PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of DIRECTV, LLC; AT&T Services, Inc., Complainants, v. Deerfield Media (Port Arthur) Licensee, LLC; Deerfield Media (Cincinnati) Licensee, LLC; Deerfield Media (Mobile) Licensee, LLC; Deerfield Media (Rochester) Licensee, LLC; Deerfield Media (San Antonio) Licensee, LLC; GoCom Media of Illinois, LLC; Mercury Broadcasting Company, Inc.; MPS Media of Tennessee Licensee, LLC; MPS Media of Gainesville Licensee, LLC; MPS Media of Tallahassee Licensee, LLC; MPS Media of Scranton Licensee, LLC; Nashville License Holdings, LLC; KMTR Television, LLC; Second Generation of Iowa, LTD; Waitt Broadcasting, Inc., Defendants.	MB Docket No. 19-168 CSR-8979-C Account Nos.: MB-202041430002, MB-202041430003, MB-202041430004, MB-202041430005, MB-202041430006, MB-202041430007, MB-202041430008, MB-202041430009, MB-2020414300010, MB-202041430011, MB-202041430012, MB-202041430013, MB-202041430014, MB-202041430015, and MB-202041430016

DEFENDANTS' PETITION FOR RECONSIDERATION

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TABLE OF CONTENTS

SUMMARY ii
DEFENDANTS' PETITION FOR RECONSIDERATION 1
ARGUMENT 2
A. The Fifth Amendment requires fair notice to regulated parties of both prohibited conduct and the magnitude of any penalty. 2
B. The Forfeiture Order violates Defendants' right to fair notice under the Fifth Amendment's Due Process Clause. 4
1. Defendants were denied fair notice that their conduct was prohibited. 5
2. Defendants were denied fair notice of the magnitude of penalty imposed. 11
CONCLUSION 14

SUMMARY

Defendants respectfully request reconsideration of the Commission's novel decision finding bad faith negotiation and imposing the maximum statutory penalty. The Forfeiture Order failed to provide Defendants with fair notice of both the imposition and size of the penalty—adopting an entirely new interpretation of permissible joint negotiation and punishing Defendants for reasonably interpreting the Commission's rules. Because that violates Defendants' due process rights guaranteed by the Fifth Amendment of the U.S. Constitution, reconsideration is warranted.

As an initial matter, the Commission did not fairly notify Defendants that their conduct was unlawful. Defendants reasonably concluded that they could engage in sequenced joint negotiations, utilizing a template agreement, because (1) it was (and is) undisputed that Defendants could lawfully negotiate as a group (and an ordinary person would assume that *joint* negotiation does not require *individual* responses to *individual* proposals); (2) not one Commission decision had addressed sequenced joint negotiation; and (3) Defendants successfully used the same approach to joint negotiations in 2016 without issue. Where Defendants acted reasonably, they cannot lawfully be punished for failing to divine the agency's unprecedented interpretation of its rules.

Nor does the Fifth Amendment permit the Commission to impose a maximum penalty (over half-a-million dollars per station) without any warning of the *magnitude* of the penalty imposed. Indeed, in the sole decision finding a violation of the good faith negotiation requirement (on inapposite grounds), the Commission did not impose any forfeiture; it merely ordered the violating party to resume negotiations. And, contrary to the Commission's assertion, the Sinclair consent decree did *not* provide fair notice. That inapposite enforcement action involved a rule that is not at issue here or in dispute. It cannot possibly have given an ordinary person fair notice of the application, scope, and likely sanctions for sequenced, joint negotiations.

Accordingly, the Commission should vacate its decision and dismiss the proceedings.

