

**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-8910-C
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

REPLY TO ANSWER OF DIRECTV, LLC

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. §§ 76.65(c) and 76.7, hereby reply to the July 1, 2015 Answer (“Answer”) of DIRECTV, LLC (“DIRECTV”) to The TV Station Group’s June 11, 2015 Emergency Complaint for Failure to Negotiate in Good Faith and Request for Relief (“Complaint”) in the above-captioned proceeding. In support whereof, the following is shown.¹

In its attempt to defend its ongoing refusal to supply The TV Station Group with basic underlying facts relevant to what is now a long-running retransmission consent negotiation stalemate over rates, and to resist The TV Station Group’s call for Commission-Controlled

¹ Initially capitalized terms used in this Reply have the same meaning as set forth in the Complaint.

Discovery, DIRECTV falls back on its playbook of how to respond in retransmission consent negotiation disputes, particularly those which hold the potential for service disruptions.²

DIRECTV's strategy is to: (i) blame broadcasters, whom DIRECTV claims hold considerably more negotiating leverage than it does, for seeking what DIRECTV typically tries to characterize as outrageously high rates;³ (ii) introduce unfounded allegations;⁴ and (iii) attempt to distract the Commission from the issue at hand through inaccurate or exaggerated arguments.⁵ As shown in the Complaint and below, none of these arguments has merit. Indeed, they do not fit the scenario and underlying facts presented by the Complaint, where The TV Station Group has provided DIRECTV with multiple extensions of an otherwise expired agreement to allow DIRECTV to carry its signals, while turning to the FCC for modest assistance through Commission-Controlled Discovery, an alternative pathway that falls well within existing FCC law and policy.

DIRECTV's approach is in effect a "one-way street" that favors the private interests of DIRECTV over those of the public. The Complaint, as a result, remains intact, well-grounded in fact and firmly anchored in law. The Answer should be summarily dismissed and the Commission-Controlled Discovery requested by The TV Station Group ordered forthwith.

² According to SNL Kagan's 2012, 2013, 2014, and 2015 retransmission consent databases, DIRECTV has been involved in approximately 30 percent of all full-power broadcast signal carriage disruptions between 2012 and 2015.

³ *See, e.g.*, Answer at 8.

⁴ Here, for example, DIRECTV alleges that The TV Station Group has improperly breached confidentiality restrictions in other of its retransmission consent deals. *But see infra* p. 7-8.

⁵ For instance, DIRECTV incorrectly claims in its Answer (Summary at 1) that The TV Station Group is insisting that DIRECTV "accept its [rate] proposal." *See* also Answer at 8, where DIRECTV makes a similarly off-base allegation about "Northwest's demand that the Commission make it the highest paid broadcaster on DIRECTV's system." In fact, the TV Station Group is not asking the Commission to establish rates, but to utilize Commission-Controlled Discovery so that negotiations can proceed beyond impasse on a rational basis, predicated on Reciprocal Fact Disclosure.

A centerpiece of DIRECTV's defense is the repeated claim that it carries more than 1700 broadcast stations nationwide, negotiates dozens of retransmission consent deals each year and, if it paid The TV Station Group what the group is asking, that would make The TV Station Group the highest paid-by-DIRECTV broadcaster in the U.S. "by a substantial amount."⁶ But DIRECTV's reliance on *generalizations* about the rates it pays to broadcasters is vitiated by a central *fact* established in the Complaint, namely that the rates sought by The TV Station Group fall at the low end of the competitive market reflected in more than fifteen separate retransmission deals The TV Station Group has finalized with those separate MVPDs over recent months.⁷

If DIRECTV's undocumented claim that the competitive rate for The TV Station Group's signals is far above any rate that DIRECTV has ever paid is accepted as true, that fact would undermine DIRECTV's position that broadcasters hold the superior leverage in retransmission consent negotiations with DIRECTV.⁸ DIRECTV's self-admitted ability to secure rates *across the entire U.S. market* that are far below those paid by such a wide swath of other MVPDs with which The TV Station Group has recently negotiated provides prima facie evidence of massive DIRECTV market leverage. DIRECTV's own assertions prove that DIRECTV (and its billions of dollars many times over in revenue and market cap) has such leverage that it can establish its

⁶ Answer at 7. DIRECTV's universe of relevant deals is much smaller than 1700, since its agreements often cover multiple, commonly-owned broadcast stations, and certain agreements were reached at earlier times when retransmission rates for broadcast signals were badly undervalued (undervaluation remains a problem for broadcasters today). What matters are today's rates.

