

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

*In the Matter of*

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

v.

DIRECTV, LLC

MB Docket No. 12-1  
CSR-8910-C

**ANSWER OF DIRECTV, LLC**

William M. Wiltshire  
Michael Nilsson  
**HARRIS, WILTSHIRE & GRANNIS LLP**  
1919 M Street, NW  
The Eighth Floor  
Washington, DC 20036  
(202) 730-1300

Stacy R. Fuller  
Vice President, Regulatory Affairs  
**DIRECTV, LLC**  
901 F Street, NW Suite 600  
Washington, DC 20004  
(202) 383-6300

*Counsel for DIRECTV, LLC*

July 1, 2015

## SUMMARY

DIRECTV carries more than 1,700 television stations nationwide. It negotiates dozens of retransmission consent agreements each year. In a recent negotiation, DIRECTV rejected a carriage proposal offered by Northwest Broadcasting, explaining that it *would make Northwest by far the highest-paid broadcaster that DIRECTV carries anywhere*. DIRECTV instead offered several counterproposals containing rates that would place Northwest well within the range of broadcasters DIRECTV carries.

Northwest nonetheless insists that DIRECTV accept its proposal. It argues that DIRECTV's failure to do so—and DIRECTV's refusal to “document” its reasoning by disclosing the rates it pays other broadcasters—constitutes bad faith. This position, however, cannot withstand scrutiny.

- ***Competitive Marketplace Considerations.*** Northwest argues that, by rejecting its demand to become the highest-paid broadcaster DIRECTV carries, DIRECTV has insisted on terms inconsistent with “competitive marketplace considerations.” This claim turns the good-faith standard on its head. That standard does not empower a broadcaster to insist that it be paid higher fees than every other broadcaster. Nor does it contemplate that the Commission would enforce such a demand. Were “good faith” ever construed in this manner, a retransmission consent regime that has already enabled broadcasters to increase the costs imposed on consumers nearly twenty-fold in the last eight years would be truly unleashed to run amok.
- ***Rate Disclosure.*** Northwest also argues that DIRECTV has bargained in bad faith by refusing to disclose the retransmission consent fees it pays other

broadcasters. Northwest surely knows that such disclosure would violate DIRECTV's agreements with those broadcasters, especially in light of the recent litigation on the subject. Yet Northwest insists that DIRECTV's refusal to "document" its claims about the retransmission consent marketplace by disclosing the contents of its other agreements constitutes bad faith. The Commission has made clear, however, that the good-faith requirement "is not intended as an information sharing or discovery mechanism." Parties, in other words, "are not required to justify their explanations by document or evidence."

- **Discovery.** Northwest argues that, even if the good faith rules do not require DIRECTV to disclose the rates it pays other broadcasters, the Commission should make DIRECTV do so in this proceeding. The Commission, however, has never done such a thing before. Northwest provides no basis for it to start here, where Northwest has failed to make even a *prima facie* case of bad faith. Even under Northwest's view of the "marketplace," DIRECTV's negotiating position still falls well within the parameters of good faith as the Commission has interpreted the standard. Nor can Northwest compel discovery simply by claiming it does not believe things DIRECTV has said during negotiations. If it could, every party to every retransmission consent negotiation would be able to obtain discovery—an outcome the Commission has explicitly disavowed.

\* \* \*

For nearly six weeks now, Northwest has essentially refused to negotiate with DIRECTV, insisting that DIRECTV either agree to Northwest's rate proposal or disclose the contents of its other agreements. Now it has filed a complaint making the same

demands. DIRECTV urges the Commission to dismiss the complaint quickly so that Northwest can return to the bargaining table, where DIRECTV continues to wait.

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**ANSWER OF DIRECTV, LLC**

DIRECTV, LLC (“DIRECTV”) hereby answers the complaint filed by Northwest Broadcasting L.P. and a group of commonly controlled broadcasters (collectively, “Northwest”).<sup>1</sup> Northwest argues that DIRECTV failed to negotiate in good faith by refusing to make Northwest the highest-paid broadcaster it carries anywhere, by a substantial amount. It also argues that DIRECTV failed to negotiate in good faith by refusing to disclose to Northwest the rates it pays other broadcasters. The Commission’s rules, however, require DIRECTV to do neither of these things. Northwest also argues that, even if the Commission’s rules do not require DIRECTV to tell Northwest its rates,

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<sup>1</sup> *Northwest Broadcasting, L.P. et al. v. DIRECTV, LLC*, Emergency Complaint for Failure to Negotiate Retransmission Consent in Good Faith and Request for Relief, MB Docket No. 12-1, CSR-8910-C (filed June 11, 2015) (“Complaint”); 47 C.F.R. § 76.65.

the Commission should force DIRECTV to do so in this proceeding by ordering discovery. The Commission has never taken such action before, and Northwest presents no basis for it to do so now. Accordingly the Commission should dismiss Northwest's complaint expeditiously.

