Kennedy, J., concurring) ("[A]n agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so.").

<sup>27</sup> *Id.* at 1824 (Kennedy, J., concurring).

<sup>28</sup> Good Faith Order at ¶ 39 ("Consistent with our determination that Congress intended that the Commission should enforce the process of good faith negotiation and that the substance of the agreements generally should be left to the market, we will not adopt the suggestions of certain commenters that we prohibit proposals of certain substantive terms, such as offering retransmission consent in exchange for the carriage of other programming such as a cable channel, another broadcast signal, or a broadcaster's digital signal.").

craft solutions to the problem of reaching retransmission consent.”<sup>29</sup> To now reverse course and more directly regulate how broadcasters and MVPDs approach a retransmission consent negotiation, the Commission would have to explain why such considerations were in error.

2. **Adding to the List of *Per Se* Violations Would Ultimately Cause More Disruption Than It Would Solve.**

Not only are several of the *per se* rules proposed in the NPRM unnecessary, but they could actually hinder the ability of parties in retransmission consent disputes to achieve successful resolutions. In recognizing the extreme nature of *per se* standards, the Commission has properly determined that “the standards must be concise, clear, and constitute a violation of the good faith standard *in all possible instances*.”<sup>30</sup> Accordingly, the Commission has properly determined that it should not define the substantive aspects of retransmission consent negotiations, but rather permit the parties to resolve such issues “though their own interactions and through the efforts of each to advance its own economic self-interest.”<sup>31</sup> Expanding the scope of *per se* violations would be inconsistent with this longstanding approach that has served consumers, broadcasters, and MVPDs well for almost 20 years.

***Refusal to Put Forth a Bona Fide Proposal on Important Issues.*** The NPRM asks whether the refusal by a negotiating party to put forth a *bona fide* proposal on certain undefined issues should constitute a *per se* violation.<sup>32</sup> Belo believes that such a stringent

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<sup>29</sup> *Id.* at ¶ 56.

<sup>30</sup> *Id.* at ¶ 31.

<sup>31</sup> *Id.* at ¶ 53.

<sup>32</sup> NPRM at ¶ 24.

rule will only limit the flexibility that is necessary to achieve positive results. Requiring parties to put forth proposals on specific issues ignores the unique circumstances of each retransmission consent negotiation and would instead impose the more hands-on approach to retransmission consent that Congress considered and rejected.<sup>33</sup> As stated above, there are a number of non-monetary issues that can come up in a retransmission consent negotiation, and it is impossible to define which of these constitute “important” issues that would require a proposal in every negotiation.

Indeed, there are myriad reasons why a party would not want to, or even be able to, put forth a proposal on certain issues. For instance, Belo has affiliation agreements with several networks and syndication agreements with a number of distributors to acquire content for broadcast over its stations. These agreements often contain provisions governing both the technologies on which Belo can authorize the distribution of the acquired programming and the geographic areas for which Belo can authorize carriage. Thus, broadcasters like Belo might face contractual restrictions that prevent them from making a proposal for certain items that an MVPD would otherwise consider reasonable, such as rights to retransmit all of the broadcaster’s programming on any device in the home, or in areas far beyond those in which Belo has acquired its rights. A broadcaster’s failure to make a proposal on such issues would have nothing to do with “bad faith,” but rather the broadcaster’s obligation to its program distributors.

Under the current system, the market will resolve the matters on which parties will put forth proposals. Today, for instance, multi-platform distribution rights are a key issue with which both broadcasters and MVPDs are grappling. If a broadcaster

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<sup>33</sup> See Good Faith Order at ¶ 6 (observing that “the statute does not intend to subject retransmission consent negotiation to detailed substantive oversight by the Commission”).

determines that it can maximize its returns by providing such rights to an MVPD, then, under the current system, it will propose or entertain a proposal to do so. If, however, the broadcaster determines that the best model is to retain those rights, that is an economically efficient outcome. By interfering with this market dynamic, however, the parties would be inviting the Commission to decree both what issues are “important” and whether a given proposal is *bona fide*. This approach would only serve to place the Commission in a position to “dictate the outcome” of negotiations, which is exactly what Congress rejected in the 1992 Act.

