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

In the Matter of	)	
	)	
Telepak Networks, Inc. d/b/a C Spire Fiber	)	MB Docket No. 19-159
	)	
v.	)	CSR-8978-C
	)	
Gray Media Group, Inc.	)	

JOINT COMMENTS OF THE ABC TELEVISION AFFILIATES ASSOCIATION, CBS TELEVISION NETWORK AFFILIATES ASSOCIATION, FBC TELEVISION AFFILIATES ASSOCIATION, AND NBC TELEVISION AFFILIATES ON THE C SPIRE PETITION FOR DECLARATORY RULING

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The ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates (collectively, the "Affiliates Associations")[1] hereby submit these comments in response to the Public Notice ("Notice") in the above-referenced docket, in which the Commission seeks comment on a petition for declaratory ruling filed by Telepak Networks, Inc., d/b/a C Spire Fiber ("C Spire").[2]

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[1] Each of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates is a non-profit trade association whose members consist of local television broadcast stations throughout the country that are each affiliated with its respective broadcast television network. Collectively, the Affiliates Associations represent more than 500 local television stations that are affiliated with the four major broadcast networks. The Affiliates Associations' member stations provide local news, weather, sports, entertainment, and other valuable, highly-desired video content to virtually every community in the country, whether large or small, urban or rural.

[2] Clarification of the *Ex Parte* Status of, and Establishment of Comment Dates for, Telepak Networks, Inc.'s Petition for Declaratory Ruling, *Public Notice*, MB Docket No. 19-159, DA 19-581, released June 20, 2019. *See also* Telepak Networks, Inc. d/b/a C Spire Fiber v. Gray Television, Retransmission Consent Complaint and Petition for Declaratory Ruling, MB Docket No. 19-159, filed June 3, 2019 (the "C Spire Petition").

INTRODUCTION AND SUMMARY

Good faith bargaining obligations already apply to retransmission consent negotiations involving communities subject to Commission market modification orders. That is the law today, and no declaration from the Commission is necessary on that point. When Congress expanded the market modification procedures to address orphan counties, its aim was to ensure that relevant in-state local programming would be made available to those communities. Consistent with those congressional objectives, broadcasters and multichannel video programming distributors ("MVPDs") routinely negotiate agreements for the delivery of that local programming to market modification communities. Broadcasters do and will continue to enter into those negotiations, irrespective of the good faith rules, in any event. The Affiliates Associations' members invest heavily in producing local programming and are committed to making sure viewers who need it have access to it.[3] The Commission need not issue a declaration on this point, which broadcasters and MVPDs already understand.

The Affiliates Associations strongly object, however, to C Spire's request that the Commission issue a broad declaration that territorial restrictions in local broadcasters' network affiliation agreements that limit distribution of network programming in market modification communities violate the good faith bargaining rules. Such a declaration would go far beyond existing law, directly contradict well-considered Commission precedent, and intrude into the private retransmission consent marketplace that Congress created.

[3] The Affiliates Associations support the view of the National Association of Broadcasters that STELAR, including the good faith negotiation rules, should be allowed to sunset. Broadcasters will negotiate in good faith for carriage of their programming regardless of whether a Commission rule requires it.

The Commission long ago thoroughly considered and rejected claims that such territorial restrictions violate the good faith bargaining rules.[4] At most, the Commission found, the good faith rules may require a local broadcaster to seek a waiver of a territorial restriction to permit retransmission of network programming in significantly-viewed areas.[5] But the Commission expressly found that Congress did not intend to interfere with network affiliation agreements when it introduced the reciprocal good faith bargaining requirement.[6] Nothing in Congress's expansion of the market modification procedures in STELAR suggests that Congress now intends that the Commission meddle in the network-affiliate relationship or undermine the networks' right to control their distribution territories.[7] The "declaration" that C Spire seeks, then, would in fact represent a substantial change in the existing good faith rules as they apply to territorial restrictions in network affiliation agreements – an outcome that can be accomplished only via notice and comment rulemaking.