⁷ Supplying no factual support, DIRECTV questions the accuracy of the competitive market fee amounts The TV Station Group supplied to DIRECTV before filing the verified Complaint. Answer at 16. By advancing such unfounded allegations, DIRECTV further clouds the "atmosphere of honesty, clarity of process and good faith" that the Commission demands of negotiating parties. See Complaint at 10-11.

⁸ See, e.g., Answer at 9.

own “market” island in the competitive sea around it. This admission: (i) makes it plain that this dispute is anything but a simple disagreement over rates and raises far more questions than it answers (e.g., what factors other than true “competitive market considerations” allow DIRECTV to extract rates so far below those paid by other MVPDs); (ii) does nothing to address the competitive market established by The TV Station Group for its signals; and (iii) raises the stakes for FCC approval of DIRECTV’s pending merger with AT&T, which threatens to greatly magnify the market-defying leverage DIRECTV already enjoys.⁹

DIRECTV’s reliance on *General Motors Corp., Hughes Electronics Corp., and The News Corp., Ltd.*, 19 FCC Rcd 473 (2004) for the proposition that broadcasters hold the superior leverage in today’s retransmission consent landscape¹⁰ is entirely misplaced. First, *General Motors*, which conditionally approved The News Corporation Limited’s (“News Corp.”) acquisition of a controlling de facto interest in DIRECTV’s then parent, Hughes Electronics, is set against a factual background that bears little resemblance to 2004. For example, DIRECTV is considerably larger and more powerful today than it was in 2004. Indeed, concerns which attended the proposed News Corp./DIRECTV combination in 2004 apply with even greater force to the proposed AT&T/DIRECTV combination now before the Commission. Second, several of the conditions the FCC imposed as part of its approval of a News Corp./DIRECTV combination

⁹ The TV Station Group reiterates its opposition to the merger. See The TV Station Group’s June 12, 2015 Informal Objection And Request To Hold Applications In Abeyance, MM Docket No. 14-90 (“Informal Objection”). The TV Station Group notes for the record that DIRECTV CEO Mike White called attention to the dangers of consolidation around the time the proposed Comcast/Time Warner merger was announced. “If the deal is approved, it clearly represents an unprecedented media concentration in one company One of the challenges is to try and ensure that it is appropriately scrutinized.” See Lisa Richwine, *DirecTV CEO: A Comcast-Time Warner Merger May Create An ‘Effective Broadband Monopoly,’* BUS. INSIDER (Feb. 20, 2014, 6:26 PM), <http://www.businessinsider.com/directv-comcast-merger-monopoly-2014-2>. See also Informal Objection at 5 n.9.

¹⁰ Answer at 8 n.29.

in 2004 have direct relevance here. For example, in *General Motors*, the Commission gave MVPDs with more than 5,000 subscribers the right to demand binding commercial arbitration in all retransmission consent disputes involving a combined News Corp./DIRECTV. More to the point, the Commission empowered arbitrators in such scenarios to engage in “final offer” arbitration, whereby they would choose between the parties’ alternative fair market value assessments for program carriage rights. Significantly, to allow arbitrators to make rational decisions about a particular signal’s value, the FCC expressly and broadly empowered them to require, among other things, the parties to submit, to the extent they were available, “current contracts between MVPDs and Fox-affiliated stations on whose behalf News Corp. does not negotiate” as well as “current contracts between MVPDs and non-Fox network stations.”¹¹ In other words, *General Motors* recognizes the central importance to informed negotiation and decision-making of what The TV Station Group is seeking here – Reciprocal Fact Disclosure relating to contracts with third parties. And, the case makes clear that such an approach can help neutralize potentially overwhelming imbalances created by parties’ disparate sizes.

Another unavailing defense raised by DIRECTV is that the Commission should not order Commission-Controlled Discovery today because the Commission has never done so before.¹² DIRECTV would have the Commission believe that The TV Station Group is seeking an unorthodox remedy. That is far from the case. In fact, *the Commission itself*, not The TV Station Group, identified Commission-Controlled Discovery in the *Good Faith Order* as a measured, reasonable response to impasses in retransmission consent negotiations. Furthermore, in that same Order in 2000, the Commission pointed to an exchange of comparable contracts with third parties (even broader relief than the narrow exchange of price information The TV

¹¹ 19 FCC Rcd at 574.

¹² Answer at 14-15.