***Refusal to Participate in Non-Binding Mediation.*** The Commission proposes establishing a *per se* violation if a party refuses to submit to non-binding mediation if the parties have not reached an agreement within 30 days of the expiration of an existing retransmission consent agreement.<sup>34</sup> Belo believes that mandatory, non-binding mediation would only increase the transaction costs and time involved in retransmission consent negotiations without providing any substantive benefits.

The Commission previously and correctly determined that mandatory mediation is unnecessary, and thus that a “refusal to engage in voluntary mediation will not be considered probative of a failure to negotiate in good faith.”<sup>35</sup> Negotiations between a broadcaster and an MVPD involve complex issues that require technical and contractual expertise. By the time parties are within 30 days of the expiration of a retransmission agreement, they typically will already have conducted extensive discussions about a wide-range of issues. Belo has found, however, that despite its best efforts to reach

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<sup>34</sup> NPRM at ¶ 25.

<sup>35</sup> Good Faith Order at ¶ 74.

retransmission consent agreements early in the process, many negotiations are completed in the final 30 days. Nevertheless, almost without fail, Belo has been able to successfully complete these negotiations without the need for mediation. Requiring mandatory non-binding mediation would serve only to disrupt these discussions so the parties could educate a new participant about the issues and their positions.

Mandatory non-binding mediation will only add to the overall costs of each retransmission consent negotiation. In addition to the cost of the mediator, the parties and their counsel would also have to dedicate the time and expense to draft position statements, review the other party's submissions, and participate in mediation sessions. As a practical matter, this could actually lead to additional disruption of carriage. Under the current system, the parties to a retransmission negotiation must work together to identify common ground. Given that virtually all negotiations reach successful resolutions on their own, Belo believes that it would be detrimental to interfere with the marketplace by essentially imposing an additional procedural requirement upon retransmission consent negotiations.

***Inclusion of “Most Favored Nation” Clauses.*** The NPRM also asks whether “most favored nation” clauses (“MFNs”) should be deemed to constitute *per se* violations of the good faith standard.<sup>36</sup> Although MFNs are often challenging to deal with, they can provide important flexibility in some negotiations, and should not be viewed as a *per se* violation of the duty to negotiate in good faith. Belo generally seeks to avoid MFNs because they can limit parties' flexibility in other negotiations. Nevertheless, Belo has used MFNs in some instances to expedite negotiations by agreeing to certain concessions,

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<sup>36</sup> NPRM at ¶ 28.

such as limits on multicast carriage, etc., based on representations that the MVPD was not providing those rights or benefits to any other broadcasters in the local market. Such clauses can be an efficient method for resolving issues that could otherwise stall the negotiations and potentially lead to carriage disruptions.

In recent years, Belo has seen the marketplace evolving toward disfavoring the use of most favored nation clauses. Given their potential benefits, however, Belo does not believe that any FCC action is necessary on this issue.

***Conditioning Retransmission Consent On Carriage of Other Programming.***

The Commission asks whether it should consider broadcasters' conditioning retransmission consent on the carriage of affiliated, non-broadcast networks, as a possible violation of the good faith requirement.<sup>37</sup> Given the history of retransmission consent agreements, Belo finds it ironic that the Commission would consider limiting the ability of broadcasters to use the retransmission consent process to obtain carriage for additional programming services. After all, broadcasters like Belo initially met steadfast and universal opposition to any attempts to receive cash compensation in exchange for retransmission consent. As the Commission has observed, during the initial negotiations “most cable operators—particularly the largest multiple system operators (“MSOs”)—were not willing to enter into agreements for cash, and instead sought to compensate broadcasters through the purchase of advertising time, cross-promotions, *and carriage of affiliated channels.*”<sup>38</sup> This was consistent with Congress' expectation that a marketplace approach to retransmission consent would lead some broadcasters, in lieu of cash

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<sup>37</sup> *Id.* at ¶ 29.