From a practical standpoint, C Spire's requested ruling is far broader than necessary to encourage the availability of in-state local programming in market modification communities.[8] As the Commission has noted, networks may waive territorial restrictions to permit delivery of network programming in market modification communities.[9] But even if the network is

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4 Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004: Reciprocal Bargaining Obligation, *Report and Order*, 20 FCC 10339, paras. 33-35 (2005) (the "*2005 Good Faith Order*").

5 *See id.* at para. 35.

6 *See id.* at para. 33.

7 *See* STELA Reauthorization Act of 2014, § 102, Pub. L. No. 113-200 , 128 Stat. 2059, 2060-62 (2014) ("STELAR") (adding 47 U.S.C. § 338(l)).

8 *See* Amendment to the Commission's Rules Concerning Market Modification Implementation of Section 102 of the STELA Reauthorization Act of 2014, 30 FCC Rcd 10406, para. 1 (describing purpose of Congressional changes to market modification rules in STELAR as designed to "promote carriage of in-state and other relevant local television programming").

9 *See 2005 Good Faith Order* at para. 35.

unwilling to waive such restrictions, MVPDs have the opportunity to agree to deliver local programming to these communities irrespective of whether local affiliates also make network programming available to those MVPDs. "Local-only" retransmission consent agreements that permit delivery of non-network programming, including local news, weather, and sports coverage, to communities outside a station's DMA have long been a feature of the retransmission consent marketplace. Such agreements can and do solve the policy issue Congress sought to address without unduly disturbing the network-affiliate relationship that is crucial to ensuring that local programming is produced in the first place.

Important and long-standing Commission policies militate against adopting the broad declaration that C Spire seeks. The network-affiliate relationship, with DMA-based exclusivity for local stations, contributes to the economic health of local television stations and their ability to produce the local news, weather, and sports programming and emergency information programming that viewers want and need. Under this system, networks must be given the freedom to determine the areas where affiliates can distribute network programming, and Congress has repeatedly recognized and protected those rights.[10] Such territorial restrictions serve localism, and nothing in C Spire's Petition persuasively argues in favor of altering Congress's and the Commission's historical conclusions to that effect.

Moreover, granting C Spire's Petition with respect to network territorial restrictions would lead to endless litigation. Network affiliation contracts include numerous conditions that affiliates and MVPDs must abide by in the retransmission of network programming. Each of these conditions could be the subject of a future Commission proceeding like this one, with

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[10] *See*, *e.g.*, *2005 Good Faith Order*, para 20 & nn.61, 64-66 (citing legislative history of various statutes evidencing Congress's intent to preserve the networks' ability to protect their copyrights through territorial exclusivity provisions).

MVPDs arguing that such conditions interfere with their ability to carry local stations' programming in market modification communities. The Commission should not go down that rabbit hole.

Instead, the Affiliate Associations urge the Commission to do no more than confirm that current law and the Commission's existing rules require that broadcasters and MVPDs must negotiate in good faith for retransmission of local television stations in market modification communities.

I. RECIPROCAL GOOD-FAITH BARGAINING OBLIGATIONS APPLY IN MARKET MODIFICATION COMMUNITIES.

The Affiliates Associations note that the reciprocal good-faith bargaining rules established in the Act and the Commission's rules already apply in market modification communities. This is nothing more than a statement of current law, and the Commission need not take further action on this point. The good-faith bargaining rules are designed to ensure that both broadcasters and MVPDs make a concerted effort to negotiate retransmission consent so that local stations' programming might be available to all television viewers throughout a station's local market (something they would have incentive to do even in the absence of the good faith rules).[11] When the Commission modifies a station's local market to include new communities, it does so only after conducting a thorough investigation of whether the station, in fact, provides substantial local service to those communities.[12] Once the Commission makes that

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[11] *See* Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, *First Report and Order*, 15 FCC Rcd 5445, para. 24 (2000) ("*First Good Faith Order*") ("We believe that, by imposing the good faith obligation, Congress intended that the Commission develop and enforce 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.").

