

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
HITV License Subsidiary, Inc.)	MB Docket No. 17-292
Complainant)	CSR-8943-C
)	
v.)	
)	
DIRECTV, LLC)	
Defendant)	

ANSWER OF DIRECTV, LLC

AT&T Services, Inc. (“AT&T”), on behalf of its affiliate DIRECTV, LLC, hereby responds to HITV License Subsidiary, Inc.’s (“HITV”) good faith negotiation complaint.¹ HITV contends that DIRECTV violated the Commission’s good faith negotiation rules by putting forth “only a single, unilateral proposal, and failing to provide HITV with justification for its refusal to even consider alternative terms for carriage.”² Not only does DIRECTV deny all of HITV’s allegations, but a plain reading of the evidence HITV proffers to support its Complaint shows that it is HITV, not DIRECTV, that has violated the Commission’s *per se* good faith negotiation rules by failing to negotiate.³ Indeed, HITV concedes that it has never presented DIRECTV with a counter-offer to DIRECTV’s initial proposal by saying that HITV merely “has offered to make

¹ *HITV License Subsidiary, Inc. v. DIRECTV, LLC*, Good Faith Negotiation Complaint, MB Docket No. 17-292, CSR-8943-C (filed Oct. 20, 2017) (“Complaint”).

² *Id.* at 1 (also alleging that DIRECTV violates the Commission’s totality of the circumstances test).

³ 47 C.F.R. § 76.65(b)(1)(i).

a specific proposal if DIRECTV were willing to consider it.”⁴ Nowhere in the numerous email exchanges between the parties does DIRECTV state that it will refuse to consider alternative terms or a counter proposal. Instead, the evidence shows that DIRECTV presented HITV with a good faith proposal on August 24, 2017, and, months later, it continues to wait on HITV to provide a counter-offer. Simply put, HITV was dissatisfied with DIRECTV’s first proposal and instead of putting forth its own, it has demanded that DIRECTV provide it with another offer that will be more to its liking. Because DIRECTV has chosen not to negotiate against itself, HITV filed this Complaint alleging bad faith by DIRECTV. Of course, the Commission’s rules do not require DIRECTV to negotiate in a vacuum and the Commission should deny this meritless Complaint.

HITV’s dissatisfaction with DIRECTV’s offer stems not from DIRECTV’s purported violation of the “good faith” rules but from DIRECTV’s offer to carry HITV’s station KFVE for free. HITV asserts that it is “entitled” to compensation⁵ and DIRECTV’s failure to offer it monetary compensation for carriage of its signal demonstrates DIRECTV’s bad faith. But nothing in the retransmission consent provisions of the Communications Act of 1934, as amended (“Act”) or the Commission’s rules requires that multichannel video programming distributors (“MVPDs”) compensate broadcast stations for carriage of their signals. Indeed, for the first decade and a half after Congress adopted the retransmission consent regime, MVPDs routinely negotiated carriage agreements that provided no monetary compensation for retransmission consent. Accordingly, there is no merit to HITV’s claim that a failure to offer

⁴ Complaint at 7.

⁵ *Id.* at 9.

such compensation inherently constitutes bad faith. Moreover, HITV acknowledges that DIRECTV previously agreed to pay compensation for carriage of KFVE only when a third party, Raycom Media, Inc. (“Raycom”), negotiated on its behalf, a practice that is now statutorily prohibited.⁶ DIRECTV’s decision not to offer to continue carrying KFVE on the same terms to which it agreed pursuant to a negotiating framework that now is unlawful cannot, on its own, constitute bad faith. Nor can its refusal to negotiate against itself in the face of HITV’s refusal to counter DIRECTV’s initial offer.

When the Commission denies HITV’s complaint, as it must, it should reiterate that (1) “failure to reach agreement would not violate either Section 325(b)(3)(C) or Section 76.65 of the Commission’s rules;”⁷ (2) DIRECTV has no duty to agree to pay or carry a broadcaster that elects retransmission consent because the good faith obligations do “not affect the ultimate ability of an MVPD to decide not to enter into retransmission consent with a broadcaster;”⁸ and (3) it is reasonable for DIRECTV to decline to offer HITV monetary compensation for carriage based on “competitive marketplace considerations.” To find otherwise would enable all stations to demand and receive retransmission consent fees, a result that renders meaningless the distinction between mandatory carriage and retransmission consent and is inconsistent with the Act. In any event, we note that HITV’s request for relief is moot. Subsequent to HITV filing its Complaint, DIRECTV has offered it a second proposal as well as an explanation that customer demand for KFVE does not justify compensation beyond DIRECTV’s valuable satellite capacity

⁶ Complaint at 3.

