Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Applications of	)	MB Docket No. 14-90
	)	
AT&T Inc. and	)	
DIRECTV	)	
	)	
For Consent to Assign or Transfer	)	
Control of Licenses and Authorizations	)	

To: The Commission

INFORMAL OBJECTION
AND REQUEST TO HOLD APPLICATIONS IN ABEYANCE

Northwest Broadcasting, L.P., Broadcasting Licenses, Limited Partnership, Mountain Licenses, L.P., Stainless Broadcasting, L.P., Eagle Creek Broadcasting of Laredo, LLC, Bristlecone Broadcasting LLC, and Blackhawk Broadcasting LLC ("The TV Station Group"), by their attorneys and pursuant to 47 C.F.R. § 1.41,[1] hereby object to grant of the above-captioned applications ("Applications") of AT&T Inc. ("AT&T") and DIRECTV (collectively, "Applicants"), and request that the Applications be held in abeyance, for the reasons set forth below. In support whereof, the following is shown.

A central issue raised by multiple parties in this proceeding is whether Commission approval of the proposed combination of two communications companies possessing the massive size and scale of AT&T (2014 revenues of $132.4 billion and current market capitalization of $179.63 billion) and DIRECTV (2014 revenues of $33.3 billion, and current market

[1] *See also* 47 C.F.R. § 73.3587.

capitalization of $46.34 billion) would serve the public interest.[2] Numerous commenters and petitioners in this proceeding have expressed concern about the size and reach of AT&T and DIRECTV as a merged entity.[3] Fox example, Cox notes that "[t]his merger represents two nationwide service providers – each already a formidable competitor in its own right – merging into a single company of staggering size and customer reach."[4] Similarly, others have commented on the merged entity's bargaining power as a result of market domination.[5] Even AT&T and DIRECTV have admitted that merging will give them power in the marketplace.[6]

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[2] These measures of AT&T's and DIRECTV's respective market sizes are set forth at pages 4-5 of the Exhibit hereto (explained *infra*).

[3] *See*, *e.g.*, Comments of American Cable Association, MB Docket No. 14-90 (Sept. 16, 2014) ("ACA Comments"); Cox Communications, Inc. Petition to Condition Consent, MB Docket No. 14-90 (Sept. 16, 2014) ("Cox Petition"); Writers Guild of American, West, Inc. Petition to Deny, MB Docket No. 14-90 (Sept. 16, 2014) ("Writers Guild Petition"); DISH Network Corporation Petition to Impose Conditions, MB Docket No. 14-90 (Sept. 16, 2014) ("DISH Petition"); Public Knowledge & Institute for Local Self-Reliance Petition to Deny, MB Docket No. 14-90 (Sept. 16, 2014); Comments of National Association of Broadcasters, MB Docket No. 14-90 (Sept. 16, 2014) ("NAB Comments").

[4] Cox Petition at 2. *See also* ACA Comments at 10 ("The primary complements that are joining together to form what will be the second largest MVPD with a nationwide footprint are those of the distribution and programming assets of AT&T and DirecTV. The harms of this form of vertical integration are well-recognized by the Commission."); Cox Petition at 3 ("[T]he marketplace will be trading two formidable challengers for one company of unprecedented size with the opportunity and the incentive to dominate the markets for video, voice, and data services for many years to come.").

[5] *See*, *e.g.*, Writers Guild Petition at 3 ("If approved, the merger will reduce competition and consumer choice, foreclose innovation by either [AT&T or DIRECTV] and give the merged entity significant control over traditional and online video distribution."); DISH Petition at 10 ("[T]he transaction will create an exclusive market of two MVPDs (Comcast and AT&T/DIRECTV) with unrivaled bargaining power. Far from benefitting competition, the leverage that this transaction will create would distort competition, enabling AT&T to command steeply preferential treatment that will not only lower its own programming costs, but also substantially raise the programming costs of everyone else, with the possible exception of Comcast."); NAB Comments at 6 ("The proposed transaction will increase the number of markets in which a single MVPD has gatekeeper control over access to large numbers of subscribers and reduce incentives to expand into additional markets, providing the merged entity

The TV Station Group hereby joins this chorus and, on the basis of its recent experiences with DIRECTV in the retransmission consent context, objects to Commission approval of the Applicants' proposed merger, and asks that the Applications be held in abeyance pending Commission examination and processing of the Emergency Complaint for Failure to Negotiate Retransmission Consent in Good Faith and Request for Relief ("Complaint") filed with the Commission yesterday by The TV Station Group against DIRECTV and attached hereto as an Exhibit. The Complaint provides a compelling real world example of DIRECTV's failure to negotiate retransmission consent for the carriage of broadcast stations' signals in good faith as mandated by Congress and the Commission. The Complaint raises substantial and material questions that go to the heart of the decision the Commission is being asked to make about the Applications in *this* proceeding. Indeed, the Complaint focuses on matters of direct relevance to the Commission's review of the Applications, including issues of both substance (whether DIRECTV uses its size to secure below-market retransmission consent rates from broadcasters, especially small broadcasters) and process (whether DIRECTV conceals relevant marketplace facts during negotiations).

Retransmission consent and FCC oversight thereof, as well as escalating industry consolidation, are matters of substantial, and increasing, importance in today's communications landscape. In that regard, as the Complaint makes clear, DIRECTV's intransigence and unwillingness to negotiate retransmission consent on the basis of reciprocal disclosure of marketplace facts is a real function of the massive size and financial resource advantages

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with significant bargaining power in retransmission consent negotiations and other programming decisions.").