DEFENDANTS' PETITION FOR RECONSIDERATION

Pursuant to 47 U.S.C. § 405(a) and 47 C.F.R. § 1.106, Defendants respectfully request reconsideration of the decision holding Defendants liable for violating good faith negotiating requirements and imposing a $512,228 penalty on each station—the statutory maximum.[1] *See* Forfeiture Order, MB Dkt. No. 19-168, FCC 21-89 (rel. July 28, 2021). Reconsideration is warranted because both the imposition and size of the penalty infringe Defendants' Fifth Amendment due process rights. The Commission is "imposing the statutory maximum on individual stations by way of a novel, first-time application of the [Commission's] rules,"[2] and there has not been fair notice that the conduct in question violates the Commission's rules or warrants such a penalty.[3]

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[1] This Petition for Reconsideration is filed on behalf of Deerfield Media (Port Arthur) Licensee, LLC; Deerfield Media (Cincinnati) Licensee, LLC; Deerfield Media (Mobile) Licensee, LLC; Deerfield Media (Rochester) Licensee, LLC; Deerfield Media (San Antonio) Licensee, LLC; Go-Com Media of Illinois, LLC; MPS Media of Tennessee Licensee, LLC; MPS Media of Gainesville Licensee, LLC; MPS Media of Tallahassee Licensee, LLC; MPS Media of Scranton Licensee, LLC; Nashville License Holdings, LLC; KMTR Television, LLC; Second Generation of Iowa, LTD; and Waitt Broadcasting, Inc. Mercury Broadcasting Company, Inc. is not participating.

[2] *DIRECTV, LLC et al. v. Deerfield Media, Inc. et al.*, MB Docket No. 19-168, Mem. Op. & Order & Notice of Apparent Liability for Forfeiture, 2020 WL 5560945, at *27 (Sept. 15, 2020) ("NAL") (statement of Comm'r O'Rielly).

[3] Defendants previously asserted that they had been denied fair notice. *See, e.g.*, Defs.' Response to NAL (Oct. 15, 2020) at 25 ("Defendants had no relevant guidance about how the Commission would ultimately apply its rules or the amount of penalties that the Commission would consider reasonable for a violation. Certainly it had no reason to believe that the Commission would calculate penalties in a manner that would reach the statutory maximum."). The Forfeiture Order only indirectly addresses this argument by asserting for the first time (at ¶ 34) that Defendants were provided due process based on the Sinclair consent decree and LOIs they had received relating thereto. Given the Commission's reliance on this new argument, Defendants' Petition is warranted under Section 405(a) of the Communications Act and 47 C.F.R. § 1.106(c)(1) (incorporating the categories set forth in 1.106(b)(2)(ii), which provides that "a petition for reconsideration will be entertained" if it "relies on . . . arguments unknown to petitioner until after his last opportunity to present them to the Commission"). This Petition therefore (1) addresses the Commission's newly asserted basis for providing Defendants fair notice, and (2) ensures that the Commission has an opportunity to address Defendants' due process argument. Grant of this Petition is also warranted under 47 C.F.R. § 1.106(c)(2), under which reconsideration is justified where "consideration of the facts or arguments relied on is required in the public interest."

The due process violation is twofold. First, the Commission failed to fairly notify Defendants that pursuing sequenced joint negotiations using one agreement as a template would constitute a *per se* violation of the agency's good faith negotiation requirement. A reasonable person would find that Defendants' efforts to jointly negotiate were lawful based on existing Commission precedent (or lack thereof) and the parties' prior dealings—notwithstanding a consent decree involving a Commission rule that no one contends is at issue here or was ever in dispute. Second, the Commission failed to fairly warn Defendants of the magnitude of the penalty that might be imposed for violating this newly created standard. The Commission should therefore vacate its decision and dismiss this proceeding.

ARGUMENT

A. The Fifth Amendment requires fair notice to regulated parties of both prohibited conduct and the magnitude of any penalty.

"A fundamental principle in our legal system," enshrined in the Fifth Amendment's Due Process Clause, "is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012); *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (requiring that agencies "provide regulated parties fair warning of the conduct [a regulation] prohibits" (cleaned up[4])). That principle is "thoroughly incorporated into administrative law." *Gen. Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (hereinafter "*General Electric*"), *as corrected* (June 19, 1995) (cleaned up); *see also SNR Wireless LicenseCo, LLC v. FCC*, 868 F.3d 1021, 1043 (D.C. Cir. 2017) ("It is a basic principle of administrative law that an agency cannot sanction an individual for violating the agency's rules unless the individual had 'fair notice' of those rules." (citations

[4] The Supreme Court employed this emergent parenthetical this year in *Brownback v. King*, 141 S. Ct. 740 (2021).

omitted)). The constitutional "requirement of clarity . . . is implicated whenever the government imposes civil penalties." *Karem v. Trump*, 960 F.3d 656, 664 (D.C. Cir. 2020) (cleaned up).