### **BACKGROUND**

Northwest attached a series of e-mails between the parties as a confidential exhibit to its Complaint. DIRECTV does not dispute the authenticity of those e-mails. Nor does DIRECTV have material additions to the exhibits provided by Northwest.<sup>2</sup>

These materials establish the following facts relevant to Northwest's Complaint. DIRECTV believes these facts to be beyond dispute.

1. Northwest and DIRECTV began negotiating renewal of the expiring retransmission consent agreement in November 2014. Between then and March 6, 2015, DIRECTV made Northwest four separate carriage offers.
2. DIRECTV made Northwest a fifth offer on March 26. In transmitting that offer, DIRECTV observed that it believed all "non-economic" issues between the parties had been resolved.<sup>3</sup> Northwest appears to agree with this characterization.<sup>4</sup>
3. Northwest responded with an offer of its own on April 3.<sup>5</sup>

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<sup>2</sup> Northwest's materials do not appear to reference exchanges of offers between the parties on April 3 and 15. *See* Declaration of Daniel York ¶¶ 6-7 ("York Decl."), attached hereto as Exhibit A.

<sup>3</sup> Email from L. Burakoff to Jon Rand (Mar 26, 2015), Northwest Attachment A.1 at 1.

<sup>4</sup> *See* Email from B. Brady to D. York (May 25, 2015), Northwest Attachment A.7 at 3 (confirming that "there are no other considerations that would affect rates in those deals").

<sup>5</sup> York Dec. ¶ 6

4. DIRECTV responded with a revised offer on April 15.<sup>6</sup>
5. On May 8, Northwest sent DIRECTV an e-mail purporting to list the retransmission consent fees it had reached in “16 deals in the last eight months,” without naming the individual MVPDs with whom it had purportedly agreed to said fees.<sup>7</sup> DIRECTV had never requested any such information from Northwest. Based on DIRECTV’s understanding of its own contracts and of industry standards, DIRECTV is unaware of the basis on which Northwest could have provided this information consistent with what DIRECTV presumes is Northwest’s own confidentiality obligations.
6. On May 17, Northwest made a revised offer to DIRECTV.<sup>8</sup> DIRECTV subsequently informed Northwest that the fees it proposed were “significantly higher than any rates we currently pay or have agreed to pay to any station group.”<sup>9</sup> The certification by Daniel York attached hereto states under penalty of perjury that Northwest’s May 17 offer would make it the highest paid broadcaster DIRECTV carries, on a per-subscriber basis, by a substantial margin.
7. On May 21, DIRECTV responded to Northwest’s offer with a revised offer of its own, increasing the fees that would be paid to Northwest.<sup>10</sup>
8. On May 25, Northwest responded *not* with an offer, but with an e-mail complaining (among other things) about having to “trust [DIRECTV’s] view of

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<sup>6</sup> *Id.* ¶ 7.

<sup>7</sup> Email from B. Brady to D. York (May 8, 2015), Northwest Attachment A.4 at 1-3.

<sup>8</sup> Email from J. Rand to L. Burakoff (May 17, 2015), Northwest Attachment A.6 at 1.

<sup>9</sup> Email from D. York to B. Brady (May 21, 2015), Northwest Attachment A.6 at 1.

<sup>10</sup> *Id.*

the market.” That e-mail requested a “Black Box audit” whereby DIRECTV would divulge to Northwest the rates it pays to other broadcasters.<sup>11</sup>

9. DIRECTV carries more than 1,700 broadcast stations, and has engaged in retransmission consent negotiations for over 15 years. No station has ever made such a request a condition of carriage before, and DIRECTV has never given a station access to such information in the course of retransmission consent negotiations.
10. On May 25, DIRECTV responded that it would not accede to what it viewed (and still views) as Northwest’s transparent attempt to access confidential information that Northwest has no right to obtain, and which DIRECTV is contractually prohibited from providing.<sup>12</sup>
11. On May 29, despite the fact that Northwest had never responded to DIRECTV’s May 21 offer with a counteroffer of its own, in the spirit of good faith on behalf of consumers DIRECTV revised its May 21 offer to make it even more favorable to Northwest.<sup>13</sup> DIRECTV, in other words, negotiated against itself. This revised offer contained rates that would place Northwest well within the range of broadcasters DIRECTV carries.
12. For the next several days, the parties exchanged emails in which Northwest repeatedly insisted that DIRECTV disclose the rates it pays other broadcasters and DIRECTV repeatedly asked Northwest to make another offer.<sup>14</sup>

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<sup>11</sup> Email from B. Brady to D. York (May 25, 2015), Northwest Attachment A.7 at 2-3.

<sup>12</sup> *E.g.*, Email from D. York to B. Brady (May 25, 2015), Northwest Attachment A.7 at 2.

<sup>13</sup> Email from D. York to B. Brady (May 29), Northwest Attachment A.7 at 1.