[12] *See* Designated Market Areas: Report to Congress, *Report*, 31 FCC Rcd 5463 (2016) para. 16; *see also* 47 U.S.C. 47 U.S.C. §§ 338(l), 534(h)(1)(C); 47 C.F.R. § 76.59.

determination, it follows that the local station and MVPDs serving market modification communities should negotiate in good faith in order to try to provide all viewers in those communities the local station programming.

Members of the Affiliates Associations invest heavily in local programming, and they want that programming to be available to every viewer who can benefit from it. Broadcasters, therefore, will continue to negotiate in good faith with MVPDs for distribution of local programming to market modification communities, fully in keeping with the Congressional policies that led to STELAR's expansion of the market modification procedures to include consideration of the distribution of local programming to orphan counties.[13]

It is important to keep in mind, however, what the reciprocal good faith bargaining rules actually require and what they do not. The rules require MVPDs to negotiate with all broadcasters serving those communities. A market modification that results in adding communities to one station's market does not remove those communities from any other station's market. Following a market modification, all stations in the market that has been modified are required to negotiate in good faith with MVPDs serving the community subject to the modification–and all MVPDs serving that community are required to negotiate in good faith with both those stations.[14]

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[13] *See* Amendment to the Commission's Rules Concerning Market Modification; Implementation of Section 102 of the STELA Reauthorization Act of 2014, 30 FCC Rcd 10406, para. 3 (2015) (describing Congress's intent in expanding market modifications to include satellite carriage markets).

[14] *See* 47 C.F.R. § 76.65. It is important that the Commission clarify this obligation because comments filed by TEGNA and C Spire in this proceeding indicate that C Spire ignored its obligations to negotiate in good faith with respect to WWL. *See* Comments of TEGA Inc., MB Docket No. 19-159 (filed July 2, 2019) (alleging that C Spire failed to respond to TEGNA offer of terms for retransmission consent); Reply to TEGNA Inc. Comments, MB Docket No. 19-159 (filed July 12, 2019) (confirming that C Spire failed to respond to TEGNA's offer of terms for retransmission consent).

Second, the rules simply require all parties to negotiate consistent with the criteria laid out in the Act and the Commission's rules; they do not require an MVPD to enter into agreements with both stations. Indeed, the rules do not require an MVPD to enter into agreements with either station, and the rules do not require either station to enter into an agreement with any MVPD.[15] Parties frequently disagree on many terms of carriage, and the good faith rules neither require nor guarantee that those disagreements can or will be resolved and agreements can or will be reached. Nothing in STELAR's revisions to the market modification or good faith rules alters that fact.

For that reason, MVPDs' negotiations with multiple television stations affiliated with the same network has a number of potential marketplace outcomes. Negotiations may lead to an MVPD retransmitting multiple stations affiliated with the same network that serve a local community. This has long been common practice for cable operators seeking to provide subscribers with attractive multichannel video lineups. Or, such negotiations could lead to a MVPD retransmitting one station's full program schedule and another station's local programming with the network programming blacked out. These types of arrangements have long been a feature of the retransmission consent marketplace in communities that straddle two states or two DMAs. Or, the negotiations could lead to an MVPD carrying neither station. Broadcasters and MVPDs are bound by the marketplace outcomes of their own negotiations. The Commission's rules do not require MVPDs to carry even one local network affiliate, let alone two. That is a business choice made by the MVPDs in negotiation with local broadcasters.

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[15] *See First Good Faith Order* at para. 40 ("Broadcasters must participate in retransmission consent negotiations with the intent of reaching agreement. Provided that the parties negotiate in good faith in accordance with the Commission's standards, failure to reach agreement does not violate Section 325(b)(3)(C).").

And broadcasters are not entitled to retransmission of their signals; they obtain it only if they can come to terms with an MVPD.