"Notice is fair if it allows regulated parties to identify, with *ascertainable certainty*, the standards with which the agency expects them to conform." *SNR Wireless v. FCC*, 868 F.3d at 1043 (emphasis added) (cleaned up). Put differently, the question is whether "a person of ordinary intelligence [would have] fair notice of what is prohibited." *FCC v. Fox*, 567 U.S. at 254; *In re Nobeltel, LLC*, 30 FCC Rcd. 11779, 11782-83 (2015) (same). As the D.C. Circuit explained:

> The Commission through its regulatory power cannot, in effect, punish a member of the regulated class for *reasonably interpreting Commission rules*. Otherwise the practice of administrative law would come to resemble "Russian Roulette." The agency's interpretation is entitled to deference, but if it wishes to use that interpretation to cut off a party's right, it must give full notice of its interpretation.

Satellite Broad. Co. v. FCC, 824 F.2d 1, 3-4 (D.C. Cir. 1987), *as amended* (July 7, 1987) (emphasis added) (vacating FCC order as arbitrary and capricious); *see also Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (conclusion by then-Judge Scalia that agency failed to provide fair notice where the regulated party's contrary interpretation of the regulation was reasonable).

Moreover, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice *not only* of the conduct that will subject him to punishment, *but also of the severity of the penalty that a State may impose*." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (emphasis added); *see also Karem*, 960 F.3d at 665 ("Karem's behavior was not so outrageous as to bring into fair contemplation the unprecedented sanction visited on him."); *FCC v. Fox*, 567 U.S. at 256-57 ("An isolated and ambiguous statement from a 1960 Commission decision does not suffice for the fair notice required when the Government intends to impose over a $1 million fine for allegedly impermissible speech.").

B. The Forfeiture Order violates Defendants' right to fair notice under the Fifth Amendment's Due Process Clause.

Here, the Forfeiture Order violates the Due Process Clause of the Fifth Amendment by severely "punish[ing] [Defendants] for reasonably interpreting Commission rules." *Satellite v. FCC*, 824 F.2d at 4. It is well settled that parties may lawfully negotiate retransmission consent agreements *jointly*. These parties (and others) have followed that principle in the past. Yet the Commission now holds for the first time that *joint* negotiation must always include, from the outset, *individual* responses to *individual* proposals. That newly announced standard effectively permits the counter-party to refuse joint negotiation whenever it chooses by persisting with individual proposals, which then must be responded to individually—effectively nullifying *joint* negotiation, which the Commission supposedly still permits.

In particular, after accepting that joint negotiation is permitted, the Commission ruled here that "the *manner* in which the joint negotiations were being conducted . . . violated Commission Rules." Forfeiture Order ¶ 29. Even though "Mr. Lammers had the authority to negotiate on behalf of the Defendant Stations, and he repeatedly claimed to be doing so when he sent draft carriage proposals [HC] [redacted] [HC] Bureau Order ¶ 24, the Commission found a violation because Defendants' joint agent had rejected AT&T's demands for individual responses from each Defendant from the start of negotiations (despite the sequenced negotiation utilized by these same parties in 2016): "Mr. Lammers explicitly and repeatedly refused to discuss the Defendant Stations until the agreement with [C] [redacted] [C] was signed." Forfeiture Order ¶ 25; *see also id.* ¶ 22 ("Mr. Lammers responded only to proposals with respect to the [C] [redacted] [C] stations and disregarded all proposals concerning the Defendant Stations."); Bureau Order ¶ 22 ("Mr. Lammers made not a single offer or proposal, formal or informal, that could have resulted in the carriage of the Defendant Stations, even if accepted unchanged by AT&T.").

The Commission thus adopted a new interpretation of its rules that undermines joint negotiation, holding that negotiation is permissible *only if* each broadcast station provides an *individual* response (at least in response to demands made from the start of the joint negotiation by a multichannel video programming distributor ("MVPD")).