<sup>38</sup> 2005 Report to Congress at ¶ 10 (emphasis added).

compensation, to seek “joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system.”<sup>39</sup>

In Belo’s experience, using the retransmission consent process to obtain carriage of other programming has served the public interest. As noted above, Belo has used retransmission consent negotiations to gain the necessary carriage to support its regional news networks, NWCN and TXCN. Quite simply, these channels would not have been viable without the carriage rights that Belo was able to obtain as a result of retransmission consent. Today, these networks provide real value to viewers in their markets. For example, in the immediate aftermath of the March 11, 2011 Japanese earthquake, viewers in the Pacific Northwest turned to NWCN for its extensive, locally focused coverage of the potential tsunami threat.<sup>40</sup> In fact, during the 3 a.m. hour, with the threat of a tsunami near its peak, more viewers tuned to NWCN’s wall-to-wall coverage than any of Seattle’s broadcast affiliates.<sup>41</sup> Later that morning, viewership for NWCN’s dedicated local coverage far outdistanced national cable news networks MSNBC and Fox News Channel.<sup>42</sup> Had the Commission forbidden Belo from seeking carriage of NWCN in exchange for retransmission consent, Belo would not have been able to provide this public service to the communities that it serves.

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<sup>39</sup> Cable Television Consumer Protection and Competition Act of 1992, S. Rep. No. 102-92, at 35-36 (1991).

<sup>40</sup> See Brenda Peterson, *The Water Way and the Tsunami*, Huffington Post (Mar. 11, 2011, 4:26 PM), [http://www.huffingtonpost.com/brenda-peterson/the-water-way-and-the-tsu\\_b\\_834725.html](http://www.huffingtonpost.com/brenda-peterson/the-water-way-and-the-tsu_b_834725.html) (describing NWCN’s tsunami coverage); Janet H., *re: Earthquake and Tsunami Coverage in Northeast Japan* (Mar. 11, 2011, 9:21 AM), <http://www.cruisersforum.com/forums/f2/earthquake-and-tsunami-in-northeast-japan-56590-3.html> (complementing NWCN’s local tsunami coverage).

<sup>41</sup> The Nielsen Company, Overnight TV Ratings for the Seattle-Tacoma Designated Market Area for March 11, 2011.

<sup>42</sup> *Id.* (based on the 10:30 a.m. half hour).

**Joint Negotiations.** The NPRM also proposes declaring it a *per se* violation for broadcast stations that are not commonly owned to jointly negotiate retransmission consent agreements.<sup>43</sup> Belo does not believe that there is any basis for the Commission to restrict these arrangements. The Commission provides no basis for the suggestions that “there may be delays” or that “negotiations may become unnecessarily complicated” as a result of these arrangements. Indeed, in some situations, joint negotiations among broadcasters can benefit retransmission consent negotiations by adding efficiency and consistency to the process and reducing the transaction costs of retransmission consent agreements by reducing the total number of agreements required. Prohibiting joint negotiations could thus contradict the goals of Congress and the Commission for facilitating retransmission consent.

In any event, there would be absolutely no basis for restricting the right of broadcasters to negotiate jointly if the Commission were to provide a parallel right for some MVPDs to “pool their resources, appoint an agent, and negotiate as a group,” as suggested elsewhere in the NPRM.<sup>44</sup>

**Defining “Unreasonable Delay.”** Finally, the FCC considers whether it should define what constitutes an “unreasonable delay” in negotiations.<sup>45</sup> The Commission’s rules currently prohibit a party from “acting in a manner that unreasonably delays retransmission consent negotiations.”<sup>46</sup> The NPRM suggests that parties can use delay as

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<sup>43</sup> NPRM at ¶ 23.

<sup>44</sup> *Id.* at ¶ 29.