There is no evidence that Congress meant to alter this balance through its revisions to the market modification and good faith bargaining rules in 2014. Congress (1) expanded the market modification procedures; (2) prohibited joint negotiation by non-commonly-owned stations; and (3) prohibited stations from conditioning a grant of retransmission consent to an MVPD on that MVPD's agreement not to carry other non-commonly-owned stations in the market modification areas. It did not, however, require broadcasters or MVPDs to reach agreements for retransmission in market modification communities, or even heighten their responsibility to negotiate in those areas. Congress clearly was concerned with orphan counties when it revised STELAR, but it did not create any special obligation for broadcasters and MVPDs to reach agreement for service to those areas. What it has done is to create a reciprocal good faith bargaining environment in which such deals can occur. At most, the Commission could confirm in response to the C Spire Petition that current law applies to negotiations in market modification areas. Local stations, however, do not require such a Commission ruling, both because they are aware of the governing rules and because they will continue to negotiate in good faith for retransmission of their signals regardless of what the Commission's rules require.

II. THE COMMISSION SHOULD REAFFIRM THAT NETWORK TERRITORIAL RESTRICTIONS DO NOT VIOLATE THE GOOD FAITH BARGAINING RULES.

The Commission should deny C Spire's request for a declaration that territorial exclusivity restrictions in network affiliation agreements violate the good faith rules. The requested declaration conflicts with long-standing Commission precedent and would undermine a number of important Commission policies promoting strong local television stations and the production of local programming content. While trying to encourage retransmission for stations

in market modification communities is a reasonable goal, undermining local stations' territorial exclusivity protections to achieve that goal is not a rational policy approach. The good faith bargaining rules already provide broadcasters and MVPDs with the tools necessary to ensure that local programming is distributed in market modification communities. Commission interference in legitimate aspects of network affiliation agreements would be unnecessary and counterproductive.

A. The Commission Long Ago Rejected C Spire's Arguments, and Nothing Has Changed To Justify a Different Outcome Here.

C Spire's request for a finding that territorial exclusivity provisions in network affiliation agreements violate the good faith rules is not new. Indeed, fifteen years ago, when Congress amended Section 325 of the Act to apply the good faith bargaining rules to both MVPDs and broadcasters, several MVPDs made precisely the same claim.[16] They argued that networks should not be allowed to include provisions in their affiliation agreements prohibiting local stations from agreeing to allow retransmission of network programming outside a station's DMA.[17] In its *2005 Good Faith Order*, the Commission completely rejected these claims.[18] The Commission explicitly recognized that Congress never intended to use the good faith bargaining rules to restrict territorial limitations in network affiliation agreements.[19] The Commission also found that territorial restrictions do not violate the prohibition on agreements that prohibit the retransmission of a station's signal by another MVPD.[20] This rule, the Commission found, was not intended to affect agreements between networks and their affiliates.

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16 *See 2005 Good Faith Order* at para. 33.

17 *See id.*

18 *See id.* at paras. 33-35.

19 *See id.* at para. 33.

20 *See id.* at para. 34.

Nothing in STELAR suggests that the Commission should revisit this ruling. C Spire doesn't even acknowledge the *2005 Good Faith Order* in its petition, let alone provide a justification for setting it aside. In supporting comments, ACA Connects ("ACA") argues that the *2005 Good Faith Order* is inapplicable to C Spire's request because it only addresses territorial restrictions on granting retransmission consent outside of a station's "market."[21] Since a market modification changes a station's "market" to include market modification communities, ACA reasons, any network restriction on the terms a station can require in market modification communities must be invalid.[22]

ACA is mistaken, and its argument rests on a fundamental mischaracterization of the Commission's ruling in the *2005 Good Faith Order*. In that Order, the Commission considered whether an affiliation agreement could, consistent with the good faith rules, "restrict a broadcaster's ability to grant retransmission consent outside of a specified geographic area, often the broadcaster's DMA."[23] ACA seeks to conflate a TV station's "local market," *i.e.*, the area where it can elect retransmission consent and is required to negotiate for carriage with MVPDs under the Commission's rules, and its DMA, *i.e.* the economic market identified by the Nielsen Company that forms the basis for a station's market, but, following a market modification, is not coterminous with it. Market modifications change a station's local carriage market, but they do not change a station's DMA. The Commission in 2005 found that network affiliation agreements restricting affiliates to distribution within their DMAs are consistent with the good faith rules.[24] When it made that determination, the market modification system was well

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21 *See* Comments of ACA Connects – America's Communications Association, MB Docket No. 19-159 at 7-9 (filed June 24, 2019).