As set forth below, the Commission's novel reading of its rules as prohibiting staggered joint negotiations based on a template agreement "is so far from a reasonable person's understanding of the regulations that they could not have fairly informed [Defendants] of the agency's perspective." *General Electric*, 53 F.3d at 1330. Regardless, and at a minimum, Defendants reasonably and in good faith believed that their conduct was permissible. *Satellite v. FCC*, 824 F.2d at 3-4. Because the Fifth Amendment protects that belief from punishment for "violation" of a newly announced, contrary agency standard, the Forfeiture Order must be vacated.[5]

1. Defendants were denied fair notice that their conduct was prohibited.

The Commission's novel interpretation of its good faith rules as barring staggered joint negotiations based on a template agreement is "by no means the most obvious interpretation." *General Electric*, 53 F.3d at 1331. For the reasons set forth below, Defendants did not have "full notice" of the Commission's interpretation. *Satellite v. FCC*, 824 F.2d at 4.

[5] Even assuming the Commission's interpretation were reasonable (and, as set forth at length in prior briefing, Defendants dispute that it is), the agency failed to provide fair notice. *See e.g.*, *SNR Wireless v. FCC*, 868 F.3d at 1044 (concluding that "the FCC reasonably applied its rules" but failed to provide sufficient notice of its "control determination and its consequent penalties"); *General Electric*, 53 F.3d at 1331 (reasoning that the agency failed to provide fair notice where its "permissible interpretation" was "by no means the most obvious interpretation of the regulation"). That is because "[i]t is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them," but "it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference." *SmithKline*, 567 U.S. at 158-59.

First, the basic and undisputed proposition that parties can jointly negotiate—including a commonsense understanding of what joint negotiation entails—is consistent with Defendants' interpretation of the Commission's rules. Both the Commission and Media Bureau recognized that joint negotiations are permissible; that Defendants' agent, Mr. Lammers, could negotiate jointly on Defendants' behalf; and that Mr. Lammers repeatedly informed AT&T that he was in fact negotiating on behalf of *all* Defendants when he provided feedback on the [C] [redacted] [C] proposal. *See, e.g.*, NAL ¶ 37 (acknowledging that "Mr. Lammers had the authority to negotiate on behalf of the Defendant Stations and repeatedly claimed to be doing so when he sent draft carriage proposals [HC] [redacted] [HC] and/or when those proposals contained headers reading [HC] [redacted] [HC]" (citations omitted)); Bureau Order ¶ 21 ("To be sure, it is not impermissible for Defendant Stations to participate in joint negotiations with AT&T. Nothing in the Act or the Commission's good faith rules prohibits broadcast stations located in different markets from jointly negotiating for retransmission content.").[6]

Because joint negotiation was (and still is) permissible, it was perfectly reasonable for Defendants to conclude that they could do so in a staggered manner, using a template that could later be modified for each individual station.[7] Defendants could also reasonably assume that AT&T

[6] In its early 2020 dismissal of the lawsuit brought in 2019 by AT&T against Mr. Lammers' company for alleged violation of an AT&T/ [C] [redacted] [C] NDA, the U.S. District Court for the Eastern District of Missouri roundly affirmed that Mr. Lammers was conducting a *joint* negotiation at all times relevant here, including when he was providing his [C] [redacted] [C]-first responses. *AT&T Services, Inc. v. Max Retrans LLC*, No. 4:19-CV-01925-NCC, 2020 WL 247965, at *3-4 (E.D. Mo. Jan. 16, 2020).

[7] The Commission faults Mr. Lammers for nowhere identifying to AT&T what portions of the [C] [redacted] [C] draft constituted a "template" applicable to all Defendants. That criticism ignores the crucial context of these joint negotiations. That is, ample "template" already existed between AT&T and the Defendants in the form of their 2016 retransmission consent agreements. Those agreements had resulted from a staggered joint negotiation, giving the parties a base to build on in the 2019 negotiations, rather than requiring them to start from scratch.

could not unilaterally refuse to negotiate jointly or dictate the terms of such negotiation, as that would eviscerate the right of the other party to engage in such negotiations.

