

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In re Applications of	)	
	)	
Belo Corp., on Behalf of Its Subsidiaries,	)	
	)	
Assignor	)	MB Docket No. 13-189
	)	
and	)	
	)	File Nos.: BALCDT-20130619AEZ
Sander Operating Co. II LLC	)	(Fac. ID 70034)
Sander Operating Co. IV LLC	)	BALCDT-20130619AFA
Sander Operating Co. V LLC	)	(Fac. ID 40993)
Tucker Operating Co. LLC	)	BALCDT-20130619AFJ
	)	(Fac. ID 7143)
Assignees	)	BALCDT-20130619AFL
	)	(Fac. ID 44052)
For Consent to the Assignment of the	)	BALCDT-20130619ADJ
Broadcast Station Licenses of	)	(Fac. ID 11908)
	)	
KMOV(TV), St. Louis, MO	)	
KTVK(TV), Phoenix, AZ	)	
KASW(TV), Phoenix AZ	)	
KMSB(TV), Tucson, AZ	)	
KTTU(TV), Tucson, AZ	)	

**REPLY OF AMERICAN CABLE ASSOCIATION, DIRECTV LLC, AND  
TIME WARNER CABLE INC.**

Pursuant to Section 73.3584(b) of the Commission’s rules, American Cable Association (“ACA”), DIRECTV LLC (“DIRECTV”), and Time Warner Cable Inc. (“TWC” and, collectively, “Petitioners”) hereby submit this reply in support of their Petition to Deny, or in the Alternative, for Conditions (“Petition”) and in response to the opposition filings submitted separately by (i) Gannett Co., Inc. (“Gannett”); (ii) Belo Corp. (“Belo”); (iii) the Sander

Operating Companies (“Sander”);<sup>1</sup> and (iv) Tucker Operating Co. LLC (“Tucker” and, collectively, “Applicants”).<sup>2</sup> The Applicants seek to avoid scrutiny of their anticompetitive agreements to coordinate retransmission consent negotiations by manufacturing procedural objections to the Petition. Principally, they claim that the pendency of rulemaking proceedings touching on broader problems with the retransmission consent regime preclude remedial action in this adjudicatory proceeding. Not so. To the contrary, the harms at issue here—the higher prices and increased blackout risks caused by collusive retransmission consent negotiations in the St. Louis, MO; Phoenix, AZ; and Tucson, AZ direct marketing areas (“DMAs”)—are plainly transaction-specific, and the Petition seeks to address those harms in a narrowly tailored way by enforcing *existing* procompetitive policies, not by calling for the adoption of any new requirements. Far from being precluded from remedying the transaction-specific harms presented, the Commission has a statutory obligation to ensure that the proposed license transfers and related sharing agreements promote the public interest, and it cannot discharge that duty without taking action to prevent anticompetitive collusion.

## ARGUMENT

### **I. THE TRANSACTION-SPECIFIC HARMS PRESENTED BY THE APPLICANTS’ PLANNED COLLUSION JUSTIFY DENYING THE LICENSE TRANSFERS OR ADOPTING APPROPRIATE CONDITIONS**

Predictably, because the Applicants cannot justify their planned collusion on the merits, they assert that the Petition is procedurally improper. But in so doing, they misconstrue the arguments advanced in the Petition and misstate the applicable law.

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<sup>1</sup> The Sander entities implicated by the Petition are as follows: (i) Sander Operating Co. IV LLC d/b/a KMOV Television; (ii) Sander Operating Co. II LLC d/b/a KTVK Television; and (iii) Sander Operating Co. V LLC d/b/a KMSB Television.

<sup>2</sup> Each opposition is referred to individually as “Opposition” preceded by the name of the filing party or collectively as “Oppositions.”

*First*, contrary to the Applicants’ assertions, Petitioners are *not* asking the Commission to address the broader concerns presented by the retransmission consent regime in this adjudicatory proceeding. The Petition readily acknowledges that separate action in the pending retransmission consent and media ownership rulemakings will be necessary to implement appropriately comprehensive reforms that address the recurring blackouts and inflated fees caused by the current regime. But the pendency of those rulemakings in no way diminishes the Commission’s obligation to ensure that the broadcast license transfers and sharing agreements incident to Gannett’s proposed acquisition of Belo will promote the public interest. And, as the Petition demonstrates, the sharing agreements at issue threaten concrete, transaction-specific harms, as coordinated retransmission consent negotiations between and among Gannett, Sander, and Tucker would harm competition and consumers.