<sup>14</sup> *See generally* Northwest Attachment A.8 (containing back-and-forth).

13. Northwest filed the instant Complaint on June 11—nearly a month after it made its most recent offer.

14. While Northwest has extended the current retransmission consent arrangement until July 3, it *still* has not made DIRECTV another offer.

### **LEGAL STANDARD**

Congress directed the Commission to require parties to negotiate retransmission consent agreements in “good faith.”<sup>15</sup> In doing so, Congress specified that it shall not be bad faith to seek “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.”<sup>16</sup>

Following Congress’s directive, the Commission identified seven *per se* violations of the good faith standard, each of which is related to process.<sup>17</sup> It also permitted parties to demonstrate a lack of good faith “based on the totality of the circumstances of a particular retransmission consent negotiation.”<sup>18</sup> In adopting these rules, the Commission stated that it will examine accusations related to “competitive marketplace considerations” under a totality-of-the-circumstances test.<sup>19</sup> The Commission also twice stated that adopting its rules would “help to ensure that negotiations are conducted in an atmosphere of honesty, clarity of process and good

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<sup>15</sup> 47 U.S.C. § 325(b)(3)(C). This requirement originally applied to broadcasters alone. It now applies to broadcasters and MVPDs.

<sup>16</sup> *Id.*

<sup>17</sup> 47 C.F.R. § 76.65(b)(1).

<sup>18</sup> 47 C.F.R. § 76.65(b)(2).

<sup>19</sup> *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order 15 FCC Rcd. 5445, ¶ 32 (2000) (“*Good Faith First Report and Order*”).

faith.”<sup>20</sup> This statement appears not to constitute a separate test itself, but rather appears to relate to the totality-of-the-circumstances test. Thus, while Northwest purports have brought four distinct claims against DIRECTV—(1) delay, (2) totality-of-the-circumstances, (3) marketplace considerations, and (4) “honesty, clarity of process and good faith”—DIRECTV believes the last two “claims” are better viewed as elements of Northwest’s totality-of-the-circumstances claim.<sup>21</sup>

## DISCUSSION

### **I. DIRECTV Seeks Rates Demonstrably Consistent with Competitive Marketplace Considerations**

Northwest claims that DIRECTV seeks rates inconsistent with “competitive marketplace considerations,” in violation of the totality-of-the-circumstances test.<sup>22</sup> The facts do not support this claim.

In bringing such a claim, Northwest has a steep hill to climb. The Commission has stated that it does “not intend the totality of the circumstances test to serve as a ‘back door’ inquiry into the substantive terms negotiated between the parties.”<sup>23</sup> Thus, “complaints which merely reflect commonplace disagreements encountered by negotiating parties in the everyday business world will be promptly dismissed.”<sup>24</sup> Moreover, the Commission has found that “[i]t is not practicably possible to discern

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<sup>20</sup> *Id.* ¶¶ 2, 24.

<sup>21</sup> *See Mediacom Commcn’s Corp. v. Sinclair Broad. Group, Inc.*, 22 FCC Rcd. 35 ¶ 9 (Med. Bur. 2007) (“*Mediacom*”) (where counts alleging “totality of the circumstances” and “marketplace consideration” violations were “factually interrelated,” the Commission would “address them together”).

<sup>22</sup> Complaint at 9-10.

<sup>23</sup> *Good Faith First Report and Order* ¶ 32.

<sup>24</sup> *Id.*

objective competitive marketplace factors that [parties] must discover and base any negotiations and offers on, [so] the retransmission consent negotiations that take place are the market through which the relative benefits and costs to the broadcaster and MVPD are established.”<sup>25</sup> By these statements, the Commission has indicated that it will not grant a good faith complaint based on “competitive marketplace considerations” unless a negotiating party insists on terms shown to be demonstrably outlandish when compared to arrangements between similarly situated parties. Northwest appears to agree that this is the applicable standard.<sup>26</sup>

Northwest cannot make such a showing. DIRECTV carries over 1,700 broadcast stations throughout the country—more than just about any other MVPD. It has completed hundreds upon hundreds of retransmission consent agreements over the years. *Northwest’s latest offer contains rates substantially higher, on a per-subscriber basis, than any retransmission consent agreement DIRECTV has negotiated with any broadcaster anywhere.* DIRECTV’s latest offer, by contrast, contains rates that would place Northwest well within the range of broadcasters DIRECTV carries. This Answer contains a declaration, submitted under penalty of perjury, attesting to these facts.<sup>27</sup>

What Northwest wants, then, is for the Commission to declare that DIRECTV can negotiate in good faith only by making Northwest the highest-paid broadcaster DIRECTV carries. This position makes a mockery of the very concept of “competitive marketplace considerations.” *Northwest*, not DIRECTV, seeks rates outside of a very

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<sup>25</sup> *Id.* ¶ 8.

<sup>26</sup> Complaint at 10 (accusing DIRECTV of insisting on rates outside the “ballpark” of those entered into by Northwest).