Second, in the twenty years since the Commission adopted its *per se* good faith negotiation rules and up until this proceeding, there had been no Commission decision addressing sequenced joint negotiation at all, much less finding it to be in bad faith. *See Karem*, 960 F.3d at 666 ("'[T]he principle of fair warning' requires that novel standards announced in adjudications 'must not be given retroactive effect where they are unexpected and indefensible by reference to the law which had been expressed *prior to the conduct in issue*.'" (quoting *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001)). Analyzing Commission precedent is essential to determining whether adequate prior guidance has been provided to regulated entities. *See, e.g.*, *FCC v. Fox*, 567 U.S. at 257 (reviewing unpublished FCC Staff rulings in assessing whether adequate notice had been provided to broadcasters in the agency's regulation of indecency).

In this proceeding, the Commission recognized that it "ha[d] *never before* issued a forfeiture for a violation of good faith retransmission consent negotiation rules," and had found a failure to negotiate in good faith just once.[8] NAL ¶ 58 (emphasis added); Forfeiture Order ¶ 34. But even

[8] By contrast, there are numerous FCC decisions issued over the past two decades that denied bad faith complaints. None of them provides guidance for the case at hand (and, if anything, they collectively evince the Commission's reluctance to find bad faith on the part of a negotiating party). *See Gray Television Licensee v. Citizens Telecom Serv. Co.*, MB Dkt. No. 20-441, Mem. Op. & Order, 36 FCC Rcd. 7459 (Apr. 21, 2021); *HolstonConnect, LLC v. Nexstar Media Grp., Inc.*, MB Dkt. No. 19-60, Mem. Op. & Order, 34 FCC Rcd. 7833 (Sep. 3, 2019); *Costal Television Broad. Co. v. MTA Commc'ns, LLC*, MB Dkt. No. 18-208, Mem. Op. & Order, 33 FCC Rcd. 11025 (Nov. 2, 2018); *HITV License Subsidiary, Inc. v. DirectTV, LLC*, MB Dkt. No. 17-292, Mem. Op. & Order, 33 FCC Rcd. 1137 (Feb. 5, 2018); *Liberman Broad., Inc. v. Comcast Corp.*, MB Dkt. No. 16-121, Mem. Op. & Order, 31 FCC Rcd. 9551 (Aug. 26, 2016); *Nw. Broad., L.P. v. DIRECTV, LLC*, MB Dkt. No. 15-151, Mem. Op. & Order, 30 FCC Rcd. 12449 (Nov. 6, 2015); *ACC Licensee, Inc. v. Shentel Telecomms. Co.*, MB Dkt. No. 12-5, Mem. Op. & Order, 27 FCC Rcd. 7584 (Jul. 6, 2012); *ATC Broadband LLC v. Gray Television Licensee, Inc.*, File No. CSR-8010-C, Mem. Op. & Order, 24 FCC Rcd. 1645 (Feb. 18, 2009); *Mediacom Commc'ns Corp. v. Sinclair Broadcast Grp., Inc.*, File No. CSR-7058-C, Mem. Op. & Order, 22 FCC Rcd. 35 (Jan. 4, 2007).

that sole decision finding a bad faith negotiation sheds absolutely no light on the issue at hand. *See* Forfeiture Order ¶ 34 (citing *Jorge L. Bauermeister*, Letter, 22 FCC Rcd. 4933 (MB 2007)). *Bauermeister* concerned a cable operator (not a broadcast station), applied the "totality-of-the-circumstances" test (not a *per se* violation), did not trigger the imposition of a fine, and involved the cable operator's failure to provide evidence of a valid retransmission consent agreement. The decision has, in short, no bearing whatsoever here. *Compare Bauermeister*, 22 FCC Rcd. 4933, *with In re Preferred Long Distance, Inc.*, 30 FCC Rcd. 13711, 13718 n.53 (2015) ("There is ample Commission precedent providing fair notice of the Commission's application of Section 201(b) to deceptive marketing.").

Absent a single decision relevant to the present dispute, the Commission asserts—for the first time—that "Defendants did, in fact, have relevant guidance about how the Commission would ultimately apply its rules" because Sinclair entered into a 2016 consent decree concerning its joint retransmission consent negotiations.[9] Forfeiture Order ¶ 34 (cleaned up); *see supra*, note 3. According to the Commission, Defendants were on notice of the unlawfulness of their conduct because (1) Defendants had a "close relationship" with Sinclair; and (2) the consent decree was widely reported in the trade press at the time. Forfeiture Order ¶ 34. But the prior Sinclair enforcement matter is completely inapposite. Sinclair had allegedly negotiated with MVPDs on behalf of stations over which it did not have *de jure* control, in the same local market where it owned one or more stations, *see id.* ¶ 34 n.159—a tactic that is clearly and indisputably barred by statute and regulation. But Defendants were not accused of violating that local market rule in this proceeding.