The Petition amply documents the public interest harms that would occur without Commission intervention. In particular, the Petition cites substantial evidence, including the Commission’s own analysis, demonstrating that coordinated retransmission consent negotiations involving more than one top-four station in a DMA drive up the price for retransmission consent and impose other related consumer harms.<sup>3</sup> Likewise, the Petition cites both Department of Justice (“DOJ”) and Commission precedent confirming that the coordinated conduct in which Gannett, Sander, and Tucker plan to engage post-transaction conflicts with bedrock principles of competition law—and, as a result, the Commission’s public interest standard.<sup>4</sup> Most notably, the

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<sup>3</sup> See Petition at 11-12 & nn.33-34 (collecting research, scholarly and economic studies, and other evidence).

<sup>4</sup> See *id.* at 9-10 & n.32; see also *News Corp. and The DirecTV Group, Inc., Transferors, and Liberty Media Corp., Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265 ¶ 23 (2008) (stating that the Commission’s “public interest evaluation necessarily encompasses the ‘broad aims of the Communications Act,’

Competitive Impact Statement in the *Texas Television* case stated unequivocally that broadcast stations are required to conduct retransmission consent negotiations “individually and independently,” and that coordinated negotiations by separately owned stations would “violate[] the Sherman Act” and harm consumers.<sup>5</sup> The Applicants cannot point to the pendency of rulemaking proceedings as an excuse to violate these fundamental competition-law principles.

Moreover, the narrow relief sought by the Petition—which is focused entirely on preventing anticompetitive collusion—belies the Applicants’ claim that Petitioners are seeking to impose “new requirements in the context of licensing proceedings.”<sup>6</sup> The Petition seeks only to enforce the *existing* obligation that retransmission consent negotiations be conducted “individually and independently” by each broadcast station.<sup>7</sup> Any new rules adopted in the retransmission consent rulemaking pursuant to Section 325(b) of the Communications Act of 1934, as amended (the “Act”), would be entirely distinct from this existing duty (grounded in antitrust law) to refrain from anticompetitive collusion. Accordingly, the Commission can and should prohibit Gannett, Sander, and Tucker from coordinating their retransmission consent negotiations with MVPDs—whether by engaging in joint carriage negotiations, appointing a common agent to negotiate on behalf of more than one station, negotiating separate carriage deals but sharing details of negotiations, or otherwise colluding in the negotiation of retransmission consent—without regard for whatever additional reforms are being considered through the rulemaking process.

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which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets”).

<sup>5</sup> *United States v. Texas Television, Inc., Gulf Coast Broadcasting Company, and K-Six Television, Inc.*, Competitive Impact Statement, at 8 (S.D. Tex. Feb. 2, 1996), available at <http://www.justice.gov/atr/cases/texast0.htm> (“*Texas Television*”).

<sup>6</sup> Belo Opposition at 7.

<sup>7</sup> *Texas Television*, Competitive Impact Statement at 8.

*Second*, the Petition is not the “same” as or “nearly identical” to petitions submitted by TWC and ACA in opposition to previous broadcast transactions, as Gannett and Belo incorrectly assert.<sup>8</sup> To the contrary, the objections raised by the Petition are narrower than those advanced in previous proceedings, as is the relief sought. For example, in opposing the LIN-ACME transactions, TWC sought to impose a number of obligations—including requirements of interim carriage and dispute resolution, among other measures, in response to any retransmission consent disputes—that (a) would have been new and unprecedented, and (b) overlapped substantially with rule changes under consideration in the retransmission consent rulemaking.<sup>9</sup> But as noted above, the instant Petition seeks only to enforce the longstanding procompetitive principles recognized by DOJ more than fifteen years ago, as well as the Commission’s well-established precedent making the safeguarding of competition a central aspect of the public interest standard.<sup>10</sup>

*Third*, Belo’s half-hearted challenge to Petitioners’ status as parties in interest is a make-weight. ACA and DIRECTV plainly have standing to prosecute the Petition based on the threat of harm they face in the event the transaction is approved without appropriate conditions.<sup>11</sup> Gannett, Sander, and Tucker do not dispute their intention to leverage Gannett’s control of

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<sup>8</sup> Gannett Opposition at 12; Belo Opposition at 9.

<sup>9</sup> See Petition to Deny, CDBS File No. BALCDT-20100917AAT, at 16-18 (filed Oct. 22, 2010); Petition to Deny, CDBS File No. BALCDT-20100917AAF, at 16-18 (filed Oct. 22, 2010).

<sup>10</sup> See *supra* at 3 & n.4. Gannett’s suggestion that the Media Bureau has distinguished or in any way “rejected” the *Texas Television* precedent is simply incorrect. See Gannett Opposition at 16 & n.47. The Bureau declined to assume that the stations (now under new ownership) that had been sued in *Texas Television* were guilty by mere association with the prior entities, but it in no way disputed the validity of that precedent or the competition-law principles it embodies.