[6] DISH Petition at 11 (AT&T and DIRECTV "do not deny that their power over programmers and rivals alike will increase. Indeed, [AT&T and DIRECTV] cite their ability to negotiate for lower programming rates as a key benefit of the merger.") (citing to the Applications at 34-37).

DIRECTV *already* enjoys in the retransmission consent marketplace.[7] On a relative basis to many broadcasters, DIRECTV is in a much stronger position to absorb financial hits from the signal blackouts that sometimes attend retransmission consent impasses. And, as the Complaint makes clear, DIRECTV tries to reap collateral benefit from signal blackout scenarios by reflexively blaming broadcasters and using consequent consumer backlash to try to curtail broadcasters' retransmission consent rights going forward.[8]

FCC approval of the Applicants' proposed combination would substantially exacerbate, in a manner that contravenes the public interest, the inequities and imbalances which already tilt the retransmission consent playing field too strongly in favor of DIRECTV. DIRECTV is a massive incumbent MVPD and should not be permitted to merge with another giant MVPD, AT&T, particularly given the latter's status and dominant market power as one of the two largest entrenched wireless incumbents in this country. This merger promises only to serve the *private* interests of the Applicants at the expense of the *public* interest, competition, and consumers.

CONCLUSION

The TV Station Group therefore requests that the Commission deny the Applications. At a minimum, the Commission should withhold action on the Applications until the processing of the Complaint is concluded, at which time fully informed Commission action can be taken. By holding the Applications in abeyance, the Commission will be able to consult the results from the "laboratory" the Complaint's processing will provide the Commission concerning critically important competitive marketplace factors, including retransmission consent rates DIRECTV is able to secure today, even at its current (pre-merger) size, as compared to a truly competitive

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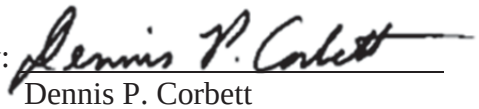
[7] *See*, *e.g.*, Complaint at 4-5.

[8] *See* Complaint at n.27.

market, as well as the lack of reciprocal transparency in how DIRECTV negotiates retransmission consent agreements.[9]

Respectfully submitted,

NORTHWEST BROADCASTING, L.P.
BROADCASTING LICENSES, LIMITED PARTNERSHIP
MOUNTAIN LICENSES, L.P.
STAINLESS BROADCASTING, L.P.
EAGLE CREEK BROADCASTING OF LAREDO, LLC
BRISTLECONE BROADCASTING LLC
BLACKHAWK BROADCASTING LLC

By: 

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June 12, 2015

Their Attorneys

[9] The TV Station Group notes that a searching Commission inquiry of the Complaint file once it is complete would be consistent with the views expressed by DIRECTV CEO Mike White in February 2014 concerning the then-pending Comcast/Time Warner merger. In calling attention at that time to the need for scrutiny of that deal, Mr. White said: "I think it certainly creates some significant changes in the competitive landscape that we need to think hard about." He added: "If the deal is approved as proposed, it clearly represents an unprecedented media concentration in one company." *See* Todd Spangler, *Dish Sets Stage for DirecTV Merger with Transfer of Satellites: Analyst*, VARIETY (Feb. 21, 2014, 10:25 AM), http://variety.com/2014/biz/news/dish-sets-stage-for-directv-merger-with-transfer-of-satellites-analyst-1201115338/.

EXHIBIT

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Northwest Broadcasting, L.P.,	)	MB Docket No. 12-1
Broadcasting Licenses, Limited Partnership,	)	CSR-_____
Mountain Licenses, L.P.,	)	
Stainless Broadcasting, L.P.	)	
Eagle Creek Broadcasting of Laredo, LLC	)	
Bristlecone Broadcasting LLC, and	)	
Blackhawk Broadcasting LLC	)	
	)	
v.	)	
	)	
DIRECTV, LLC	)	

To: Office of the Secretary
Attn: Media Bureau

EMERGENCY COMPLAINT FOR FAILURE TO NEGOTIATE RETRANSMISSION CONSENT IN GOOD FAITH AND REQUEST FOR RELIEF

NORTHWEST BROADCASTING, L.P.
BROADCASTING LICENSES, LIMITED PARTNERSHIP
MOUNTAIN LICENSES, L.P.
STAINLESS BROADCASTING, L.P.
EAGLE CREEK BROADCASTING OF LAREDO, LLC
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June 11, 2015

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SUMMARY

In this Complaint, a group of seven commonly-controlled broadcast companies ("The TV Station Group") establishes that retransmission consent negotiations the group has been conducting since the fall of 2014 with DIRECTV have reached an impasse over unbridgeable positions on price. During the negotiation, The TV Station Group has directly tied its position on price to *marketplace* facts by supplying DIRECTV with relevant generalized data from more than fifteen separate retransmission consent agreements it has reached this calendar year with separate MVPDs, facts which clearly establish the current market value of the group's signals. DIRECTV, on the other hand, has responded with the bald assertion that it has its own facts, based on deals it has reached with other broadcasters, which DIRECTV claims establish a sharply divergent market value for the group's signals. *But*, DIRECTV has repeatedly and resolutely refused The TV Station Group's multiple requests that it provide the group with any underlying data DIRECTV may have relevant to its substantially disparate position on price.

As a matter of law, the Complaint establishes that DIRECTV's actions violate: (i) the FCC's bedrock good faith retransmission consent negotiation requirement that parties "refrain from insisting on terms that are not consistent with competitive marketplace considerations;" (ii) the Commission's *per se* good faith negotiation rule prohibiting a party from unreasonably delaying negotiations; (iii) the Commission's totality of circumstances test; and (iv) the Commission's requirement that retransmission negotiations be conducted in "an atmosphere of honesty, purpose, and clarity of process."