<sup>27</sup> York Decl. ¶¶ 9, 14.

well established “marketplace,” a marketplace evidenced by the hundreds of retransmission consent agreements that DIRECTV has negotiated with broadcasters large and small across the country.

Northwest’s demand that the Commission make it the highest-paid broadcaster on DIRECTV’s system seems particularly unfortunate given the state of the retransmission consent market. The Commission has found that “MVPDs and broadcasters occupy different positions when negotiating retransmission consent and that the Commission should recognize this distinction when applying the totality of the circumstances test and in determining whether specific terms and conditions are consistent with competitive marketplace considerations.”<sup>28</sup> It has also specifically found that *broadcasters* are the ones with market power in retransmission consent<sup>29</sup>—a conclusion consistent with the increasing willingness of broadcasters to hold MVPD subscribers hostage to their demands.<sup>30</sup> The Commission has cited reports suggesting that retransmission consent fees rose from \$214.6 million in 2006 to an estimated \$4.3 billion in 2014—a nearly twenty-fold increase in eight years.<sup>31</sup> According to SNL Kagan, retransmission consent fees are expected to increase to a staggering \$7.6 billion by 2019.<sup>32</sup> All this at a time

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<sup>28</sup> *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 20 FCC Rcd. 10,339 ¶ 15 (2005) (“*Reciprocal Bargaining Order*”).

<sup>29</sup> *See, e.g., General Motors Corp., Hughes Electronics Corp., and The News Corp. Ltd.*, 19 FCC Rcd. 473 ¶ 201 (2004) (“We find that News Corp. currently possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations.”).

<sup>30</sup> *See* [http://www.americantelevisionalliance.org/?page\\_id=36](http://www.americantelevisionalliance.org/?page_id=36) (containing list of broadcaster blackouts).

<sup>31</sup> *Amendment of the Commission’s Rules Related to Retransmission Consent*, 29 FCC Rcd. 3351 ¶ 58 (2014).

<sup>32</sup> <http://www.fiercecable.com/story/kagan-retrans-fees-hit-76b-2019/2013-11-22>

when consumers' income has essentially stagnated over the last several years.<sup>33</sup> Indeed, Congress just directed the Commission to open a new proceeding to strengthen the good-faith rules to address what can only be described as serial broadcaster abuse of the retransmission consent process.<sup>34</sup> For Northwest to suggest that DIRECTV has violated the law by not acceding to such abuse borders on the outrageous.

DIRECTV, moreover, finds itself in a particularly vulnerable position with respect to broadcasters. While it is large *nationally*,<sup>35</sup> it generally has lower *local* market share than the cable operators with which it competes. It thus has less leverage in typical retransmission consent negotiations than do cable operators, who often control the majority of a broadcaster's viewers in a given market.<sup>36</sup> The idea that DIRECTV has any "marketplace size advantage" over Northwest with respect to these negotiations,<sup>37</sup> much less that the Commission should curb that "market power" by raising rates for DIRECTV subscribers, is simply wrong.

One other point perhaps bears mentioning. Northwest halfheartedly suggests that DIRECTV's pending transaction with AT&T has some bearing on this dispute.<sup>38</sup> It does

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<sup>33</sup> See United States Census Bureau, Historical Income Tables: Households, Table H-1 (all races), available at <http://www.census.gov/hhes/www/income/data/historical/household/>.

<sup>34</sup> The STELA Reauthorization Act of 2014 ("STELAR"), § 103(c), Pub. L. No. 113-200, 128 Stat. 2059, 2060-62 (2014). STELAR was enacted on December 4, 2014 (H. R. 5728, 113th Cong.).

<sup>35</sup> Complaint at 5.

<sup>36</sup> See, e.g., *Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc.*, 26 FCC Rcd. 4238 ¶ 42 (2011) (finding that "the relevant geographic markets for MVPD services are local"); *Adelphia Commc'ns Corp., Time Warner Cable Inc., and Comcast Corp.*, 21 FCC Rcd. 8203 ¶ 123 (2006) (finding that increases in cable operators' regional market share would increase their incentive and ability to engage in a variety of anticompetitive strategies).

<sup>37</sup> Complaint at 4.

<sup>38</sup> *Id.* at 5.

not. DIRECTV's combination with AT&T, if approved, will have virtually no effect on DIRECTV's share in the markets served by Northwest stations, because AT&T has minimal U-verse penetration in Northwest markets. Accordingly, there is not even a theoretical basis for the merger-related concern Northwest attempts to inject into this proceeding.