<sup>11</sup> As noted in the Petition, Petition at 1 n.1, TWC joined the Petition only as an informal objector. See 47 C.F.R. § 73.3587.

carriage negotiations for the broadcast stations in the St. Louis, Phoenix, and Tucson DMAs to seek higher retransmission consent fees. Such increased higher fees, and the increased prospect of blackouts, obviously constitute harm sufficient to establish standing in this proceeding—a point that Gannett, Sander, and Tucker (the proposed *assignees*) implicitly concede by failing to raise any objection.

## **II. COLLUSIVE NEGOTIATIONS INVOLVING DIRECT COMPETITORS CANNOT BE JUSTIFIED ON THE MERITS**

The plans of Gannett, Sander, and, in the Tucson DMA, Tucker to combine forces in negotiating retransmission consent agreements with MVPDs unquestionably would increase their leverage based on the aggregation of market power, thus enhancing their ability to extract inflated rents.<sup>12</sup> The Applicants do not seriously dispute this basic proposition. Instead, they pretend that Gannett’s role as negotiating “agent” for its ostensible competitors is somehow distinct from collusion, and they posit that the prospect of collusion is not certain at this point. Both claims miss the mark.

*First*, the Applicants’ efforts to sanitize the anticompetitive conduct at issue by referring to Gannett as a mere “negotiating agent”<sup>13</sup> is unavailing, because *direct competitors* may not serve as agents for one another in negotiating with purchasers. Indeed, under the Applicants’ theory, Coke could serve as Pepsi’s “agent” in negotiating contracts with wholesale beverage distributors. But such collusive conduct by direct competitors is starkly and unequivocally anticompetitive, regardless of whether separate negotiators for two entities coordinate their demands or whether one of the entities negotiates for both. That is why the Competitive Impact Statement in the *Texas Television* case provides, with unmistakable clarity, that “[a]lthough the

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<sup>12</sup> See *supra* n.3 (citing Petition at 11-12).

<sup>13</sup> Gannett Opposition at 14; Sander Opposition at 9; Tucker Opposition at 9.

1992 Cable Act gave broadcasters the right to seek compensation for retransmission consent of their television signals, the antitrust laws require that such rights be exercised *individually* and *independently* by broadcasters.”<sup>14</sup> Gannett’s service as negotiating agent for Sander or Tucker cannot be squared with this fundamental requirement, as the latter entities plainly would not be acting either “individually” or “independently” if Gannett were to negotiate retransmission consent on their behalf. As DOJ recognized, such joint conduct (however effectuated) would “strengthen [the participating broadcast stations’] negotiating positions against third parties and ... violate[] the Sherman Act.”<sup>15</sup>

*Second*, the Applicants’ assertion that they *might not* collude after all overlooks the reality that Gannett secured the agency role for a reason, and this proceeding presents the Commission with the only meaningful opportunity to prevent the harms from such collusion. While the Applicants emphasize that Gannett has “only” an *option* to serve as negotiating agent, no further review or oversight by the Commission would be required before that option could be exercised once these applications were approved. Accordingly, the time to ensure that anticompetitive coordinated negotiations will not occur is *now*. As for the Applicants’ suggestion that the sharing agreements outside the Tucson DMA do not include the same agency role for Gannett,<sup>16</sup> that is cold comfort, as the Applicants have not (a) produced all the sharing agreements pertinent to the Phoenix and St. Louis DMAs, (b) confirmed that *none* of the agreements pertaining to those markets contemplates coordinated negotiations (as opposed to stating only that *certain* agreements omit such terms), or (c) disclaimed the intention to coordinate negotiations through an informal agreement, rather than a written contract.

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<sup>14</sup> *Texas Television*, Competitive Impact Statement at 8 (emphasis added).

<sup>15</sup> *Id.*

<sup>16</sup> Gannett Opposition at 14; Sander Opposition at 10.

Petitioners therefore reiterate their request that the Commission compel the Applicants to produce all of the relevant agreements to enable the Commission and Petitioners to evaluate the public interest harms at issue.

### CONCLUSION

For the reasons stated herein and in the Petition, the Commission should deny the Applications or, in the alternative, condition their approval on the requirement that Gannett, Sander, and Tucker refrain from coordinating their retransmission consent negotiations.

Respectfully submitted,

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August 20, 2013

## CERTIFICATE OF SERVICE

I, Cristina Pauzé, hereby certify that on this 20th day of August, 2013, a true and correct copy of the foregoing Reply of American Cable Association, DIRECTV LLC, and Time Warner Cable Inc. was served, via first-class mail (unless otherwise indicated), upon the following:

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