22 *See id.*

23 *See 2005 Good Faith Order* at para. 33.

24 *See id.*

established, and dozens of such modifications had been granted. The Commission knew that many stations had carriage markets that were larger (or smaller) than their DMAs. If the Commission meant to say that network territorial restrictions are acceptable as long as they permit retransmission in market modification communities, it would have said so. Instead, the Commission said the good faith rules were not meant to be a lever to force networks and their affiliates to change territorial limitations in network affiliation agreements.[25] That remains the law today.

C Spire's request for declaratory ruling and ACA's comments would overturn the Commission's determination in the *2005 Good Faith Order* that networks and their affiliates can agree to geographical restrictions in their affiliation agreements without running afoul of the good faith bargaining rules. Neither C Spire nor ACA have provided any basis for the Commission to justify changing the rules – nor would a petition for declaratory ruling be the procedural vehicle for doing so, as the promulgation of a new rule can be accomplished only via notice and comment rulemaking.

The Commission's 2005 determination remains sound today, and the Commission should reaffirm it.

B. Market Mechanisms Already Exist for Ensuring Retransmission of Local Programming in Market Modification Communities.

The existing retransmission consent market mechanisms are already sufficient to encourage distribution of local programming in market modification communities without the Commission interfering in free-market negotiations and imposing government-mandated changes to network affiliation agreements. As the Commission recognized in the *2005 Good Faith Order*, broadcasters have a duty to seek waivers of territorial restrictions in the event an MVPD

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[25] *See id.*

seeks to carry a station outside its DMA.[26] The Commission did not say that networks are required to grant such waivers, but it expressed its belief that networks "might be amenable to a limited waiver of the restriction" in some circumstances.[27]

Even if a network partially or fully denies such a waiver request, though, broadcasters and MVPDs have other options for ensuring that local programming reaches market modification communities, including carriage of more than one affiliate of the same network or carriage of a local affiliate's non-network local programming only. Historically, cable operators in communities that are served by stations in multiple markets have carried multiple affiliates of the same network to ensure their customers are fully served. If the economics of such dual or multiple carriage arrangements could not be agreed, MVPDs and local stations remain free to negotiate an agreement for carriage of a local station's non-network programming only (blacking out the network programming made available via another in-market station). Such arrangements are not uncommon in the industry. Any of these options would be preferable to additional Commission involvement in the retransmission consent negotiation process. Congress made retransmission consent negotiations private precisely because free market negotiations lead to better results than a government-mediated process.[28] Nothing in the C Spire Petition suggests the Commission should insert itself into the marketplace by limiting network territorial restrictions.

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26 *See id.* at para. 35.

27 *See id.*

28 *See First Good Faith Order* at para. 53 (the appropriate terms of retransmission consent agreements are "precisely the judgment that Congress generally intended the parties to resolve through their own interactions and through the efforts of each to advance its own economic self interest").

C. Grant of C Spire's Petition Would Undermine Important Commission Policies Promoting Broadcast Television Localism.

1. Legitimate Territorial Restrictions on Distribution of Network Programming Are Essential to Promoting Production of Local Programming.

Territorial exclusivity is typical in a wide range of industries. Just as franchisees like McDonald's do not grant two franchise locations on the same street, TV networks generally do not license their content to multiple television stations serving the same area.[29] Given that the economic market of each local television station is now universally accepted to be that station's DMA, it is unsurprising that most modern network affiliation agreements stipulate that the licensed network programming can be distributed by a station only within its DMA. C Spire's request would force networks to allow distribution of their content outside a local station's DMA and, in most cases, within the DMA of another local affiliate. This unprecedented incursion into the network-affiliate relationship cannot be justified by any act of Congress or the Commission.

