

**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.)	
Gray Media Group, Inc.)	CSR-8978-C

**REPLY COMMENTS OF TEGNA INC.
TO C SPIRE PETITION FOR DECLARATORY RULING**

In its Petition for Declaratory Ruling, Telepak Networks, Inc. d/b/a C Spire Fiber (“C Spire”) asserts that “a network affiliation agreement that restricts the ability of a broadcast station to grant consent to an MVPD to retransmit a station’s broadcast stream that has been found to be local under section 534 should violate the Commission’s rules,” and C Spire accordingly asks the Commission to issue a declaratory ruling that C Spire apparently believes would prohibit networks and their affiliates from agreeing to or enforcing such restrictions.¹ But C Spire’s assertion and belief that such affiliation agreement provisions “should violate the Commission’s rules” does not make it so. To the contrary, as the Affiliates Associations demonstrate, “[t]he Commission long ago thoroughly considered and rejected claims that such territorial restrictions violate the good faith bargaining rules.”²

¹ Telepak Networks, Inc. d/b/a C Spire Fiber, Retransmission Consent Complaint and Petition for Declaratory Ruling, MB Docket No. 19-159, CSR-8978-C, at 19 (filed June 3, 2019) (“Petition”). As instructed by the Media Bureau, these Reply Comments are directed to the declaratory ruling petition in C Spire’s combined filing and do not address the merits of C Spire’s retransmission consent complaint against Gray Media Group, Inc. *See Clarification of the Ex Parte Status of, and Establishment of Comment Dates for, Telepak Networks, Inc.’s Petition for Declaratory Ruling*, Public Notice, DA 19-581 at n.6 (MB June 20, 2019) (“C Spire Petition PN”).

² Joint Comments of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates, MB Docket No. 19-159, CSR-8978-C, at 3 (filed July 22, 2019) (“Affiliates Associations Comments”).

Furthermore, a declaratory ruling cannot provide C Spire with the requested relief. The prohibition C Spire apparently seeks would require a new rule, which could be enacted by the Commission only through a rulemaking. The Commission must reject C Spire's attempt to obtain substantive changes to the rules governing retransmission consent and network-affiliate relations through an abuse of the declaratory ruling process. TEGNA Inc. ("TEGNA") therefore files these Reply Comments to urge the Commission to dismiss or deny the Petition.

The Commission may "issue a declaratory ruling terminating a controversy or removing uncertainty."³ But there is no controversy or uncertainty regarding the issues raised in the Petition. C Spire asks the Commission to declare that "[w]hen the Commission modifies a commercial television broadcast station's market to include an additional community or additional communities, that station and all of its broadcast streams are now considered to be in-DMA (or 'local') for reciprocal retransmission consent negotiation purposes in those communities."⁴ The Affiliates Associations correctly note that on its face such a declaration would simply restate the uncontroversial proposition "that the reciprocal good-faith bargaining rules established in the [Communications] Act and the Commission's rules already apply in market modification communities."⁵ No party argues otherwise. Indeed, the reciprocal duty to negotiate retransmission consent in good faith applies "to any retransmission consent negotiation regardless of where the MVPD and the broadcaster are situated."⁶ Yet when the Commission in 2005 adopted the rules making the good-faith negotiation obligations reciprocal between broadcasters and MVPDs, it concluded that "negotiations involving truly distant broadcasters

³ 47 C.F.R. § 1.2.

⁴ Petition at 19.

⁵ Affiliates Associations Comments at 5.

⁶ *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 20 FCC Rcd 10339, 10351 ¶ 26 (2005) ("Reciprocal Bargaining Order").

and MVPDs *and negotiations for which a broadcaster is contractually precluded from reaching consent* may be truncated.”⁷ The Commission thus recognized that a broadcaster might be “contractually precluded from reaching consent” with an MVPD even if the station and MVPD are not “truly distant.” These are distinct, albeit frequently overlapping, circumstances. Whether or not a station is considered “local,” “the determination of what conduct constitutes a breach of the duty of good faith is necessarily contextual,”⁸ and the territorial scope of a broadcaster’s contractual right to broadcast third-party content is a relevant part of that context. There is no outstanding ambiguity for the Commission to resolve on these points, and thus no need or justification for a declaratory ruling.