Station Group is here seeking) as precisely the type of Commission-Controlled Discovery it was authorizing.¹³ To the extent Commission-Controlled Discovery has lain unused in the Commission's tool box for a number of years, that is hardly a reason it should not be employed now.¹⁴ To the contrary, given the Commission's frustration with its limited ability to prevent or limit service disruptions, there is ample reason to embrace Commission-Controlled Discovery now as a proactive, potentially productive alternative approach. And, contrary to DIRECTV's claims, there is no need for the FCC to reconsider the *Good Faith Order* in order to utilize Commission-Controlled Discovery. Commission-Controlled Discovery is a procedure explicitly adopted and embedded within *the Good Faith Order*.¹⁵

A major gulf remains in the stated positions of record now before the Commission. But, The TV Station Group's position is fully supported on the record, in sharp contrast to DIRECTV's continuing to advance claims unsupported by disclosed facts. The persistent DIRECTV refusal to exchange essential facts perhaps explains DIRECTV's conspicuous failure to address *at all*, much less refute, the labor law precedent on which The TV Station Group prominently relied in the Complaint. That precedent, which the Commission made clear in 2000 and again in 2011 it will closely consult, consistent with the intentions of Congress,¹⁶ strongly

¹³ See Complaint at Section II.

¹⁴ *EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070 (2001), cited by DIRECTV at 15 n.62, is inapposite. The passage cited by DIRECTV makes clear that the rationale of *EchoStar* applies only where "both parties and the Commission [have] access to all relevant documentary evidence." That is not this case. DIRECTV has repeatedly refused access to its data in this proceeding.

¹⁵ DIRECTV's citation to passages from the *Good Faith Order* and the *Mediacom* decision (Answer at 10-13), which The TV Station Group acknowledged and distinguished in Section II of the Complaint, in no way defeats The TV Station Group's reliance on Commission-Controlled Discovery.

¹⁶ See Complaint at 6 n.8 and 12-14.

favors Reciprocal Fact Disclosure of the type The TV Station Group is here requesting. Given that its stance before the Commission in this proceeding is in direct conflict with that reciprocal approach, DIRECTV has elected to ignore labor law cases entirely. But DIRECTV cannot wish away such directly-on-point precedent. The reality remains that for true good faith negotiation to occur, Reciprocal Fact Disclosure is essential. And there is no more important “competitive market consideration” in today’s retransmission consent marketplace than price, which lies at the heart of this matter now before the Commission.

DIRECTV’s dual contentions that it believes The TV Station Group breached confidentiality obligations owed to third parties when The TV Station Group generically disclosed fees from deals with more than fifteen separate MVPDs, “without naming the individual MVPDs with whom it had purportedly agreed to said fees,”¹⁷ and that DIRECTV cannot make similarly limited disclosures without breaching its agreements, are unavailing. First, by DIRECTV’s own admission, it does not know which rates of The TV Station Group go with which MVPD, so deal confidentiality has in fact been preserved. Second, DIRECTV is inconsistent on confidentiality issues. That is, in its retransmission consent contracts, DIRECTV is known to seek “Most Favored Nation” (“MFN”) provisions and related rights to “audit” a licensee’s third party contracts, provisions which necessarily give DIRECTV a clear window into otherwise confidential contracts to which it is not a party.¹⁸ In other words, when it serves DIRECTV’s purposes, DIRECTV contractually insists on gaining unilateral access to key

¹⁷ Answer at 3.

¹⁸ For example, DIRECTV is currently making headlines in a lawsuit seeking to enforce MFN rights against Al Jazeera. *See DIRECTV Ups Its Lawsuit Against Al Jazeera America by \$46M*, N.Y. POST (June 26, 2015, 10:43 PM), <http://nypost.com/2015/06/26/directv-ups-its-lawsuit-against-al-jazeera-america-by-46m>. *See also* Matthew Belloni, *DIRECTV Lawsuit Gets Hot and Heavy with Playboy*, THR, ESQ. (Mar. 28, 2010, 12:04 PM), <http://reporter.blogs.com/thresq/2010/03/directv-lawsuit-gets-hot-and-heavy-with-playboy.html> (referencing an MFN and audit rights secured by DIRECTV).

(*confidential*, by DIRECTV's own argument) information found only in a broadcast station's *other* retransmission consent deals. But when DIRECTV's self-interest dictates otherwise, DIRECTV claims that nothing can be disclosed. This kind of one-way-street advocacy is inherently contradictory and wholly ineffectual.