C Spire bases this claim that Congress intended the Commission to intervene in network affiliation agreements on the following language it quotes from the Senate Report on legislation that was subsequently amended to become STELAR.[30] That language, however, provides no support for C Spire's position. The Senate Report clearly states that Congress intended to prohibit a television station from insisting that MVPDs in its market refrain from carrying other stations that had counties added to their markets through the market modification process (unless

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[29] The ability to control where local television stations deliver their programming is essential to networks and syndicators. *See 2005 Good Faith Order* at paras. 20, 33. Since MVPDs have a compulsory license to distribute broadcast programming in certain territories, the only way programming owners can control the territorial distribution of their programming is by including those limitations in affiliation and syndication agreements. If those clauses were unenforceable, broadcast television would become a very unattractive way to distribute high-value content like network and top-flight syndicated programming.

[30] *See* C Spire Petition at 15-16.

those stations were commonly owned, in which case such a practice would be fine).[31] In short, this Congressional statement has nothing to do with a station limiting its own retransmission to areas within its DMA and says even less about network affiliation agreements. Undoubtedly, Congress hoped to expand the retransmission of stations into market modification communities, but it said precisely nothing about requiring stations to grant such carriage for network programming or about limitations in network affiliation agreements. C Spire is actively misinterpreting Congress's words and asking the Commission to take an unprecedented step into heretofore private commercial marketplace negotiations based on that misinterpretation. Obviously, the Commission should deny that request.

There are important policy reasons why C Spire's requested ruling would be ill-advised. Territorial restrictions not only make logical sense from a network's perspective, they are vital to the economic success of local television stations that are affiliated with networks. As the Commission knows, broadcasters depend in large part on local advertising revenues to fund the important local services they provide. The value of local station advertising time arises from the programming that local broadcasters produce or purchase from third-party programmers, chiefly syndicators or the networks. If broadcasters cannot secure territorial exclusivity for that programming, then the value of local advertising, and the crucial local programming services that ad revenue funds, will necessarily decline.

For those reasons, territorial programming exclusivity is essential to maintaining the local broadcast system. And the Commission's signal carriage, syndicated exclusivity, and network non-duplication rules have developed to ensure that federal policy recognizes this fact. In 2005, the Commission expressly declined to intervene in the network-affiliate relationship solely for

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[31] *See* S. 2799 Rep No. 113-322, at 7, 12-13 (2014).

the purposes of trying to alter retransmission consent outcomes, and it has never deviated from that course. The Commission should again follow is own precedents here.

2. A Commission Rule Prohibiting Enforcement of Territorial Restrictions in Network Affiliation Agreements Would Lead to Endless Litigation Over Other Requirements of Network Affiliation Agreements.

C Spire's argument that territorial restrictions in network affiliation agreements amount to impermissible restrictions on local stations' right and obligation to negotiate retransmission consent logically implicates every condition networks place on the right of an affiliate station to grant retransmission consent for network programming. Until now, Congress, the Commission, and broadcasters have assumed that networks, which own or obtain clearance for the copyrights to their programs, can establish reasonable terms for local broadcast distribution of that content. If the Commission finds to the contrary, then the legality of numerous contractual provisions will be thrown into doubt and likely subject to future litigation at the Commission.

For example, networks generally require retransmission of network programming to be in its entirety because the networks reasonably do not want their network commercials removed. Networks generally require retransmission to be substantially simultaneous with the live broadcast because they do not want to promote an 8 PM program and have the MVPD show it at 2PM the next day. Retransmission must include Nielsen codes because the networks reasonably want ratings credit. Networks generally require retransmission to be at a certain level of picture quality. The list goes on. No one should claim that insisting that MVPDs adhere to these reasonable provisions in retransmission consent agreements violates good faith, but granting C Spire's request will encourage MVPDs to do just that, creating great expense for broadcasters and a substantial waste of the Commission's resources. The Commission should cut off that line of argument by denying C Spire's request and affirming that the good faith

bargaining rules were not designed or meant to interfere in the network-affiliate relationship or turn the Commission into an ombudsman of network affiliation agreements.

III. CONCLUSION

For the reasons set forth herein, the Commission should confirm that the reciprocal good faith bargaining rules apply to negotiation of retransmission consent for market modification communities and otherwise deny C Spire's petition.

Respectfully submitted,

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