## **II. The “Good Faith” Rules Do Not Require DIRECTV to Disclose its Retransmission Consent Agreements**

Northwest apparently does not believe DIRECTV's characterizations of the “marketplace” in which DIRECTV does business. It thus wants DIRECTV to “supply the background facts necessary to allow a true negotiation of the marketplace value” of its signals.<sup>39</sup> That is, Northwest wants DIRECTV to reveal what DIRECTV pays other broadcasters, just as Northwest told DIRECTV what *Northwest* purportedly is paid by other MVPDs. DIRECTV's contracts with other broadcasters prohibit it from disclosing those rates to Northwest.<sup>40</sup> Northwest nonetheless argues that the Commission's rules *require* such disclosure, and that DIRECTV's failure to provide the requested information is a sign of bad faith.<sup>41</sup> More specifically, it suggests that DIRECTV's refusal to violate its contractual agreements with other broadcasters (1) unreasonably delayed negotiations with Northwest;<sup>42</sup> and (2) constitutes bad faith under the totality of

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<sup>39</sup> *Id.* at 10.

<sup>40</sup> York Decl. ¶ 13. Northwest claims that it presented its own information to DIRECTV in a “generalized” fashion consistent with its own contractual obligations. Complaint at 3. As DIRECTV understands the confidentiality provisions in its own agreements, they would not allow such a disclosure. York Decl. ¶ 13.

<sup>41</sup> Complaint at 3.

<sup>42</sup> *Id.*

the circumstances by insisting on non-marketplace terms and failing to negotiate in an atmosphere of “honesty, clarity of process and good faith.”<sup>43</sup>

Northwest plainly has no right to this information under existing rules. To the contrary, the Commission has explicitly found that one party to a retransmission consent negotiation has no right to information from the contracts of the other party. A party, to be sure, “must provide reasons for rejecting any aspects of the [other party’s] offer.”<sup>44</sup> The Commission has made clear, however, that this requirement “*is not intended as an information sharing or discovery mechanism.*”<sup>45</sup> Parties, in other words, “*are not required to justify their explanations by document or evidence.*”<sup>46</sup>

The Media Bureau’s *Mediacom* decision—cited by Northwest—confirms this interpretation.<sup>47</sup> *Mediacom* had accused Sinclair of negotiating in bad faith under the totality-of-the-circumstances test in part by insisting on terms allegedly inconsistent with competitive marketplace considerations. It also accused Sinclair of refusing “to disclose the amounts it has agreed to receive in long-term retransmission consent agreements with other similarly situated or larger cable companies.”<sup>48</sup> The Media Bureau rejected this claim:

As discussed above, good faith negotiation requires both parties to explain their reasons for putting forth or denying an offer. In this instance, however, *Mediacom* appears to ***expand this requirement to the point that Sinclair must empirically prove that its offers are consistent with marketplace considerations or violate the good faith rules.*** *Mediacom* and Sinclair are sophisticated, well established

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<sup>43</sup> *Id.*

<sup>44</sup> *Good Faith First Report and Order* ¶ 44

<sup>45</sup> *Id.* (emphasis added).

<sup>46</sup> *Id.* (emphasis added).

<sup>47</sup> *Mediacom*, 22 FCC Rcd. at ¶ 15.

<sup>48</sup> *Id.* ¶ 14.

media corporations that can determine for themselves whether particular proposals reflect market conditions. Accordingly, *we decline to expand the requirement in this manner*.<sup>49</sup>

Northwest asks here for exactly what Mediacom sought in the prior proceeding, and the Commission should reject Northwest's request here for the same reasons the Media Bureau did so there.

Northwest appears to realize this, suggesting that the Media Bureau in *Mediacom* “failed to consider” whether an earlier Commission order—applying the “good faith” rules reciprocally to MVPDs as well as broadcasters<sup>50</sup>—actually created a new obligation to hand over documents.<sup>51</sup> The Media Bureau had no reason to consider the issue in *Mediacom*, however, as the “*Reciprocal Bargaining Order*” in which the Commission implemented the reciprocal bargaining mandate could not have been clearer on the subject. There, the Commission stated: “Congress did not instruct the Commission to amend its existing good faith rules *in any way* other than to implement the statutory extension and impose the good faith obligation on MVPDs.”<sup>52</sup> Thus, the Commission concluded that “it did not believe that Congress intended that the Commission revisit the findings and conclusions that were reached in the [*Good Faith First Report and*

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<sup>49</sup> *Id.* ¶ 15. (emphasis added).

<sup>50</sup> *Reciprocal Bargaining Order*, *supra*.

<sup>51</sup> Complaint at 8-9.

<sup>52</sup> *Reciprocal Bargaining Order* ¶ 8 (emphasis added).

Order].”<sup>53</sup> Given this explicit finding by the full Commission just two years earlier, there was no reason for the Media Bureau to revisit the issue in *Mediacom*.