⁷ *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Reciprocal Bargaining Obligation*, MB Docket No. 05-89, 20 FCC Rcd 10339, ¶ 14 (2005) (“*Reciprocal Bargaining Order*”).

⁸ *Id.* at ¶ 11 (quoting H.R. Rep. No. 108-634, 108th Cong., 2nd Sess. 19 (2004) (“House Report”).

and the expanded reach the station would receive with carriage, which was the relief HITV requested in its Complaint.⁹

STATEMENT OF FACTS AND APPLICABLE LAW

HITV attached a series of emails between the parties as exhibits to its Complaint. AT&T does not dispute the authenticity of those emails. HITV omitted two emails from its exhibits, which we attach hereto as Exhibits 1 and 2. Collectively, all of the exhibits establish the following facts.

(1) HITV contacted DIRECTV via email on August 9 to begin negotiating a new retransmission consent agreement. In this email, HITV stated that, “[t]he station has, until now, been covered under Raycom’s agreement, but as you know Raycom can no longer negotiate for KFVE because of its other stations in Hawaii.”¹⁰

(2) DIRECTV responded two days later, Friday, August 11, indicating its willingness to negotiate and suggesting the parties talk the following Monday.¹¹

(3) The parties agreed on August 15 to a confidentiality agreement covering the parties’ discussions.¹²

(4) On August 24, DIRECTV provided HITV with its carriage offer, proposing to carry KFVE through December 2020.¹³

⁹ Complaint at 9.

¹⁰ *Id.*, Exh. 1. HITV subsequently clarified that the parties’ retransmission consent agreement would expire on August 31, not July 31. *See* Answer, Exh. 1 (Email from Dan Kirkpatrick to Julia Hongfeng Dai on Aug. 11, 2017).

¹¹ Answer, Exh. 1 (Email from Julia Hongfeng Dai to Dan Kirkpatrick on Aug. 11, 2017).

¹² Complaint, Exh. 2.

¹³ *Id.*, Exh. 4.

(5) On August 26, HITV informed DIRECTV that its August 24 offer was a “non-starter.” However, HITV did not provide a counter-offer to DIRECTV.¹⁴

(6) Over the next few months, the parties agreed to four extensions of the prior retransmission consent agreement.¹⁵

(7) Over that period of time, HITV never provided a counter-offer to DIRECTV’s offer of carriage made on August 24.

On February 18, 2015, the Commission amended section 76.65(b)(1)(viii) of its rules to implement section 103(a) of the STELA Reauthorization Act of 2014 (“STELAR”).¹⁶ Section 103(a) of STELAR required the Commission to amend its retransmission consent rules:

[to] prohibit a television broadcast station from coordinating negotiations or negotiating on a joint basis with another television broadcast station in the same local market (as defined in section 122(j) of title 17, United States Code) to grant retransmission consent under this section to a multichannel video programming distributor, unless such stations are directly or indirectly under common de jure control permitted under the regulations of the Commission.¹⁷

Amended section 76.65(b)(1)(viii) provides,

(b) Good faith negotiation—(1) Standards. The following actions or practices violate a broadcast television station's or multichannel video programming distributor's (the “Negotiating Entity”) duty to negotiate retransmission consent agreements in good faith:

(viii) Coordination of negotiations or negotiation on a joint basis by two or more television broadcast stations in the same local market (as defined in 17 U.S.C. 122(j)) to grant retransmission consent to a multichannel video

¹⁴ *Id.*, Exh. 5.

¹⁵ See Answer, Exh. 2 (Email from Julia Hongfeng Dai to Dan Kirkpatrick on Aug. 30, 2017); Complaint, Exhs. 9, 11, 14.

¹⁶ *Implementation of Sections 101, 103 and 105 of the STELA Reauthorization Act of 2014*, MB Docket No. 15-37, 30 FCC Rcd 2380 (2015).

¹⁷ See 47 U.S.C. § 325(b)(3)(C).

programming distributor, unless such stations are directly or indirectly under common *de jure* control permitted under the regulations of the Commission.