Against this background, The TV Station Group respectfully asks the Commission to employ a tool that the Commission put in place when it adopted the 2000 *Good Faith Order* – Commission-Controlled Discovery. Compelled reciprocal fact disclosure in the targeted fashion

demanded by the facts of this case and requested herein by The TV Station Group would be: (i) entirely consistent with the roadmap for Commission-Compelled Discovery already adopted in the *Good Faith Order*; (ii) faithful to the statutory directive that the Commission accord central importance to "competitive market considerations" when it evaluates good faith negotiation disputes; (iii) consonant with the labor law precedent which Congress intended the FCC to follow in this area, as well as fundamental principles of negotiation and bargaining; (iv) appropriately protective of the sensitive proprietary facts involved in this case; and (v) an embrace of a welcome alternative pathway which allows the FCC to proactively and efficiently move to facilitate resolution of intractable disputes like this one, disputes that threaten to trigger the potentially destructive cycle of signal blackouts, with collateral damage to the innocently bystanding public.

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Northwest Broadcasting, L.P.,	)	MB Docket No. 12-1
Broadcasting Licenses, Limited Partnership,	)	CSR-_____
Mountain Licenses, L.P.,	)	
Stainless Broadcasting, L.P.,	)	
Eagle Creek Broadcasting of Laredo, LLC,	)	
Bristlecone Broadcasting LLC, and	)	
Blackhawk Broadcasting LLC	)	
	)	
v.	)	
	)	
DIRECTV, LLC	)	

To: Office of the Secretary
Attn: Media Bureau

EMERGENCY COMPLAINT FOR FAILURE TO NEGOTIATE RETRANSMISSION CONSENT IN GOOD FAITH AND REQUEST FOR RELIEF

Northwest Broadcasting, L.P., Broadcasting Licenses, Limited Partnership, Mountain Licenses, L.P., Stainless Broadcasting, L.P., Eagle Creek Broadcasting of Laredo, LLC, Bristlecone Broadcasting LLC, and Blackhawk Broadcasting LLC (commonly-controlled entities collectively referred to herein as "The TV Station Group"), by their attorneys and pursuant to 47 C.F.R. §§ 76.65(c) and 76.7, hereby submit this emergency complaint requesting both a finding by the Federal Communications Commission ("FCC" or "Commission") that Multichannel Video Programming Distributor ("MVPD") DIRECTV has failed to negotiate retransmission consent in good faith, and swift FCC imposition of a remedy as outlined herein. In support whereof, the following is shown.[1]

[1] On June 10, 2015, The TV Station Group notified DIRECTV of their intention to file this Complaint. *See* 47 C.F.R. § 76.65(e)(3).

For the reasons set forth below, this complaint is of an emergency nature. Protracted negotiations between The TV Station Group and DIRECTV which are the subject of this Complaint have been going on since the fall of 2014, and the otherwise expired-by-its-terms 2011 retransmission consent agreement between the parties is currently on "life support" through multiple extensions. The TV Station Group has agreed to the most recent extension of that agreement in a good faith effort to avoid harming innocent consumers who want to continue to receive the programming provided by The TV Station Group on DIRECTV. Under these circumstances, Commission action on this Complaint at the earliest possible time is both needed, and respectfully requested.

I. The Background Facts.

The factual basis for this Complaint is straightforward and simple. DIRECTV is currently carrying the signals of The TV Station Group's stations licensed to various communities around the United States pursuant to the most recent of more than half a dozen extensions of a January 1, 2011 Retransmission Consent Agreement (the "2011 Agreement"), which was set to expire by its terms on February 1 of this year. Negotiations looking toward a possible new agreement have been ongoing since the fall of last year, without resolution to date, more than four months after the 2011 Agreement's expiration date. A key remaining issue gives rise to this complaint and is of overarching importance to broadcasters and MVPDs. It concerns the contours of the established good faith negotiation requirement that "both parties to the negotiation refrain from insisting on terms that are not consistent with competitive marketplace

considerations."[2] This proceeding is of particular moment because of the dearth of Commission precedent on this increasingly important area of the law. The TV Station Group respectfully asks the FCC to resolve this complaint at the earliest possible time.

In this case, an unbridgeable chasm has opened between The TV Station Group and DIRECTV on the issue of the competitive market value of the stations' signals. At this point, after months of negotiation, The TV Station Group currently has a standing good faith proposal on price, supported by data from more than fifteen separate retransmission consent deals entered into with different MVPDs of varying sizes (from large to small) in calendar year 2015, data supplied by The TV Station Group to DIRECTV on May 8, 2015.[3] This data was provided to DIRECTV in a generalized manner consistent with applicable contract confidentiality restrictions. As The TV Station Group has explained to DIRECTV, these many separate contracts establish, as a matter of verifiable fact, the competitive market price for its signals.

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[2] *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, Report and Order, 20 FCC Rcd 10339, 10353 (2005) ("*Reciprocal Bargaining Order*"); *see also Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order, 15 FCC Rcd 5445, 5458 (2000) (subsequent history omitted) ("*Good Faith Order*") (holding that the Commission will entertain evidence that differences among agreements are not based on competitive marketplace considerations).

[3] The TV Station Group is filing this day separately with the Commission, accompanied by a request for confidential treatment, the documents that comprise Attachment A hereto. Because Attachment A consists of copies of relevant emails between the parties between March 19, 2015 and May 31, 2015 containing sensitive, proprietary information concerning the parties' disparate positions on price, as discussed in the textual paragraph above, they are not being filed with this publicly available Complaint. According them confidential treatment is entirely in keeping with the *Good Faith Order*'s protection-sensitive roadmap for Commission-Controlled Discovery (defined *infra* page 7), which is the remedy The TV Station Group seeks herein. In the text which follows above, The TV Station Group uses several limited passages from these emails concerning non-proprietary matters to help establish a discrete factual predicate. The TV Station Group also notes that, while there has been some movement on price during the negotiation, The TV Station Group's offers have always been tied to the established market value for its signals whereas, as explained below, DIRECTV has refused to provide any reciprocal facts, market-based or otherwise, to support its offers.