[9] The full Commission's position in this regard does not square with the concluding paragraph 35 of the Bureau's November 8, 2019 ruling in this case. There, the Bureau directed those parties who had not already reached agreement with AT&T to return to the negotiating table and implement the "*guidance*" provided in that Bureau Order. (Emphasis added).

The Sinclair consent decree therefore cannot have provided Defendants with fair notice of the application or the scope of the Commission's rules. The Commission has not identified even one statement that could possibly have allowed Defendants to determine with "ascertainable certainty" that licensees operating stations in separate markets would be subject to significant liability for jointly negotiating through a template agreement, rather than providing individualized responses. *SNR Wireless v. FCC*, 868 F.3d at 1043.

In fact, a reasonable person could conclude that the Forfeiture Order *conflicts* with Commission precedent that—consistent with decades of decisions denying bad faith complaints (*see supra*, note 8)—makes clear the agency will keep faith with congressional intent and not "intrude in the negotiation of retransmission consent." *Implementation of Satellite Home Viewer Imp. Act of 1999*, 15 FCC Rcd. 5445, 5450 (2000). The Commission has explained "that to arbitrarily limit the range or type of proposals that the parties may raise in the context of retransmission consent will make it more difficult for broadcasters and MVPDs to reach agreement," and, "[b]y allowing the greatest number of avenues to agreement, we give the parties latitude to craft solutions to the problem of reaching retransmission consent." *Id.* at 5469. The federal appellate courts, moreover, have stressed in analogous contexts that the obligation to negotiate in good faith does not require a party to "abandon its intentions or . . . agree with [the other party's] proposals," *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 678 n.17 (1981), and that "the parties should have *wide latitude in their negotiations*, unrestricted by any governmental power to regulate the substantive solution of their differences," *NLRB v. Ins. Agents' Int'l Union, AFL-CIO*, 361 U.S. 477, 488 (1960) (emphasis added).[10] This body of case law harmonizes with Defendants' interpretation.

[10] *See also Timken Roller Bearing Co. v. NLRB*, 161 F.2d 949, 954 (6th Cir. 1947) ("[W]e know of no mandate of the law that bargaining must be undertaken and pursued in a particularized manner, excluding every other."); *Warrior Constructors, Inc. v. Int'l Union of Operating Eng'rs, Loc.*

In short, there was not a single prior statement by the Commission that fairly notified Defendants that, when they embarked early in 2019 on what they reasonably expected to be a repeat of their 2016 staggered, template-based approach to joint negotiation, they needed instead to comply from the outset with AT&T's unilateral demand for individual responses.[11]

Third, "a person of ordinary intelligence" could reasonably conclude that Defendants negotiated in good faith based on the parties' prior dealings. *FCC v. Fox*, 567 U.S. at 254. Indeed, the Commission recognized that "the parties' 2016 negotiations . . . followed the same approach that Mr. Lammers attempted to follow again in 2019"—using the [C] [redacted] [C] template, with station-specific modifications. *See* Forfeiture Order ¶ 28. Those staggered negotiations from 2016, identical to the 2019 negotiations at issue here, resulted in agreements for each station without any indication that Defendants had engaged in unlawful conduct. Defs.' Application for Review at 2-3, MB Dkt. No. 19-168 (Dec. 9, 2019). Whether or not the parties' 2016 negotiations precluded a finding of bad faith (*see* Forfeiture Order ¶ 28), those prior dealings between the parties support the conclusion that Defendants reasonably believed they were jointly negotiating in good faith, both in 2016 and then again in 2019. *See Bhd. of R.R. Trainmen v. Atl. Coast Line R.R.*, 383

Union No. 926, 383 F.2d 700, 708 (5th Cir. 1967) ("[T]he parties [may] consider the details of a proposed agreement, perhaps settling them one by one." (cleaned up)); *Pease Co. v. NLRB*, 666 F.2d 1044, 1049 (6th Cir. 1981) (holding that a party did not "act in bad faith by disclosing its proposals bit by bit over the course of negotiations" (cleaned up)).