Furthermore, when the Commission first adopted its rule prohibiting joint negotiations in 2014, it found, among other things, that “joint negotiation gives such stations both the incentive and the ability to impose on MVPDs higher fees for retransmission consent than they otherwise could impose if the stations conducted negotiations for carriage of their signals independently.”¹⁸

DISCUSSION

Count I: HITV asserts that DIRECTV refused to put forth more than a single, unilateral proposal in violation of section 76.65(b)(1)(iv) of the Commission’s rules.¹⁹ In response to DIRECTV’s carriage proposal, HITV states, “while it is not willing to agree to that unilateral proposal, it is willing to negotiate carriage on reasonable terms.”²⁰ DIRECTV could only guess as to what carriage terms HITV is willing to agree since HITV has refused to provide a counter-offer to DIRECTV’s carriage proposal. By its Complaint, HITV is insisting that DIRECTV must negotiate against itself, and asserts that its unwillingness to do so demonstrates a *per se* violation of the Commission’s good faith negotiation rules. The Commission must reject this allegation, which attempts to turn a good faith negotiation on its head.

In its orders implementing the good faith statutory requirements of the Act, the Commission has never said that it is a *per se* violation of the good faith rules for a party to refuse to negotiate against itself instead of standing by its unanswered carriage offer. In its *Good Faith*

¹⁸ *Amendment of the Commission’s Rules Related to Retransmission Consent*, MB Docket No. 10-71, 29 FCC Rcd 3351, ¶ 13 (2014) (limiting its initial prohibition on joint negotiations to same-market Top Four broadcast television stations) (“*2014 Retransmission Consent Report and Order*”).

¹⁹ Complaint at 6.

²⁰ *Id.*

Order, the Commission explained its prohibition against single, unilateral proposals by using the example of a broadcaster proposing carriage of its signal as long as the MVPD also carries a cable channel owned by, or affiliated with, the broadcaster. The Commission's example has the MVPD rejecting the offer and, instead, requesting to compensate the broadcaster in some other way. The Commission further explains that a good faith negotiation requires that the broadcaster at least consider some form of consideration other than carriage of affiliated programming.²¹ Importantly, in the Commission's example, the MVPD does not merely reject the broadcaster's proposal and demand that the broadcaster provide it with another offer, as HITV has done with DIRECTV. Instead, the MVPD offers the broadcaster some other form of compensation. DIRECTV is still waiting for HITV to provide it with alternative terms or a counter-proposal that the rule contemplates.²²

Black's Law Dictionary defines "negotiation" as "[a] consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter."²³ Merriam Webster defines "negotiation" as "the action or process of negotiating or being negotiated —often used in pl."²⁴ Inherent in both definitions is some back and forth between parties but again, it is clear from the exhibits that HITV has refused to negotiate.

²¹ *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, CS Docket No. 99-363, 15 FCC Rcd 5445, ¶ 43 (2000) ("*Good Faith Order*").

²² *Id.* (finding that a party "may not put forth a single, unilateral proposal and refuse to discuss alternative terms or counter-proposals").

²³ Black's Law Dictionary (10th ed. 2014).

²⁴ Merriam Webster's Collegiate Dictionary 777 (10th ed. 1994).

DIRECTV provided HITV with its carriage proposal on August 24. Not once in the 10 weeks that the parties exchanged emails did HITV ever provide a counter-offer to DIRECTV's proposal. Instead, HITV stated DIRECTV's proposal was a "non-starter."²⁵ And, while in one email, HITV stated that the parties may ultimately agree to carriage with no fee,²⁶ most of HITV's other emails simply repeat HITV's disappointment that DIRECTV's August 24 offer did not propose providing HITV with any fee payments. Rather than offering its own specific proposal, HITV rejected DIRECTV's initial proposal, insisting that DIRECTV offer it another for its consideration.²⁷ Of course, that is not a good faith negotiation. Saying that it is willing to negotiate once DIRECTV submits *another proposal* to HITV for its consideration is tantamount to refusing to negotiate the proposal before it. As the Commission explained in its *Good Faith Order*, "[o]utright refusal to negotiate clearly violates the requirement of Section 325(b)(3)(C)"²⁸ and HITV's refusal to negotiate is a *per se* violation of the Commission's good faith negotiation requirements.²⁹

Count II: HITV also alleges that DIRECTV committed a *per se* violation of the Commission's good faith negotiation rules because DIRECTV failed to provide a reason why it rejected HITV's proposal.³⁰ When the Commission established this *per se* violation, it explained

²⁵ Complaint, Exh. 5.