<sup>45</sup> *Id.* at ¶ 26.

<sup>46</sup> 47 C.F.R. § 76.65(b)(1)(iii).

a tactic that could lead to an impasse or disruption.<sup>47</sup> Although Belo has found that, in some cases, MVPDs do not begin serious negotiations until late in the process, Belo does not believe that any action is necessary. As discussed above, Belo attempts to begin negotiations with MVPDs, no matter how large or small, several months in advance of the expiration of an existing agreement. Given the number of factors that could determine when parties begin serious negotiations, however, Belo believes the current rule provides sufficient flexibility to determine when a party “unreasonably” delays negotiations.

**B. The Commission Should Ensure that Cable Operators Provide Meaningful Notice Under Existing Rules Rather than Adopting an “Enhanced Notice” Requirement.**

The NPRM proposes an “enhanced notice” requirement, to require broadcasters and MVPDs to notify consumers of *potential* deletion of a broadcaster’s signal when an existing agreement is within 30 days of expiration.<sup>48</sup> Although cable operators are currently required to provide such notice,<sup>49</sup> in Belo’s experience, many cable operators fail to effectively notify customers 30 days before an agreement is due to expire. And, even when notice is given, it is rarely *meaningful*, often published in obscure locations where it is likely to be unseen. Given that cable operators failing to provide proper notice would be in violation of the rule if a service disruption were to occur,<sup>50</sup> the only logical conclusion is that cable operators believe that they will reach an agreement in a timely fashion.

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<sup>47</sup> NPRM at ¶ 26.

<sup>48</sup> *Id.* at ¶¶ 36-37.

<sup>49</sup> 47 C.F.R. § 76.1601.

<sup>50</sup> NPRM at ¶ 35.

Meanwhile, current practices by Belo and other broadcasters make an “enhanced notice” requirement unnecessary. Belo seeks to inform its viewers in meaningful ways well in advance of any potential carriage disruption. This approach is prudent both to maintain Belo’s relationship with its viewers and to ensure that, if negotiations reach an impasse, viewers are well-informed about alternative methods for obtaining Belo’s programming. In some instances, however, it is unnecessary for Belo to provide notice to viewers, even if an existing agreement is approaching expiration. As noted above, Belo will frequently extend carriage with an MVPD as long as the parties are engaged in productive negotiations. A requirement that would force Belo or MVPDs to provide notice in all instances 30 days out could confuse viewers and create additional disruption.

The terms of certain carriage agreements could provide a further impediment to a notice requirement. For instance, some of the MVPDs with which Belo has retransmission consent agreements have insisted upon stringent confidentiality agreements that prohibit, among other things, disclosing the termination date of the agreement. Potentially, then, Belo could be forced to choose between violating a mandatory notice provision or violating the terms of its agreement.

Ultimately, all of the parties to a retransmission consent agreement are aware of the deadline and the consequences of failing to reach an agreement. This provides the necessary incentive for each party to take the appropriate actions to provide adequate notice to viewers and subscribers. Accordingly, there is no reason for the Commission to expand notice requirements.

**C. Network Non-Duplication and Syndicated Exclusivity Rules Are Essential to Fulfilling the FCC’s Localism Objectives.**

Finally, the Commission raises the prospect of eliminating the network non-duplication and syndicated exclusivity rules.<sup>51</sup> Contrary to the claims of petitioners, these rules do not create exclusivity rights. Instead, and as the Commission has recognized, they “provide a regulatory means for broadcasters to prevent MVPDs from undermining their contractually negotiated exclusivity rights.”<sup>52</sup> Under the system of local broadcasting fostered by the Communications Act, broadcasters—with their defined geographic reach and inability to control how content reaches the MVPD end-user—are unable to enforce exclusive programming contracts as easily as MVPDs.<sup>53</sup> Accordingly, the FCC has adopted rules allowing a broadcaster who has negotiated with a program supplier for the exclusive right to display certain programming within its market to demand that an MVPD remove duplicate programming on another channel that interferes with this right. Contractual exclusivity is a fundamentally valuable right that broadcasters pay significant sums to obtain. Without an efficient and timely mechanism to enforce this right, broadcasters would suffer material damage from the importation of duplicate programming into the local market.