DIRECTV's current response is a counteroffer on price that sharply diverges from the fair market value The TV Station Group has established for its signals. DIRECTV claims that its counteroffer is supported by facts. But, when asked by The TV Station Group for those ostensibly supporting facts, DIRECTV has repeatedly and resolutely refused to supply them, without giving any reason for this withholding tactic. For example, on May 25, 2015, DIRECTV stated:

> [W]e will not fall victim to your silly and obvious tactics to try to audit our retrans deals so you can see them all. We did not ask you to send to us your supposed rates, and your unilateral decision to do so doesn't give you the right to see our other deals. But trust [us], no other station group – especially small groups such as Northwest – are paid by DIRECTV nearly what you have proposed, let alone what your sheet says.

On May 30, 2015, DIRECTV stated:

> To repeat yet again, DIRECTV is not going to get pulled into your transparent trap to define what is 'market' by seeing our other deals. That is a precedent we will not set, including for NW. Please do not ask again.

DIRECTV is in effect arguing that special rules apply to it, allowing it to dictate price on the basis of unverified claims that are squarely at odds with the verified facts The TV Station Group has supplied in good faith.

DIRECTV's taking an inflexible position on price is reflective of the substantial marketplace size advantage it enjoys over The TV Station Group. DIRECTV can afford a prolonged dispute (including signal blackouts) much more easily than can The TV Station Group, which collectively operates stations in seven small- to moderate-sized markets, such as Spokane, Washington and Yuma, Arizona. DIRECTV, by contrast, is a *nationwide* satellite provider, with 2014 revenues of $33.3 billion and, as of June 9, 2015, a market capitalization of

$46.34 billion.[4] The TV Station Group notes that this size imbalance only threatens to get much worse. The FCC is currently being asked to grant an application by which DIRECTV would be acquired by AT&T. The latter is one of the two dominant nationwide wireless incumbents, with consolidated 2014 revenues of $132.4 billion and, as of June 9, 2015, a marketplace capitalization of $179.63 billion.[5]

The vital issue presented by this Complaint is whether an MVPD's repeated refusal to provide factual support for its claims of competitive market value, claims that sharply diverge from the market value facts *documented* by a broadcaster during the negotiation, constitutes "insist[ence] on terms that are not consistent with marketplace considerations," behavior that the Commission has singled out as a violation of good faith negotiation requirements, and behavior which demands that the Commission step in and order discovery of relevant facts.

II. The Background Law.

The TV Station Group sharpens the issues presented here by reviewing below the relevant legal landscape, as embodied in statute, implementing FCC regulations, and the limited available case law.

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[4] *See* Press Release, DIRECTV, *DIRECTV Announces Fourth Quarter and Full Year 2014 Results* (Feb. 19, 2015) (http://investor.directv.com/files/doc_news/earnings_releases/2014/Earnings-Release-Q4-2014-FINAL_updated_v001_l64pg5.pdf). *See also* NASDAQ, http://www.nasdaq.com/symbol/dtv (last visited June 9, 2015).

[5] *See* Press Release, AT&T, *AT&T Reports Strong Subscriber Gains and Solid Revenue Growth in Fourth Quarter* (Jan. 27, 2015) (http://about.att.com/story/att_fourth_quarter_earnings_2014.html). *See also* New York Stock Exchange, https://www.nyse.com/quote/XNYS:T (last visited June 9, 2015).

In enacting the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), Congress imposed a unilateral good faith negotiation obligation on broadcasters engaged in retransmission consent negotiations. SHVIA provided in relevant part that the FCC was to:

> prohibit *a television broadcast station* that provides retransmission consent from engaging in exclusive contracts for carriage or *failing to negotiate in good faith*, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors *if such different terms and conditions are based on competitive marketplace considerations*.[6]

In the 2000 *Good Faith Order* implementing SHVIA, the Commission established a two-part test for "good faith negotiation" compliance: (i) whether one or more of seven *per se* violation standards established by the order was contravened; and (ii) a more general totality of the circumstances test. One of the seven *per se* violations was a broadcaster's refusal to provide an MVPD with "reasons" for a negotiating position.[7] The *Good Faith Order* separately observed that a broadcaster's obligations did not extend to providing an MVPD the right to test the factual basis and validity of reasons proffered by a broadcaster through litigation-type discovery of facts underlying a broadcaster position. The FCC recognized that good faith bargaining labor law precedent requires disclosure by *both* sides of relevant facts underpinning a negotiating position ("Reciprocal Fact Disclosure").[8] But the FCC distinguished SHVIA obligations from Reciprocal Fact Disclosure on grounds that SHVIA was a one-way street, imposing a good faith negotiating

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[6] 47 U.S.C. § 325(b)(3)(C)(ii) (emphasis added).

[7] *See* 47 C.F.R. § 76.65(b)(1)(v).