²⁶ *Id.*, Exh. 7.

²⁷ HITV claims that DIRECTV informed it "on October 9 . . . that it would not negotiate for any other terms" but the referenced email says nothing of the sort. *Id.* at 5, citing Exh. 13. Instead, this email merely reiterates that DIRECTV's August 24th offer, to which HITV never responded, is still available to HITV.

²⁸ *Good Faith Order* at ¶ 40.

²⁹ See 47 C.F.R. § 76.65(b)(1)(i).

³⁰ Complaint at 7 (citing 47 C.F.R. § 76.65(b)(1)(v)).

that “a broadcaster, *in responding to an offer* proposed by an MVPD, must provide the reasons for rejecting any aspects of the MVPD’s offer.”³¹ The obvious prerequisites of this violation are that one party present an actual offer to the other party and that the other party reject that offer without explanation. As discussed above, HITV never provided DIRECTV with its own proposal. Indeed, in its Complaint, HITV acknowledges that it has “*offered* to make a specific proposal” but it will only do so once DIRECTV offers it another proposal. Until HITV submits a proposal to DIRECTV, there is nothing for DIRECTV to consider, let alone reject. For this reason, the Commission must deny Count II of HITV’s Complaint.

Count III: For its final count, HITV asks the Commission to conclude that DIRECTV violated the good faith negotiation requirements under the Commission’s totality of the circumstances test because of “DIRECTV’s continued refusal to negotiate for terms, or even to substantively engage HITV on the reasons for such refusal.”³² With this count, HITV raises no new arguments and it also lacks merit for the reasons provided above.

Request for Relief: In HITV’s request for relief, it asks the Commission to order DIRECTV to explain why it believes HITV is no longer “entitled” to compensation.³³ The Complaint explains that the parties’ prior agreements were negotiated by a third party, Raycom.³⁴ As such, those agreements were the product of a negotiating framework now prohibited specifically because it enabled stations to “impose on MVPDs higher fees for

³¹ *Good Faith Order* at ¶ 44 (emphasis added).

³² Complaint at 8.

³³ *Id.* at 9.

³⁴ *Id.* at 3.

retransmission consent than they otherwise could impose if the stations conducted negotiations for carriage of their signals independently.”³⁵ In the prior agreements, DIRECTV agreed to pay retransmission consent fees only because Raycom negotiated on HITV’s behalf in conjunction with a much broader portfolio of stations. Those payments were *not* based on competitive marketplace conditions, which is exactly why Congress ultimately prohibited such negotiations. HITV’s outside counsel, who was authorized to negotiate on HITV’s behalf, understands this. Indeed, he stated that he “understand[s] DIRECTV’s general position of not compensating non-Big 4 affiliates.”³⁶

The Commission and the broadcast industry are well aware that direct broadcast satellite (“DBS”) providers, like DIRECTV, have significant capacity constraints.³⁷ With the vast majority of its spot beams currently full, carriage on DIRECTV has become a scarce and very valuable resource for broadcasters, particularly insofar as it allows broadcasters to reach more viewers than they otherwise would without DIRECTV carriage. Thus, DIRECTV’s August 24 proposal to carry KFVE offered HITV significant consideration even without the payment of retransmission consent fees. And, in a further sign of DIRECTV’s good faith, it offered even

³⁵ *2014 Retransmission Consent Report and Order* at ¶ 13. *See also Good Faith Order* at ¶ 58 (finding that a proposal involving compensation that results from an exercise of market power by a broadcast station is presumptively not consistent with competitive marketplace considerations and the good faith negotiation requirement).

³⁶ Complaint, Exh. 8.