Northwest might really be saying that the Commission *should have* reconsidered its fifteen-year-old decision not to require negotiating parties to produce their contracts, or that it should do so now.<sup>54</sup> The Commission, suggests Northwest, originally decided not to require disclosure because only broadcasters were subject to the good faith rules, and the decision should no longer apply now that obligations are mutual.<sup>55</sup> Yet even putting aside the Commission’s finding that Congress did not intend to change its conclusions, Northwest’s argument about the Commission’s original decision is not entirely accurate. The Commission declined to require disclosure for two separate reasons—the mutuality cited by Northwest *and* the particularly confidential nature of the materials related to retransmission consent negotiations.<sup>56</sup>

Clearly, concerns about confidentiality remain valid, if not heightened, today. No broadcaster has ever insisted that DIRECTV disclose its retransmission consent rates with other broadcasters.<sup>57</sup> To the contrary, a group of programmers—including the trade

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<sup>53</sup> *Id.*

<sup>54</sup> Complaint at 12 (arguing 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”) (emphasis in original).

<sup>55</sup> *See id.* (citing cases from labor law).

<sup>56</sup> *Good Faith First Report and Order* ¶ 44 n.100 (“We do not believe it would be desirable to attempt to replicate such a requirement here *because the parties are competitors and the information involved would, in most instances, be competitively sensitive*. 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.”) (emphasis added).

<sup>57</sup> York Decl. ¶ 12.

association on whose Board of Directors Northwest's CEO recently served<sup>58</sup>—recently sued the Commission to prevent disclosure of programming agreements and related materials, even under the protection of one of the most comprehensive confidentiality orders the Commission has ever put in place.<sup>59</sup> The court sided with the programmers in that case, citing the competitive harm that disclosure would cause *to programmers and others*.<sup>60</sup>

In any event, Northwest's argument about what the rules should be would be more appropriate in the context of a rulemaking. Under the rules as they now exist, Northwest simply has no basis upon which to state a claim.

### **III. Northwest Has Presented No Basis for Commission-Initiated Discovery**

Northwest also argues that, even if the rules did not require DIRECTV to hand over its retransmission consent agreements when Northwest asked for them, the Commission should make DIRECTV do so now.<sup>61</sup> The Commission has never granted such discovery in the fifteen years since it enacted the good-faith rules, despite having

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<sup>58</sup> <https://www.nab.org/documents/newsRoom/pressRelease.asp?id=3668>.

<sup>59</sup> *CBS Corp. v. F.C.C.*, 785 F.3d 699 (D.C. Cir. 2015).

<sup>60</sup> *Id.* at 2. (“If the Commission gives third parties access to information about the merger applicants’ dealings with ESPN and Disney, however, more than just the applicants will be affected. For instance, by disclosing AT&T’s contracts with Disney, the Commission will necessarily be disclosing Disney’s contracts with AT&T. It would therefore be a simple matter for, say, Fox to peruse those documents, figure out what Disney charges for ESPN, and then price its own sports channel accordingly. Not having signed up for that exposure, petitioners think it unfair and, more important for our purposes, unlawful.”).

<sup>61</sup> Complaint at 11 *et seq.*

been asked to do so at least twice.<sup>62</sup> If ever there might be an occasion to do so, surely this is not it.

To begin with, Northwest has failed to present even a *prima facie* case of bad faith. It argues, essentially, that DIRECTV demands rates that are lower than those Northwest has most recently negotiated, and that DIRECTV has failed to substantiate its own characterizations of the rates it pays to other broadcasters. Even if Northwest's view of DIRECTV's rates were true, this would not constitute "bad faith" under the Commission's interpretation of the "marketplace considerations" standard. As the Commission has stated, there may be "fundamental disagreement between the parties over the appropriate valuation of [a broadcaster's] signals" but "[s]uch disagreements, without more, however, are not indicative of a lack of good faith."<sup>63</sup> And as demonstrated above, DIRECTV is under no obligation to substantiate its position by providing documentary evidence to Northwest.

Nor does Northwest's refusal to believe DIRECTV's characterizations, without more, constitute a *prima facie* case of bad faith for which discovery might be appropriate. If a party can obtain discovery simply by refusing to believe something the other party

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<sup>62</sup> See *EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd. 15070, ¶ 4 (2001) (denying discovery request where there were there were "no special factors that would require discovery in this matter because both parties and the Commission [had] access to all relevant documentary evidence" and where "[t]he record in the case, while complicated, [was] sufficient on its face and the imposition of discovery [was] not necessary to resolve the complaint"). Mediacom also sought Commission-initiated discovery in its complaint against Sinclair, but the Commission rejected this request without discussion. See *Emergency Retransmission Consent Complaint*, File No. CSR-7058-C ¶ 87 (filed Oct. 31, 2006) (seeking discovery); *Mediacom*, 22 FCC Rcd. at ¶ 1 (rejecting complaint without granting discovery).