[8] *See infra* page 12. The FCC more generally made clear in the *Good Faith Order* that, pursuant to congressional direction, it would rely on good faith bargaining labor law precedent. 15 FCC Rcd at 5448 ("*Congress intended* that the Commission follow established precedent, *particularly in the field of labor law*, in implementing the good faith retransmission consent negotiation requirement.") (emphasis added).

obligation *only on broadcasters*, not MVPDs: "Because there is no mutuality of obligations under Section 325(b)(3)(C), the marketplace negotiation contemplated in SHVIA would be negated by a one-sided information disclosure requirement." ("Unilateral Fact Disclosure").[9] In this portion of the *Good Faith Order*, the Commission provided no guidance to negotiating parties as to the meaning of the very important *statutory* phrase "competitive market considerations" and gave them no insight into the role of competitive market *facts* in their good faith negotiations.

Later, however, in Section VI.C. of the *Good Faith Order*, the FCC expressly *reopened* the door to evidentiary discovery in retransmission consent negotiations. That is, while the Commission declined to apply discovery as-of-right as a standard retransmission consent procedure, given the FCC's general anticipation that "evidence of a violation of the good faith standard will be accessible by the MVPD complainant," the Commission also made clear that:

> Where complainants can demonstrate that such information is not available (*e.g., agreements entered into [by broadcasters] with other MVPDs*) and that discovery is necessary to the proper conduct and resolution of a proceeding, the Commission will consider, where necessary, the imposition of discovery to develop a more complete record and resolve complaints. In this regard, parties are free to raise appropriate discovery requests in their pleadings. We will protect proprietary information, where necessary, pursuant to Section 76.9 of our rules. Accordingly, we will employ Commission-controlled discovery as contemplated in Section 76.7 procedures.[10]

The TV Station Group will refer herein to this procedure as "Commission-Controlled Discovery."

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[9] *Good Faith Order*, 15 FCC Rcd at 5464 n.100 (emphasis added).

[10] *Id*. at 5479.

47 U.S.C. § 325 (b)(3)(C)(iii), part of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"), requires the Commission to:

> prohibit a *multichannel video programming distributor* from *failing to negotiate in good faith* for retransmission consent under this section, and it shall not be a failure to negotiate in good faith if the distributor enters into retransmission consent agreements containing different terms and conditions, including price terms, with different broadcast stations *if such different terms and conditions are based on competitive marketplace considerations.*[11]

This provision mirrors for MVPDs SHVIA's good faith negotiation requirement which was, as noted above, imposed exclusively on broadcasters.

In its *Reciprocal Bargaining Order*, the FCC implemented SHVERA's extension of good faith negotiating obligations to MVPDs. The *Reciprocal Bargaining Order* did not address issues arising from SHVERA's *elimination* of the Unilateral Fact Disclosure rationale as the basis for the *Good Faith Order*'s decision not to impose disclosure obligations on broadcasters. But, the *Reciprocal Bargaining Order* did set forth the concise good faith test on which The TV Station Group directly relies here, namely that "*both parties to the negotiation refrain from insisting on terms that are not consistent with marketplace considerations.*"[12] The *Reciprocal Bargaining Order* left Commission-Controlled Discovery intact.

In *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, 22 FCC Rcd 47 (Med. Bur. 2007), the Media Bureau denied Mediacom's request that Sinclair be ordered to disclose to Mediacom certain information underlying Sinclair negotiating positions, citing the *Good Faith Order*'s policy on Unilateral Fact Disclosure. Like the *Reciprocal Bargaining Order*, however, *Mediacom* did not address the issue of whether the *Good Faith Order*'s

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[11] 47 U.S.C. § 325(b)(3)(C)(iii) (emphasis added).

[12] *Reciprocal Bargaining Order*, 20 FCC Rcd at 10353 (emphasis added).

approach to Unilateral Fact Disclosure remained relevant in light of the essential change to the landscape effected by SHVERA (i.e., making good faith negotiation a *reciprocal* obligation for MVPDs). *Mediacom* made no mention of Commission-Controlled Discovery, and *Mediacom* was never reviewed by the full Commission, making it binding only on the two parties to the dispute.[13]

III. DIRECTV Has Failed To Negotiate In Good Faith.

DIRECTV's actions to date in its "negotiations" with The TV Station Group violate existing Commission good faith requirements.

First, the facts outlined above establish a prima facie violation of the bright-line, easy-to-understand good faith negotiation test articulated in the *Reciprocal Bargaining Order*, under which both parties to a negotiation must "refrain from insisting on terms that are not consistent with marketplace considerations." That standard does not leave DIRECTV free to respond to The TV Station Group's price offer, expressly predicated on more than fifteen separate marketplace negotiations, with a counteroffer supported by no marketplace facts at all, just the repeated, naked insistence, in effect, that The TV Station Group should trust DIRECTV's unverified claims "because we said so." Indeed, DIRECTV is engaging in precisely the type of behavior this Commission standard prohibits. DIRECTV is "insisting" on price terms that are

[13] *See Comcast Corp. v. FCC*, 526 F.3d 763, 769-70 (D.C. Cir. 2008) ("an agency is not bound by unchallenged staff decisions").

not just "[in]consistent with" the documented marketplace value of The TV Station Group's signals, but are well outside that value's "ballpark."[14]

Second, DIRECTV's refusal to supply the background facts necessary to allow a true negotiation of the fair market value of The TV Station Group's signals has unreasonably delayed negotiations, a *per se* violation of 47 C.F.R. § 76.65(b)(1)(iii). The TV Station Group notes that it has taken extraordinary measures to prevent the harm created by DIRECTV's intransigence from falling on consumers. Indeed, in lieu of letting the 2011 Agreement's expiration take effect, The TV Station Group has on multiple separate occasions agreed to extend the 2011 Agreement beyond its February 1, 2015 expiration date.