³⁷ *See, e.g., Amendment to the Commission’s Rules Concerning Market Modification; Implementation of Section 102 of the STELA Reauthorization Act of 2014*, 30 FCC Rcd 10406 ¶ 32 & n.178 (2015) (noting that most of DIRECTV’s spot beams already are full); *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999; Local Broadcast Signal Carriage Issues and Retransmission Consent Issues*, 23 FCC Rcd 5351 ¶¶ 7-14 (2008) (detailing satellite carriers’ capacity and technological constraints and finding that such constraints justify phasing in the so-called HD carry-one, carry-all requirement for DBS providers).

more generous consideration to HITV on October 24 by proposing to extend the term through the end of 2023.³⁸

The Commission has never held that financial payments are a necessary element to a good faith negotiation. To the contrary, the Commission has recognized repeatedly that, provided the parties negotiate in good faith, failure to reach agreement does not violate the statutory good faith negotiation requirement or the Commission's rules.³⁹ An MVPD must be able to decline to enter into retransmission consent if it concludes that the competitive marketplace conditions do not support the terms demanded by the broadcaster. If the Commission rules otherwise, which it should not, it would eviscerate the statutory distinction between retransmission consent and must carry by requiring MVPDs to provide carriage, with the payment of retransmission consent fees, irrespective of the broadcaster's election. In the attached declaration, AT&T explains that, based on its review of KFVE's customer demand and competitive marketplace conditions, it does not believe that financial compensation is warranted and that it thus valued carriage of HITV's station appropriately in its August 24 proposal.⁴⁰

In addition to its request that the Commission order DIRECTV to explain why it believes HITV is not entitled to compensation, HITV asks the Commission to order DIRECTV to offer more than the single proposal it provided on August 24.⁴¹ Although not required by the Commission's good faith rules, as discussed above, DIRECTV did in fact offer HITV a second

³⁸ See Answer, Exh. 3 (Email from Julia Hongfeng Dai to Dan Kirkpatrick on Oct. 24, 2017).

³⁹ See, e.g., *Good Faith Order* at ¶ 40.

⁴⁰ See Declaration of Linda Burakoff attached hereto.

⁴¹ Complaint at 9.

carriage proposal on October 24.⁴² Consequently, DIRECTV has satisfied HITV's request for relief and no further Commission action is necessary in this regard.

CONCLUSION

The Commission should deny the Complaint because AT&T has demonstrated above that its affiliate, DIRECTV, has committed no violation of the Commission's good faith negotiation rules. If anything, the Complaint demonstrates that it is HITV, not DIRECTV, that has failed to negotiate in good faith. The incontrovertible record shows that DIRECTV submitted a good faith offer of carriage to HITV on August 24, 2017. Rather than countering with its own offer, HITV rejected DIRECTV's carriage offer and, for the past several months, has been demanding that DIRECTV provide it with another offer that includes monetary compensation. Only then will HITV respond with its own proposal. HITV's bargaining posture is the textbook example of a party refusing to negotiate, which is a *per se* violation of the Commission's rules. All of HITV's counts in its Complaint are premised on the incorrect notion that HITV actually submitted a counter-offer to DIRECTV. It did not and thus the Commission should deny all three counts. Finally, as mentioned above, subsequent to the Complaint and in a sign of its continued good faith, DIRECTV has (1) explained to HITV why the competitive marketplace conditions do not support monetary compensation to HITV and (2) provided HITV with an even

⁴² See Answer, Exh. 3.

more generous offer of carriage. As this was relief requested by HITV, we note that its request is now moot.

Respectfully Submitted,

/s/ Cathy Carpino

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November 9, 2017

Its Attorneys


**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
HITV License Subsidiary, Inc.)	MB Docket No. 17-292
Complainant)	CSR-8943-C
)	
v.)	
)	
DIRECTV, LLC)	
Defendant)	

DECLARATION OF LINDA BURAKOFF

I, LINDA BURAKOFF, do hereby, under penalty of perjury, declare and state as follows:

1. My name is Linda Burakoff. I am a Vice President of Content and Programming employed by DIRECTV Enterprises, LLC ("DIRECTV"), a wholly owned subsidiary of AT&T Inc. I have held this position since 2010. In that capacity, I was and am familiar with DIRECTV's retransmission consent agreements with broadcasters like HITV License Subsidiary, Inc. ("HITV").
2. I have reviewed the factual statements contained in the Answer and they are true and correct to the best of my knowledge and belief.
3. Based on customer demand and competitive marketplace considerations, I believe that DIRECTV's August 24 proposal incorporated an appropriate valuation of HITV's station KFVE.