The network non-duplication and syndicated exclusivity rules are an essential component of the general regulatory approach to broadcast carriage, as envisioned by Congress. For more than 45 years, the Commission has recognized that non-duplication

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<sup>51</sup> *Id.* at ¶ 43.

<sup>52</sup> 2005 Report to Congress at ¶ 44.

<sup>53</sup> 1988 Syndex Order at ¶ 62.

rules are critical to the preservation of local television service.<sup>54</sup> In 1988, the Commission reinstated its syndicated exclusivity rules after a failed eight-year experiment, concluding that such rules “provide the proper market incentives for video outlets to deliver the programming that will maximize consumer benefits.”<sup>55</sup> As a result, broadcasters that negotiate for exclusive rights have the necessary tools to enforce those rights within their zone of protection.

It is against this background that Congress passed the Cable Act and granted broadcasters the right to grant retransmission consent. The Commission has previously recognized that Congress adopted Section 325 of the Communications Act upon the foundation of the Commission’s existing network non-duplication and syndicated exclusivity rules<sup>56</sup> and that Congress viewed network non-duplication and syndicated exclusivity rules as “integral to achieving congressional objectives.”<sup>57</sup> Belo concurs with this interpretation of the legislative history and believes that modifying or eliminating program exclusivity rules would contravene both the clear intent of Congress and the Commission’s prior holdings.

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<sup>54</sup> First Report and Order in Dockets 14895 and 15233, 38 FCC 683 (1965).

<sup>55</sup> *In the Matter of Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd. 18, ¶ 1 (1988) (“1998 Syndex Order”).

<sup>56</sup> *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd. 2965, 3006 ¶ 180 (1993) (“Cable Act Implementation Order”) (quoting Senate Committee on Commerce, Science, and Transportation, S. Rep. 102-92 (1991) at 38) (“Amendments or deletions of these rules in a manner which would allow distant stations to be submitted (sic) on cable systems for carriage or (sic) local stations carrying the same programming would, in the Committee’s view, be inconsistent with the regulatory structure created in S.12.”).

<sup>57</sup> 2005 Report to Congress at ¶ 50.

Moreover, Belo agrees with the Commission's longstanding recognition of the beneficial role that network non-duplication and syndicated exclusivity rules play in protecting the rights of local broadcasters, and thus, the FCC's localism objectives. The Commission's role in these areas is a limited, but important, one. As the FCC has observed, the network non-duplication and syndicated exclusivity rules do "not preordain any particular outcome," but rather provide a mechanism for enforcing rights acquired through free and unfettered negotiations.<sup>58</sup> By providing broadcasters with a means to effectuate their rights to "secure programming content that meets the need and interests of their communities," the network non-duplication and syndicated exclusivity rules further the Commission's "longstanding policy favoring the provision of local broadcast service to communities . . . ."<sup>59</sup>

Thus, the network non-duplication and syndicated exclusivity rules provide an efficient mechanism for enforcing contractual rights. Broadcasters, syndicators, networks, and MVPDs all understand these rules and have relied upon them in structuring thousands of existing agreements. Belo has only had to rely upon these rules in a few instances, and even then, a simple letter to the MVPD resolved the issue. In the absence of these rules, however, broadcasters and syndicators would be forced to seek judicial resolution, adding to the time, cost, and uncertainty of resolving exclusivity disputes. Most importantly, a judicial remedy might be inadequate where the party that is interfering with the exclusive contract is not a party to the contract or where a much-demanded program has already been broadcast by the duplicating station. Accordingly,

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<sup>58</sup> 1998 Syndex Order at ¶ 89.

<sup>59</sup> 2005 Report to Congress at ¶ 50.

revocation of these rules could undermine the entire concept of exclusivity, harming the programming marketplace and, ultimately, the broadcast industry.