Third, DIRECTV's failure to base its price demands on demonstrable competitive market considerations lies so close to the heart of the good faith negotiation process that it is necessarily dispositive under the alternative "totality of the circumstances" test embodied in 47 C.F.R. § 76.65(b)(2). DIRECTV's actions (or, more precisely, its dogged inactions) here clearly violate that standard.

Fourth, DIRECTV's disingenuous approach to this critically important issue in the negotiations violates the Commission's requirement that retransmission consent negotiations be conducted in "an atmosphere of honesty, purpose, and clarity of process."[15] DIRECTV has here created the opposite "atmosphere" of that required by withholding key facts on the issue of

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[14] In this regard, The TV Station Group notes that in discussing the difficulty of defining "competitive marketplace considerations," the FCC observed in the *Good Faith Order* that "in the aggregate, *retransmission consent negotiations are the market* through which the relative benefits and costs to the broadcaster and MVPD are established." 15 FCC Rcd at 5467 (emphasis added). In other words, The TV Station Group's many already-concluded MVPD *negotiations this year* are the best evidence of the *market* for The TV Station Group's signals, requiring DIRECTV to justify any claimed contrary position through similarly *fact-based* competitive marketplace considerations.

[15] *Good Faith Order*, 15 FCC Rcd at 5455.

competitive market conditions, with the apparent purpose of evading a true negotiation over a true market price as determined by competitive market considerations, and DIRECTV has muddied and stymied the negotiation process by repeatedly refusing to engage on the competitive market facts.

IV. The TV Station Group's Request For Commission-Controlled Discovery In This Proceeding Is Fully Justified And Should Be Promptly Granted.

On the issue of remedy, the facts of this case amply justify the utilization of Commission-Controlled Discovery, by which the FCC would require DIRECTV to disclose underlying facts relevant to its claims that its price offer for The TV Station Group's signals is based on marketplace considerations, despite the fact that its offer sharply diverges from the evidence The TV Station Group has already disclosed to DIRECTV. That is, in perfect keeping with the *Good Faith Order*'s rationale for employing Commission-Controlled Discovery, The TV Station Group here seeks critical marketplace evidence, information derived, in the words of the *Good Faith Order*, from "agreements entered into [by DIRECTV] with other" broadcasters, that is not otherwise available to The TV Station Group, necessitating "the imposition of discovery to develop a more complete record and resolve" this complaint. This scenario is exactly suitable for Commission-Controlled Discovery, where DIRECTV has given every indication that it will continue to shield from The TV Station Group's view its underlying marketplace "evidence," regardless of the depth of the impasse its insistence has created.[16] For that reason, The TV Station Group requests that the Commission employ Commission-Controlled Discovery in this proceeding and order DIRECTV to fully disclose facts relevant to its negotiating position on price.

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[16] *See supra* page 4 ("Please do not ask again.").

Finally, The TV Station Group notes that this case provides the perfect occasion and opportunity for the Commission to reaffirm the *Good Faith Order* and clarify that it will utilize Commission-Controlled Discovery in a targeted manner going forward. This approach is all the more important given the fact that Commission policy based on Unilateral Fact Disclosure has been outmoded since Congress made good faith negotiation a *reciprocal* obligation for broadcasters *and* MVPDs in 2004. And, this case illustrates why, in the absence of Commission guidance on the meaning of the statutory phrase "competitive market considerations," parties can find themselves careening toward negotiation impasse on the basis of factors *other than* competitive considerations, while pivotal marketplace facts remain hidden from view.

There are compelling legal and policy reasons for the agency to order Commission-Controlled Discovery in this case on an expedited basis. For example, labor law precedent, on which the FCC has repeatedly noted it will rely in this area,[17] strongly supports more frequent and proactive FCC use of Commission-Controlled Discovery to implement Reciprocal Fact Disclosure going forward. For example, the *Good Faith Order* cited three separate cases for the proposition that, in the labor law context, "there is an information exchange requirement applicable to both parties as to claims made in the bargaining process": *Teleprompter Corporation v. NLRB*, 570 F.2d 4 (1st Cir. 1956); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) ("*Truitt*"); and *Silverman v. Major League Baseball Player Relations Committee*, 516 F. Supp. 588, 594 (S.D. N.Y. 1981) ("Information concerning subjects at issue in bargaining is presumed to be necessary and relevant to negotiations, and *employers and unions alike* must provide such information when requested in the course of bargaining.").[18]

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[17] *See supra* note 8.

[18] *Good Faith Order*, 15 FCC Rcd at 5464 n.100 (emphasis added by FCC).

In *Truitt*, set in the context of Section 8(d) of the Taft Hartley Act, which the FCC expressly identified in 2011 as a labor law-related statutory provision it will closely consult in the retransmission consent arena,[19] the Supreme Court explained that "[g]ood-faith bargaining necessarily requires that claims made by either bargainer should be honest claims."[20] In that case, the Court found that an employer's refusal to substantiate its claim of economic inability to pay increased wages supported a finding of the employer's failure to bargain in good faith.[21] As the Court explained, "[i]f such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. And it would certainly not be farfetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim."[22]

More generally, it is well-established under Taft-Hartley that a refusal to supply specifically-requested information relevant to a collective bargaining effort can also support a finding of a failure to bargain in good faith.[23] For example, in *N.L.R.B. v. Milgo Indus., Inc.*, 567 F.2d 540 (2d Cir. 1977), the Second Circuit concluded that where a union had "specifically and repeatedly" requested information from the employer that was "clearly relevant to the

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[19] *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2723 (2011) ("*2011 NPRM*").

[20] *Truitt*, 351 U.S. at 152.

[21] *Id*. at 152-53.

[22] *Id*.