Name

Dated: 11/9/17

EXHIBIT 1

DAI, HONGFENG

From: Dan Kirkpatrick <kirkpatrick@fhhlaw.com>
Sent: Friday, August 11, 2017 10:43 AM
To: DAI, HONGFENG
Cc: MALLETT, BROOKE E (Legal)
Subject: RE: KFVE, Honolulu

Sensitivity: Confidential

Julia:

Thanks for the reply. Yes, the date is August 31, not July (otherwise I would have been really late reaching out). I am happy to talk Monday; my schedule is pretty open until about 5 eastern.

Dan

From: DAI, HONGFENG [mailto:hd619r@att.com]
Sent: Friday, August 11, 2017 1:38 PM
To: Dan Kirkpatrick <kirkpatrick@fhhlaw.com>
Cc: MALLETT, BROOKE E (Legal) <bm5370@att.com>
Subject: RE: KFVE, Honolulu
Sensitivity: Confidential

Hi Dan,

Did you mean the current agreement expires on 8/31/17 (not 7/31/17)? I'd be happy to work with you on this one too. Maybe we can talk on Monday?

Thanks,
Julia

Julia Hongfeng Dai



DIRECTV

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From: Dan Kirkpatrick [mailto:kirkpatrick@fhhlaw.com]
Sent: Wednesday, August 09, 2017 2:14 PM
To: DAI, HONGFENG
Cc: MALLETT, BROOKE E (Legal)
Subject: KFVE, Honolulu
Sensitivity: Confidential

Julia:

I don't know that you are the right person to work with on this, but if not, hopefully you can point me in the right direction. I have been asked to assist television station KFVE, Honolulu, Hawaii in negotiating a new retransmission consent agreement with DIRECTV. The station has, until now, been covered under Raycom's agreement, but as you know Raycom can no longer negotiate for KFVE because of its other stations in Hawaii. I apologize for the late contact, but the existing agreement expires on July 31, 2017. Hopefully we can agree on renewal/replacement terms relatively quickly, but my client would in any event be open to extension of the current agreement to prevent any blackout. Please just let me know what we need to do (or who to talk to) to get the ball rolling on this one.

Thanks

Dan

Daniel A. Kirkpatrick

 **Fletcher, Heald & Hildreth**

1300 N. 17th Street, Suite 1100| Arlington, VA 22209

Tel: 703.812.0432| Fax: 703.812.0486 | Mobile: 703.967.1927

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EXHIBIT 2

DAI, HONGFENG

From: DAI, HONGFENG
Sent: Wednesday, August 30, 2017 11:18 AM
To: 'Dan Kirkpatrick'
Cc: ZARROW, JOSHUA D (Legal)
Subject: RE: HITV License Subsidiary - Confidentiality Agmt (Fletcher, Heald & Hildreth)

Hi Dan,

Thank you for the understanding. We approve a two week extension (until 9/14) on the terms/arrangement you proposed in your email below.

Best,
Julia

Julia Hongfeng Dai



DIRECTV

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☎: 310.964.0982 | ✉: hd619r@att.com

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From: Dan Kirkpatrick [mailto:kirkpatrick@fhhlaw.com]
Sent: Wednesday, August 30, 2017 8:17 AM
To: DAI, HONGFENG
Cc: ZARROW, JOSHUA D (Legal)
Subject: RE: HITV License Subsidiary - Confidentiality Agmt (Fletcher, Heald & Hildreth)

Julia:

Not surprisingly, my client is extremely surprised and disappointed by DIRECTV/AT&T's position on this. With the station having received fee payments for at least the last three years, and with the station continuing to carry the same network programming, and increasing amounts of very popular local programming, we find it difficult to see the rationale for refusing to negotiate on a fee payment at this point. That being said, my client would like some additional time to consider their response. To that end, we would propose an extension of the existing agreement for two weeks (until September 14).

To address your concerns about fee payments, we would propose that, while carriage would otherwise continue under the existing terms, any fee payments would be suspended. If we ultimately agree to some fee payment, it would be applied retroactively to September 1. If we ultimately agree to carriage with no fee, that would also be applied retroactively to September 1. In either case, we would not expect to receive payment during the extension period.

Please let me know if this arrangement is acceptable and, if so, if you need a more formal document memorializing it.

Thank you.