<sup>63</sup> *Id.*, 22 FCC Rcd. at ¶ 24; see also *id.* ¶ 16 ("Sinclair seeks in this negotiation to alter the amount and manner by which it is compensated for retransmission of its signals on Mediacom's systems. For its part, Mediacom believes that Sinclair's valuation is excessive. Either Sinclair is overvaluing its signals or Mediacom is undervaluing these same signals.").

says during negotiations, then every disputed negotiation will result in discovery. Indeed, DIRECTV doubts the claims *Northwest has made* at the bargaining table—but this does not mean that the Commission should allow DIRECTV to have access to Northwest’s agreements with other MVPDs. This is not what the Commission provided in the *Good Faith First Report and Order*, and this is not how the Commission has interpreted the law ever since.<sup>64</sup>

Northwest also fails to consider, much less grapple with, the exacting standard the D.C. Circuit recently placed on Commission directives to produce confidential documents in general, and programming carriage agreements in particular. As the court explained, the Trade Secrets Act makes it criminal for government officials to publish such information unless disclosure is “authorized by law.”<sup>65</sup> The Commission’s regulations provide that although “[t]rade secrets . . . are not routinely available for public inspection,” the Commission may, despite the Act’s near-categorical protection, disclose private information upon a “persuasive showing as to the reasons” for doing so.<sup>66</sup> Referring to the Commission’s own guidance on the subject, the D.C. Circuit found that, “in order to make the persuasive showing necessary to disclose petitioners’ confidential documents, the Commission must explain (1) why disclosure is in the public interest, (2) why it is a good idea on balance, and (3) why the information serves as a ‘necessary link in a chain of evidence.’”<sup>67</sup> Northwest has nowhere attempted to explain how its request

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<sup>64</sup> *See Mediacom, supra.*

<sup>65</sup> *CBS*, 785 F.3d at 703, *citing* 18 U.S.C. § 1905.

<sup>66</sup> *Id.* at 704, *citing* 47 C.F.R. § 0.457(d)(1), (2).

<sup>67</sup> *Id.* at 705.

meets this exacting standard. Absent such a showing, the Commission cannot grant Northwest's request as a legal matter.

Northwest cannot possibly make such a showing in any event. In order for discovery to be useful to Northwest in resolving this dispute, information regarding DIRECTV's rates would necessarily *have* to go to those at Northwest responsible for retransmission consent negotiations. In other words, Northwest seeks to obtain information specifically for those involved in "competitive decision making"—despite the fact that the D.C. Circuit found that even a confidentiality regime that *prohibited* such persons from accessing confidential information was not sufficient protection under the Trade Secrets Act.<sup>68</sup>

#### **IV. The Commission Should Dismiss Northwest's Complaint**

DIRECTV has demonstrated above that the Commission's good-faith rules do not require DIRECTV to pay Northwest more than it pays any broadcaster anywhere, or to violate its contractual obligations by giving Northwest access to its retransmission consent agreements with other broadcasters. Each of Northwest's claims derives from its position with respect to these two issues. Thus:

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<sup>68</sup> *Id.* at 702. This should end the matter. If, however, the Commission were to consider granting Northwest's request, it could not reasonably limit discovery to *DIRECTV's* retransmission consent agreements. Rather, DIRECTV would want to see all of *Northwest's* agreements to verify the veracity of Northwest's claims about the retransmission consent marketplace. Moreover, DIRECTV would want to be able to examine all other arrangements, written or unwritten, between Northwest, its MVPD partners and their affiliates, as well as Northwest's network affiliation agreements and other economic arrangements networks and their affiliated companies. Only discovery of that scope would result in "verifiable facts" to establish Northwest's claims about the marketplace in which it operates. Again, DIRECTV believes such discovery is inappropriate and unnecessary to resolve this dispute, and contrary to the Commission's rules as they have been interpreted. If the Commission were nonetheless to grant discovery, however, this would be the only basis upon which it could reasonably do so.

- Northwest claims that DIRECTV has insisted on “terms that are not consistent with marketplace negotiations” because DIRECTV has refused to accede to Northwest’s proposed rates and has refused to turn over its contracts.<sup>69</sup>
- Northwest claims that DIRECTV has unreasonably delayed negotiations by refusing to turn over its contracts.<sup>70</sup>
- Northwest claims that DIRECTV has negotiated in bad faith under the “totality of the circumstances” test because it has refused to accede to Northwest’s proposed rates and has refused to turn over its contracts.<sup>71</sup>
- Northwest claims that DIRECTV has failed to conduct negotiations in an “atmosphere of honesty, purpose, and clarity of process” because it has refused to turn over its contracts.<sup>72</sup>

Each of Northwest’s claims, in other words, presupposes an obligation on DIRECTV that simply does not exist under current law. The Commission should thus expeditiously dismiss Northwest’s complaint.

\* \* \*

The undersigned hereby certifies that she has read this submission and, to the best of her knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose.

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<sup>69</sup> Complaint at 9.