[23] *See, e.g., N.L.R.B. v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967) ("There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties."); *N.L.R.B. v. Mt. Sinai Hosp.*, 8 Fed. Appx. 111, 115 (2d Cir. 2001) (citing *Acme Indus. Co.* for an employer's duty to provide information needed by bargaining representatives).

Union's efforts to bargain on the subject, the failure to provide it was an unfair labor practice."[24] Likewise, in *N.L.R.B. v. Pratt & Whitney Air Craft Division, United Technologies Corporation,* 789 F.2d 121 (2d Cir. 1986), where an employer refused to disclose the results of an employee survey on attitudes regarding the workplace and benefit programs, on the basis that such results were confidential, the court concluded that this refusal violated the employer's collective bargaining obligations, where the survey results were pertinent to the union's role in supervising an existing contract and negotiating a new contract.

These cases have obvious, direct application to the facts presented here, where DIRECTV has pointedly and repeatedly refused The TV Station Group's specific requests to supply the factual basis for its claims. Ample public policy considerations support FCC fidelity to this labor law precedent. With respect to retransmission consent prices, the essential purpose of a good faith negotiation is to give the parties a fair opportunity to arrive at a mutual agreement on the competitive (or fair) market value of an MVPD's right to retransmit a broadcast station signal, typically expressed as a monthly per subscriber fee paid to the broadcaster by the MVPD. Indeed, the essence of *any* negotiation over the value of *any* asset, from rights fees to real property, is to establish the fair market value of those assets. If a sale is to occur, the parties must come to a market-based meeting of the minds over the value of the respective rights or property, and if that is to occur, both parties must be able to consult the underlying facts which establish the potential value of the asset. The most accurate barometer of market value in deals for intangible or tangible assets is found in the terms of comparable contracts. It is axiomatic that if a negotiating party is deprived of access to the basic facts relating to competitive market

[24] *Milgo Indus.* 567 F.2d at 543-44.

value, there is no way for that party to fairly and in good faith reach a mutual agreement on price.[25]

While the facts of this case establish a prima facie violation of FCC good faith negotiation requirements, The TV Station Group urges the FCC to use this important opportunity to make clear that it will carefully promote Reciprocal Fact Disclosure through Commission-Controlled Discovery going forward. One party to a negotiation, a negotiation which by statute and rule *must* be conducted in good faith and be based on competitive market considerations, cannot be allowed to unreasonably delay negotiations and try to dictate competitive market value on the basis of unverified factual assertions. In order to fulfill its oft-articulated goal of minimizing harms to innocent consumers from signal blackouts,[26] the Commission should rule that, where one party to a retransmission negotiation insists on a contractual term that sharply diverges from market value facts documented by the other party to the negotiation, the FCC will use Commission-Controlled Discovery to enforce well-established labor law-based policies predicated on Reciprocal Fact Disclosure.

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[25] Any independent third party tasked with mediating a dispute necessarily *starts* by ascertaining the factual basis for each party's claims. For example, the statutory arbitration procedures that apply to carrier interconnection agreements call for a party seeking government mediation to "provide the State commission *all relevant documentation* concerning . . . the unresolved issues" and "the position of each of the parties with respect to those issues." 47 C.F.R. § 252(b)(2)(A) (emphasis added). The State commission may then "require the petitioning party and the responding party to provide such [additional] information as may be necessary for the State commission to reach a decision on the unresolved issues." 47 C.F.R. § 252(b)(4). This approach implicitly recognizes that successful resolution requires that *both* parties "develop 'principled' opening offers they can logically explain to the other side." Charles B. Craver, *The Benefits to be Derived from Post-Negotiation Assessments*, GW Law Faculty Publications & Other Works, Paper 464, at 11 (2012).

[26] *See, e.g.*, *2011 NPRM*, 26 FCC Rcd at 2719 ("Our primary objective is to assess whether and how the Commission rules in this arena are ensuring that the market-based mechanisms Congress designed to govern retransmission consent negotiations are working effectively and, to the extent possible, minimize video programming service disruptions to consumers.").

The TV Station Group believes that such a Commission clarification concerning Commission-Controlled Discovery will allow parties to a retransmission consent negotiation to understand the basis for each other's position on relevant marketplace considerations, and will thereby measurably diminish blackouts by placing such negotiations on rational, market-based footing.

The use of Commission-Controlled Discovery to facilitate resolution of a deadlocked negotiation on a basic contractual term such as that involved here, where the record of negotiation narrowly hones the issue, has a sound basis in fact, legal precedent, and public policy, and will not be unduly burdensome on any party or the Commission. It will also clear away smoke which makes it difficult for consumers and regulatory authorities to see clearly in this area. For example, if DIRECTV's inflexible position on competitive market facts as described herein results in the loss of The TV Station Group's signals to DIRECTV's customers, DIRECTV no doubt plans to follow its established playbook and try to tar The TV Station Group with the perception (*not* based on disclosed facts) that The TV Station Group is placing financial

greed ahead of the interests of consumers.[27] And with that, the decidedly non-productive, and potentially destructive, cycle of impasse, recrimination, publicity stunt, and consumer loss will be perpetuated once again. While the Commission correctly observed several times in its *2011 NPRM* that Section 325(b) precludes it from preventing blackouts or mandating signal carriage in the retransmission consent context, the FCC has, for many years, possessed a potent tool for breaking negotiation impasses – Commission-Controlled Discovery, which promotes Reciprocal Fact Disclosure. The TV Station Group respectfully urges the FCC to use this tool now.