Dan

Daniel A. Kirkpatrick

 **Fletcher, Heald & Hildreth**

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✉ kirkpatrick@fhhlaw.com | www.fhhlaw.com | www.commlawblog.com

EXHIBIT 3

DAI, HONGFENG

From: Dan Kirkpatrick <kirkpatrick@fhhlaw.com>
Sent: Wednesday, October 25, 2017 1:24 PM
To: DAI, HONGFENG
Cc: ZARROW, JOSHUA D (Legal)
Subject: RE: Good Faith Negotiation Complaint

Julia:

Thank you for the reply. We will await your formal response, and I will share your email below with my client. In the meantime, however, on your point 1 below, I just want to be clear that I had meant only that I understood that it was DIRECTV's position not to compensate non Big-4 affiliates, not that I fully understood DIRECTV's reasoning behind that decision. On your second point, I will share this with my client, but just note that previously I had offered to make a specific proposal if DIRECTV was willing consider it. In light of your apparent unwillingness to consider any counter-proposal other than the "RLMC" offer, we had not made a specific proposal. That said, we are still willing to do so. However, if DIRECTV is unwilling to consider providing any compensation to KFVE for its valuable programming, I am not sure that there is a path forward here.

Dan

Daniel A. Kirkpatrick

 **Fletcher, Heald & Hildreth**

1300 N. 17th Street, Suite 1100 | Arlington, VA 22209

Tel: 703.812.0432 | Fax: 703.812.0486 | Mobile: 703.967.1927

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From: DAI, HONGFENG [<mailto:hd619r@att.com>]
Sent: Tuesday, October 24, 2017 8:34 PM
To: Dan Kirkpatrick <kirkpatrick@fhhlaw.com>
Cc: ZARROW, JOSHUA D (Legal) <jz6880@att.com>
Subject: RE: Good Faith Negotiation Complaint

Hi Dan,

We are in receipt of HITV's FCC complaint and plan to respond formally, but I'd like to address HITV's position on certain issues.

- 1) Compensation for carriage: You've previously indicated that you "understand DIRECTV's general position of not compensating non-Big 4 affiliates." As you know, we do not believe that the customer demand justifies providing monetary compensation to KFVE/MNT for carriage. While we previously provided compensation for KFVE under a prior agreement, that agreement was reached using a practice that the FCC has since prohibited. We believe our offer of carriage is valuable for several reasons, including: a) our carriage expands KFVE's viewership to those subscribers it cannot reach over the air (OTA), as well as our carriage provides seamless access to KFVE for those customers that could receive its signal via OTA and b) satellite capacity is costly to DIRECTV.
- 2) Single unilateral proposal: HITV has insisted that DIRECTV compensate HITV for carriage of KFVE, but has not put forth any alternative proposal for DIRECTV to consider except its single demand for compensation

for carriage. However, in an effort to reach a resolution for carriage of KFVE, here are a few options for HITV to consider:

- a) DIRECTV will honor KFVE's must carry status, and re-launch KFVE upon receipt of its must carry election letter even though the election deadline has passed, and continue carriage throughout 2020.
- b) While our previously provided RLMC (a short-form retransmission consent agreement) would provide KFVE carriage through 2020, we are willing to extend the RLMC offer to cover 2 election cycles, ending 2023 if your client so desires.

If you would like to discuss either or both of these proposals, please reach out to me at your convenience.

Best regards,

Julia Hongfeng Dai



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☎: 310.964.0982 | ✉ hd619r@att.com

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From: Dan Kirkpatrick [<mailto:kirkpatrick@fhhlaw.com>]

Sent: Friday, October 20, 2017 4:01 PM

To: Diana.Sokolow@fcc.gov; DAI, HONGFENG <hd619r@att.com>; ZARROW, JOSHUA D (Legal) <jz6880@att.com>

Subject: Good Faith Negotiation Complaint

Please see the attached, which was filed electronically via ECFS this afternoon.

Thank you.

Best regards,

Daniel A. Kirkpatrick



1300 N. 17th Street, Suite 1100 | Arlington, VA 22209
Tel: 703.812.0432 | Fax: 703.812.0486 | Mobile: 703.967.1927
✉ kirkpatrick@fhhlaw.com | www.fhhlaw.com | www.commlawblog.com

CERTIFICATE OF SERVICE

I, Marquita Goins, hereby certify that on this 9th day of November 2017, I caused a true and correct copy of the foregoing Answer to be served via electronic mail and U.S. mail upon:

Daniel A. Kirkpatrick
Fletcher, Heald & Hildreth, PLC
1300 North 17th St., Suite 1100
Arlington, VA 22209

/s/ Marquita Goins
Marquita Goins