<sup>70</sup> *Id.* at 10.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

Respectfully submitted,

William M. Wiltshire  
Michael Nilsson  
**HARRIS, WILTSHIRE & GRANNIS LLP**  
1919 M Street, NW  
The Eighth Floor  
Washington, DC 20036  
(202) 730-1300

*Counsel for DIRECTV, LLC*

July 1, 2015

/s/ \_\_\_\_\_  
Stacy R. Fuller  
Vice President, Regulatory Affairs  
**DIRECTV, LLC**  
901 F Street, NW, Suite 600  
Washington, DC 20004  
(202) 383-6300

**CERTIFICATE OF SERVICE**

I, Sabrina McMillin, certify that on this 1<sup>st</sup> day of July, 2015, I have caused a true and correct copy of the foregoing Answer to be served via electronic mail and overnight delivery upon:

Dennis Corbett  
Lerman Senter PLLC  
2000 K Street, NW, Suite 600  
Washington, DC 20006  
dcorbett@lermansenter.com

/s/  
Sabrina McMillin  
Harris, Wiltshire & Grannis LLP

**EXHIBIT A**

**DECLARATION OF DANIEL YORK  
CHIEF CONTENT OFFICER  
AND EXECUTIVE VICE PRESIDENT, PROGRAMMING  
DIRECTV**

## **DECLARATION OF DANIEL YORK**

I, Daniel York, hereby declare the following:

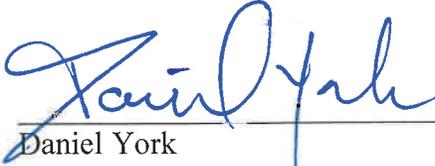
1. My name is Daniel York and I am the Chief Content Officer and Executive Vice President of Programming at DIRECTV. I have held these positions since 2012. I am responsible for, among other things, DIRECTV's retransmission consent negotiations with broadcasters. My team and I conducted the negotiations with Northwest that are the subject of Northwest's Complaint against DIRECTV and the Answer accompanying this Declaration.
2. I have reviewed the Answer. Each of the factual statements contained therein is true and correct.
3. Without limiting the foregoing, and because the accuracy and veracity of DIRECTV's negotiating claims has become an issue in this proceeding, I specifically certify the truthfulness of the following:
4. Northwest and DIRECTV began negotiating renewal of expiring retransmission consent agreement in November 2014. Between then and March 6, 2015, DIRECTV made Northwest four separate carriage offers.
5. DIRECTV made Northwest a fifth offer on March 26. In transmitting that offer, DIRECTV observed that it believed all "non-economic" issues between the parties had been resolved. Northwest appears to agree with this characterization.
6. Northwest responded with an offer of its own on April 3.
7. DIRECTV responded with a revised offer on April 15.
8. On May 8, Northwest sent DIRECTV an e-mail purporting to list the retransmission consent fees it had reached in "16 deals in the last eight months,"

without naming the individual MVPDs with whom it had purportedly agreed to said fees. DIRECTV had never requested any such information from Northwest. Based on my understanding of DIRECTV's own contracts and of industry standards, I am unaware of the basis on which Northwest could have provided this information consistent with what I presume is Northwest's own confidentiality obligations.

9. On May 17, Northwest made a revised offer to DIRECTV. DIRECTV subsequently informed Northwest that the fees it proposed were "significantly higher than any rates we currently pay or have agreed to pay to any station group." Northwest's May 17 offer would make it the highest paid broadcaster DIRECTV carries, on a per-subscriber basis, by a substantial margin.
10. On May 21, DIRECTV responded to Northwest's offer with a revised offer of its own, increasing the fees that would be paid to Northwest.
11. On May 25, Northwest responded *not* with an offer, but with an e-mail complaining (among other things) about having to "trust [DIRECTV's] view of the market." That e-mail requested a "Black Box audit" whereby DIRECTV would divulge to Northwest the rates it pays to other broadcasters.
12. DIRECTV carries more than 1,700 broadcast stations, and has engaged in retransmission consent negotiations for over 15 years. No station has ever made such a request a condition of carriage before, and DIRECTV has never given a station access to such information in the course of retransmission consent negotiations.

13. On May 25, DIRECTV responded that it would not accede to what it viewed (and still views) as Northwest's transparent attempt to access confidential information that Northwest has no right to obtain, and which DIRECTV is contractually prohibited from providing (in black-box form or otherwise).
14. On May 29, despite the fact that Northwest had never responded to DIRECTV's May 21 offer with a counteroffer of its own, in the spirit of good faith on behalf of consumers DIRECTV revised its May 21 offer to make it even more favorable to Northwest. DIRECTV, in other words, negotiated against itself. This revised offer contained rates that would place Northwest well within the range of broadcasters DIRECTV carries.
15. For the next several days, the parties exchanged emails in which Northwest repeatedly insisted that DIRECTV disclose the rates it pays other broadcasters and DIRECTV repeatedly asked Northwest to make another offer.
16. Northwest filed the instant Complaint on June 11—nearly a month after it made its most recent offer.
17. While Northwest has extended the current retransmission consent arrangement until July 3, it *still* has not made DIRECTV another offer.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 30, 2015.

  
Daniel York