Moreover, C Spire is incorrect to suggest that by issuing the declaration requested by the Petition the Commission could or should nullify contractual provisions that base the scope of a station’s retransmission consent rights on its Nielsen-defined DMA. When the Commission has imposed substantive restrictions on the terms of network affiliation or other programming agreements, it has adopted rules setting forth those restrictions.⁹ Likewise, the good-faith negotiation standards are the product of rulemaking proceedings. In 2005 the Commission explicitly considered and rejected a request “that the Commission declare a per se violation of a broadcaster’s reciprocal bargaining obligation a contractual provision, such as one contained in a network affiliation agreement, that restricts a broadcaster’s ability to negotiate retransmission consent in good faith.”¹⁰ Proponents asserted – as C Spire does today – that such a declaration was needed because “some networks, through their affiliation agreements, restrict a broadcaster’s ability to grant retransmission consent outside of a specified geographic area, often

⁷ *Id.* at 10345 ¶ 14 (emphasis added).

⁸ *Id.* at 10352 ¶ 29.

⁹ See 47 C.F.R. § 73.658.

¹⁰ *Reciprocal Bargaining Order*, 20 FCC Rcd at 10354 ¶ 33.

the broadcaster's DMA.”¹¹ The Commission rejected these arguments, concluding instead that it could “perceive no intent on the part of Congress that the reciprocal bargaining obligation interfere with the network-affiliate relationship or to preclude specific terms contained in network-affiliate agreements.”¹² As the Affiliates Associations correctly note, “[n]othing 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.”¹³ Thus, particularly in the absence of any relevant statutory change, any change to the conclusions the Commission reached in the 2005 rulemaking would, at a minimum, require a new rulemaking. Indeed, the Petition's own examples of Commission proceedings that considered the networks' role in retransmission consent negotiations are proceedings stemming from notices of *proposed rulemaking*.¹⁴

A rulemaking would be the appropriate forum for the Commission to consider whether new regulations on contracts that govern the distribution of network content (which is national in nature) actually are necessary or appropriate to enable the distribution of a station's local news and other locally focused content to communities added to a station's local carriage market. The Affiliates Associations note, for instance, that under existing rules “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).”¹⁵ TEGNA has entered into several such local-only programming arrangements with cable

¹¹ *Id.*

¹² *Id.*

¹³ Affiliates Associations Comments at 3; *see also id.* at 10-11.

¹⁴ *See* Petition at 19 n.55 (citing *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd 10327, ¶ 14 (2015) and *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, ¶ 22 (2011)).

¹⁵ Affiliates Associations Comments at 12.

operators interested in providing a station's local news to subscribers outside of the station's DMA.

In contrast, the Commission has emphasized that it will not allow declaratory ruling proceedings to be used as backdoor rulemakings.¹⁶ Both the *per se* good faith negotiation standards and the Commission's rules governing network affiliation agreements are products of rulemakings. Yet C Spire asks the Commission, in the guise of a declaratory ruling, to adopt a new *per se* standard that the Commission explicitly rejected in its 2005 rulemaking and which would effectively establish a new substantive restriction on affiliation agreements. The Commission must reject this end run around the rulemaking process. The Petition accordingly should be dismissed or denied.

Respectfully submitted,
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¹⁶ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961, 8017 ¶ 107 (2015) (denying declaratory ruling where “we find no uncertainty on this issue, and view Glide’s request as seeking reversal of the Commission’s prior ruling regarding text messages as calls rather than seeking clarification, and therefore inappropriate for declaratory ruling”), *vacated in part on other grounds by ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018); *Amendment of Part 101 of the Commission’s Rules to Facilitate the Use of Microwave for Wireless Backhaul and Other Uses and to Provide Additional Flexibility to Broadcast Auxiliary Service and Operational Fixed Microwave Licensees*, NPRM & NOI, 25 FCC Rcd 11246, 11260 ¶ 35 (2010) (denying declaratory ruling request “because the requested interpretation is inconsistent with the plain language of the current rule” and “it would not be appropriate to change the meaning of an established rule under the guise of a declaratory ruling,” particularly where “the comments raise various policy issues that are best addressed through the rulemaking process”).