DIRECTV's reliance on the recent Commission decision in *CBS Corporation v. FCC*, No. 14-1242 (D.C. Cir. 2015), rendered in the discrete context of the proposed, now defunct, Comcast/Time Warner merger, where the Commission had issued an order requiring that a host of program carriage contracts be made generally available for public inspection, ostensibly to allow review by multiple third parties in connection with their possible comments on the transaction, is entirely misplaced. The facts presented in this case are decisionally different than in *CBS*. Here, The TV Station Group, one of only two parties to a dispute, is asking for discrete, narrow, Commission-Controlled Discovery, a remedy sanctioned by the *Good Faith Order* some fifteen years ago. With grant of the relief The TV Station Group requests, the black box audit would provide a protective confidentiality layer, no third parties outside the dispute, much less the public more generally, would gain access to any documents, and the FCC can use its ample expertise to make sure confidential information is properly protected, as it made clear it would do in the *Good Faith Order*.¹⁹

The TV Station Group calls attention to another issue DIRECTV raises in the Answer. That is, DIRECTV says it opposes the discrete, black box, targeted discovery The TV Station Group seeks, claiming that confidentiality precludes it from disclosing prices even in a carefully protected, Commission-controlled environment. Yet, DIRECTV goes on to say, if discovery is

¹⁹ Even if the test established by the Court in the recent *CBS* case were applicable here, which it decidedly is not, it would be satisfied. That is, stated most simply, the price information sought by The TV Station Group is "necessary" to good faith negotiation.

ordered, it would want access to every contract of The TV Station Group, including tangential affiliation agreements. If the Commission adopts this DIRECTV approach, The TV Station Group will be entitled to seek reciprocal access to all DIRECTV contracts (*and* to all AT&T contracts if the AT&T/DIRECTV merger goes through despite the many reasons it should not).

Finally, The TV Station Group addresses other unfounded DIRECTV claims advanced in the Answer. For example, DIRECTV argues that it has mostly recently been “negotiating against itself.”²⁰ But, in fact, DIRECTV only most recently increased its offer to The TV Station Group by a de minimis amount (less than one percent). Review of the substance of the supporting emails The TV Station Group previously provided the Commission as part of the Complaint (under a request for confidentiality) reveals how hollow and superficial DIRECTV’s claim on this score is. The fact remains that DIRECTV has made no meaningful attempt to bridge the gaping divide between the parties. Similarly, DIRECTV claims that its retransmission consent negotiations are essentially local, not national, in nature.²¹ But trade press reports indicate otherwise. Almost always, DIRECTV negotiates unitary retransmission deals that cover the entire complement of a broadcast company’s stations, across all their markets.²²

DIRECTV effectively argues for Commission embrace of the status quo in retransmission consent disputes. And why not? DIRECTV has perfected the art of securing, under the cloak of confidentiality, rates well below the market in which its competitors (other MVPDs) operate, while DIRECTV simultaneously complains about how broadcasters’ requests for fair prices are “outrageous” and that ensuing service disruptions are proof of a broken system

²⁰ Answer at 4.

²¹ Answer at 9.

²² See, e.g., David Liberman, *Sinclair Stations to Stay on DIRECTV While They Work Out Retransmission Deal*, DEADLINE (Feb. 28, 2013 6:32 PM), <http://deadline.com/2013/02/directv-sinclair-retransmission-consent-deal-443223>.

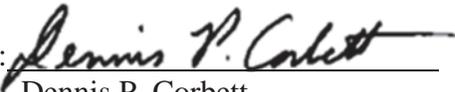
justifying reform to DIRECTV's specifications. But DIRECTV's arguments are transparent, easily pierced, as shown above. The TV Station Group urges the Commission instead to reaffirm the fundamental importance of Reciprocal Fact Disclosure to good faith negotiation, and to use the existing tool of Commission-Controlled Discovery in a manner entirely consistent with the *Good Faith Order* and ample labor law precedent. The Commission should not, indeed cannot, expect to follow the "same old" pathway advocated by DIRECTV and expect a result other than recriminations and the recurring potential for service disruptions.

Conclusion

For all the reasons set forth in the Complaint and the Reply, the TV Station Group asks the FCC to order Commission-Controlled Discovery in this proceeding at the earliest possible time.

Respectfully submitted,

**NORTHWEST BROADCASTING, L.P.
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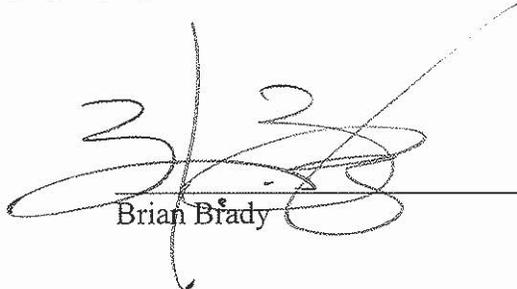
July 13, 2015

Their Attorneys

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 Reply to Answer of DIRECTV, LLC (the "Reply"), and to the best of my knowledge, information and belief formed after reasonable inquiry, the Reply 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 Reply is not interposed for any improper purpose.



Brian Brady

Executed: July 13, 2015