[11] In fact, the record shows that the parties' 2019 negotiation generally followed the 2016 path. That is, the [C] [redacted] [C] agreement was finalized first, and the others followed at different times thereafter. Notably, several Defendants reached agreement with AT&T *before* the Bureau Order was released and its novel bad faith finding was publicized. With respect to those Defendants, AT&T immediately (and ultimately successfully) moved to withdraw its complaint with prejudice. The Commission cannot ignore the distinct possibility that the 2019 negotiations would have been concluded much sooner if AT&T had followed the 2016 pathway, one that had previously borne timely fruit, rather than doggedly insisting on blazing a new "individual-negotiations-from-the-start" trail.

F.2d 225, 229 (D.C. Cir. 1967) ("What constitutes good faith bargaining . . . is colored by how parties have actually bargained in the past.").

Fourth, AT&T's shifting arguments related to the parties' negotiations only underscore the lack of fair notice. *Cf. General Electric*, 53 F.3d at 1332 ("Our concern about the regulations' lack of clarity is heightened" where "EPA's position regarding the basis for GE's liability has subtly shifted throughout this case."). Indeed, AT&T's position advanced before the Commission (that Mr. Lammers was negotiating only for [C] [redacted] [C]) is the exact opposite of the position that AT&T advanced in its federal lawsuit, which alleged that [HC] [redacted] [HC]." *See* Civil Complaint ¶ 6, *AT&T Servs., Inc. v. Max Retrans LLC*, No. 19-01925 (E.D. Mo. July 11, 2019).

* * * *

Defendants were denied fair notice that their conduct was unlawful. Holding Defendants liable based on the Commission's unprecedented interpretation of its rules violates their Fifth Amendment right to due process.

2. Defendants were denied fair notice of the magnitude of penalty imposed.

Even if Defendants had received prior fair notice that their conduct in this proceeding was unlawful (and as set forth above, they did not), Defendants were denied adequate warning of *the magnitude* of the sanction—here, the statutory maximum of over half-a-million dollars per station.[12] *See Karem*, 960 F.3d at 665 ("Even assuming the Acosta Letter provided Karem some notice of behavioral expectations in the open areas of the White House, it failed to put him on notice of the magnitude of the sanction that the White House might impose for his purported failure to

[12] The sole exception was the fine imposed against Mercury. *See* Forfeiture Order ¶ 1.

heed any such expectations." (cleaned up)). As Commissioner O'Rielly recognized, the Commission's "novel decision" here imposed a penalty "*for the first time* since the retransmission consent good faith negotiation rules were established." NAL ¶ 36 (statement of Comm'r O'Rielly) (emphasis added). That is, the very first time the Commission imposed *any* penalty, it imposed the statutory *maximum*. Indeed, the only other time the Commission had previously found a violation of the good faith negotiation requirement, it merely ordered the violating party to resume negotiations.[13] *See Bauermeister*, 22 FCC Rcd. at 4934. That alone (and certainly together with the various factors discussed above) demonstrates that Defendants were denied "fair notice . . . of the severity of the penalty." *Gore*, 517 U.S. at 574.

Certain aspects of the Commission's historic approach to indecency regulation and related penalties stand in sharp relief to the way the Commission has approached its fair notice obligations here. That is, when the Commission elected in 1987 to begin enforcing a newly announced indecency standard based on the generic definition of indecency articulated in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), it did so by way of rulings in particular adjudications that merely warned investigation targets that a new standard was now in place and future violations were subject to penalty. *See Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). From there, the Commission proceeded to impose small fines—ratcheting them up only if the agency

[13] That lack of notice is particularly egregious as to GoCom Media of Illinois, LLC's satellite station WCCU. While this station was included in the negotiations with DIRECTV, in light of the fact that it duplicated the programming of station WRSP, and has never been carried by AT&T, no additional harm to any viewer could have occurred by DIRECTV losing the right to retransmit that station. As such, it was not reasonable for GoCom to anticipate that any forfeiture, let alone the maximum forfeiture, would have been applied to that station.