Network non-duplication and syndicated exclusivity rules benefit consumers by providing broadcasters like Belo with the necessary incentives to acquire the most appealing programming. Today, local broadcasters often pay for both network and syndicated programming, with the most highly desired programming requiring the highest fees. This market-based approach creates incentives for producers to develop quality programming that meets the needs of audiences and for broadcasters to acquire the rights to broadcast such programming. Exclusivity rights are negotiated between the parties and reflect a considered decision that such protection is in their mutual interests. Broadcasters like Belo will often pay higher fees to obtain exclusivity and then rely upon that exclusivity to ensure higher ratings, which generate the revenue necessary to secure such programming in the first place. Indeed, an inability to obtain or enforce exclusive rights would likely lead to a migration of programming to non-broadcast networks, where exclusivity is easier to protect because the non-broadcast networks would serve as the sole source of that programming.

Absent a framework for protecting privately negotiated rights, localism will suffer. In reinstating its syndicated exclusivity rules in 1988, the Commission observed that “the potential for duplicating broadcasters’ programs, diverting broadcasters’ audiences and advertising” was greater than it had expected.<sup>60</sup> Yet this result should come as no surprise. When MVPDs are able to import duplicate programming, some viewers in the broadcaster’s market will, either by accident or by choice, watch the same

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<sup>60</sup> 1988 Syndex Order at ¶ 32.

programming on a different channel. This directly affects local broadcasters like Belo by reducing their ratings, and thus the amount of revenue they have to spend on network agreements, syndicated programming contracts, and developing local news and public affairs programming. The effect of this diversion can extend to local newscasts, which often immediately follow network and syndicated programming. Fewer viewers watching network and syndicated programs on local broadcast channels may result in fewer viewers tuning into the local news. Moreover, viewers watching the same programs on an imported channel lose the benefits of local news cut-ins, local weather updates, and even local advertising. Accordingly, as the Commission reported to Congress in 2005, revocation of these rules “would contradict [the Commission’s] requirements of broadcast licensees and would hinder [its] policy goals.”<sup>61</sup>

Belo believes that it is critical for the Commission to maintain the network non-duplication and syndicated exclusivity rules regardless of a broadcaster’s retransmission consent status. The Commission has considered this issue before, concluding that “Congress intended that local stations electing retransmission consent should be able to invoke network nonduplication rights, whether or not these stations are actually carried by a cable system.”<sup>62</sup> This conclusion holds equally true today. If MVPDs could freely substitute network and syndicated programming, then they will have no incentive to value such programming in retransmission consent negotiations, despite the actual value such programming contributes to their services. Such a result would reduce the total value of broadcast programming, leading to retraction in the market for the type of

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<sup>61</sup> 2005 Report to Congress at ¶ 50.

<sup>62</sup> Cable Act Implementation Order at ¶ 180.

quality content that local viewers desire and ultimately leaving communities and localism to suffer.

**V. CONCLUSION**

Congress and the Commission have carefully crafted an efficient and interrelated mosaic for program carriage that includes retransmission consent and exclusivity protection. Broadcasters like Belo rely upon these rules to both acquire and produce content that fulfills the needs and desires of their local communities. As a result, Americans have access to the most diverse and high-quality selection of programming in the world.

Belo recognizes that retransmission consent negotiations are not always easy, and in fact can be quite stressful at times. Such is the nature of taking two parties with divergent interests and requiring them to each cede ground to achieve a compromise result. Nevertheless, as the Commission has consistently recognized, the market-based approach to retransmission consent produces economically efficient outcomes that ultimately benefit the public interest. As Belo's experience indicates, the system now in place works. Accordingly, Belo urges the Commission to further encourage the provision of responsive, local broadcast television by maintaining the current policies that have served the marketplace well.

Respectfully submitted,

Belo Corp.

By: \_\_\_\_\_ /s/ \_\_\_\_\_

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