In sum, The TV Station Group asks the FCC to make clear that, going forward, it will use its authority to oversee good faith negotiation in the retransmission consent arena to ensure that both negotiating parties engage in a *reciprocal* process to establish competitive market terms, including price, *based on disclosed, verifiable facts.*

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[27] *See, e.g.*, Cynthia Littleton, *CBS, Fox Affiliates in Major Markets Go Dark on DirecTV Amid Retrans Dispute*, VARIETY (Sept. 2, 2014, 7:37 AM), http://variety.com/2014/tv/news/cbs-fox-affiliates-in-major-markets-go-dark-on-directv-amid-retrans-dispute-1201295846/ ("DirecTV said Raycom was seeking 'more than double' the fees compared to its most recent deal. The satcaster also described the situation as Raycom 'withholding' its stations."); Update on Quincy Newspapers, https://support.directv.com/app/answers/detail/a_id/4516/~/update-on-quincy-newspapers (last visited June 9, 2015) ("Quincy Newspapers has blocked its local stations unless DIRECTV customers pay more than three times as much to get the same shows they can still have for free over the air and often online. We intend to return all of the stations to our lineup soon, and have asked for our customers' patience since it has a direct impact on their bill."); Press Release, TVfreedom.org, *TVfreedom.org Issues Statement on the DirecTV/Raycom Media Retransmission Consent Agreement* (Sept. 7, 2014) (http://www.tvfreedom.org/news-release-090714) ("DirecTV's baseless, self-serving statement blaming Raycom Media for this week's brief local TV service disruption represents the height of hypocrisy and arrogance. Only a company the size of DirecTV – with more than 20 million U.S. customers and annual revenues of nearly $32 billion – would be shameless enough to suggest that Raycom Media has undue clout negotiating fair value for its most-watched local TV programming. DirecTV has been involved in one-third of all service disruptions with local TV stations in the last 20 months, proving that its real motivation is not to protect TV viewers, but rather to perpetuate its manufactured claim of a 'retransmission blackout crisis.'"); Press Release, American Cable Association, *ACA: Tribune's Blackout of DirecTV Supports Need for Action by Congress, FCC on Retransmission Consent Reform* (Apr. 2, 2012) (http://www.americancable.org/node/3491) ("Until the law and rules change, everyone can expect that TV station owners will continue to push their 'blackmail or blackout' strategy to the detriment of consumers and competition.").

V. Conclusion.

For all the reasons set forth above, The TV Station Group respectfully requests that the Commission find that DIRECTV's failure to demonstrate that its substantial deviation from the proven fair market value established by The TV Station Group for their signals is based on competitive market considerations, and its stonewalling with respect to facts essential to establishing the market value of The TV Station Group's signals, place DIRECTV squarely in violation of its duty to negotiate with The TV Station Group in good faith. The TV Station Group accordingly requests that the Commission both order DIRECTV to comply with targeted Commission-Controlled Discovery by supplying The TV Station Group with any data DIRECTV has which is relevant to its negotiating position on price, and impose such additional sanctions on DIRECTV as the Commission deems appropriate.

Respectfully submitted,

NORTHWEST BROADCASTING, L.P.
BROADCASTING LICENSES, LIMITED PARTNERSHIP
MOUNTAIN LICENSES, L.P.
STAINLESS BROADCASTING, L.P.
EAGLE CREEK BROADCASTING OF LAREDO, LLC
BRISTLECONE BROADCASTING LLC
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June 11, 2015

Their Attorneys

The Attachment A cover sheet and the documents which comprise Attachment A have been submitted under separate cover pursuant to a confidentiality request in accordance with Sections 0.459 and 76.9 of the Commission's rules.

DECLARATION AND VERIFICATION OF BRIAN BRADY

I, Brian Brady, under penalty of perjury, hereby declare and verify as follows:

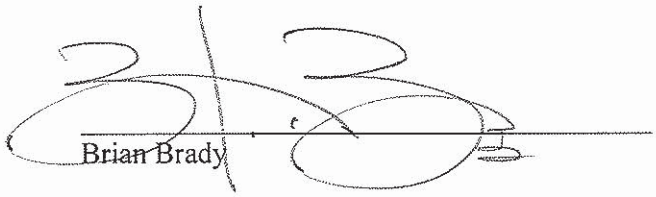
1. I am the President and CEO of Northwest Broadcasting, Inc., which is the general partner of Northwest Broadcasting, L.P., Mountain Licenses, L.P., and Broadcasting Licenses, Limited Partnership.

2. I am the President and CEO of Stainless Broadcasting Company, which is the general partner of Stainless Broadcasting, L.P.

3. I am President and CEO of Eagle Creek Broadcasting, LLC, which is the managing member of Eagle Creek Broadcasting of Laredo, LLC.

4. I am President, CEO, and Managing Member of each of Blackhawk Broadcasting LLC, and Bristlecone Broadcasting, LLC.

5. I have read the foregoing Emergency Complaint for Failure to Negotiate Retransmission Consent in Good Faith and Request for Relief (the "Complaint"), and to the best of my knowledge, information and belief formed after reasonable inquiry, the Complaint is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and the Complaint is not interposed for any improper purpose.



Brian Brady

Executed: June 11, 2015

CERTIFICATE OF SERVICE

I, Rebecca J. Cunningham, certify that on this 11th day of June, 2015, I caused a copy of the foregoing Emergency Complaint for Failure to Negotiate Retransmission Consent in Good Faith and Request for Relief to be served by first class, postage prepaid U.S. mail (except where indicated), to the following:

DIRECTV, LLC
Local Into Local
2230 East Imperial Highway
El Segundo, CA 90245
Attn: Vice President, Programming Acquisitions

William M. Wiltshire*
Harris, Wiltshire & Grannis LLP
1919 M Street NW, 8th Floor
Washington, DC 20036-3537

*via hand delivery

Rebecca J. Cunningham