found additional violations by the same company.[14] Here, by contrast, the Commission issued no warning, instead leaping to maximum fines in the very first order announcing the new standard.[15]

The huge fines imposed by the Forfeiture Order are also inconsistent with the principle that the Commission must treat similarly situated parties similarly. *See Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). Consider this example: When the FCC fines tower owners for failure to comply with lighting requirements, a dereliction that poses a threat to air safety and human life, the agency typically assesses a base forfeiture *without* applying a daily multiplier.[16] Under the principle of *Melody Music*, even if fair notice had been given here, only a base forfeiture without a multiplier should apply, and the base forfeiture for the closest analog violation identified by the Commission in the Forfeiture Order, a cable carriage rule violation, would be $7,500.

Moreover, the Commission asserts for the first time that Defendants had notice of "the amount of penalties that the Commission would consider reasonable for a violation" based on the 2016 Sinclair consent decree and LOIs that Defendants had received relating thereto. Forfeiture Order ¶ 34 (cleaned up); *see supra*, note 3. But, as discussed above, the rule allegedly violated in

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[14] *See, e.g.*, *Mr. Mel Karmazin*, 5 FCC Rcd. 7291 (Mass Med. Bur. 1988) (NAL proposing a $2,000 forfeiture for each of three commonly-owned radio stations broadcasting the Howard Stern Show); *Mr. Mel Karmazin*, 8 FCC Rcd. 2688 (Mass Med. Bur. 1992) (subsequent history omitted) (NAL proposing a $200,000 forfeiture for each of three commonly-owned radio stations broadcasting the Howard Stern Show).

[15] In the second cited *Mr. Mel Karmazin*, *supra*, note 14, the Bureau explained its warning-first, then incrementally-increased-fine approach as resulting from "the apparent pattern of indecent broadcasting exhibited . . . over a substantial period since our initial indecency warning . . . in 1987[.] . . . The clear notice afforded by the 1987 warning and the substantial similarity of the material cited then and here render this intervening pattern of apparent misconduct particularly troubling." 8 FCC Rcd. at 2689. Again, the contrast between that approach and the one followed here by the Commission is stark.

[16] *See, e.g.*, *CBS Commc'ns Servs., Inc*., File No. EB-10-LA-0110 (rel. Apr. 27, 2011) (Enf. Bur. Field Office) (imposing a base fine of $10,000 without a daily multiplier, even though the tower's top red obstruction light was extinguished for at least one week); *Super Towers, Inc*., File No. EB-11-TP-0142 (rel. July 18, 2012) (Enf. Bur. Field Office) (same).

the Sinclair enforcement matter is no way implicated here, and the scope of that rule (a well-established and clear bar on negotiating on behalf of multiple stations in the same local market) was not subject to dispute. *See supra*, Part B(1). Defendants could not have reasonably understood that they would be subject to a massive forfeiture for jointly negotiating using a sequenced, template-based approach—conduct that the Commission had *never* addressed in any statement, and which mirrored the parties' prior successful negotiations—simply because a separate entity paid a large penalty related to an entirely different, and very clear rule.

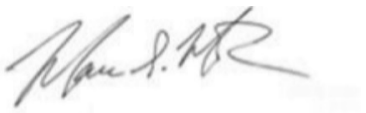
In sum, Defendants' reasonable conduct could not have brought "into fair contemplation the unprecedented sanction visited on [them]." *Karem*, 960 F.3d at 665.

CONCLUSION

The Commission cannot constitutionally impose maximum penalties for Defendants' understandable failure to "divine the agency's interpretations" before it "announc[ed] [them] for the first time." *SmithKline*, 567 U.S. at 159. The Commission should vacate the Forfeiture Order and terminate this proceeding.

Dated: August 27, 2021

Respectfully submitted,



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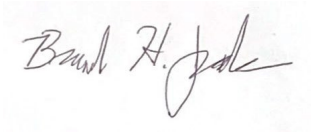
CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of August 2021, a true and correct copy of the foregoing Defendants' Petition for Reconsideration was submitted by hand, by mail, and electronically to the Federal Communications Commission, consistent with the Commission's rules and the terms of the Protective Order entered in this proceeding.



Brandon H. Johnson