REDACTED FOR PUBLIC INSPECTION

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of: Buckeye Cablevision, Complainant *Against* Sinclair Broadcast Group Defendant	File No. CSR-____-C MB Docket No. 13-____

To: The Secretary's Office
Attn: The Media Bureau

COMPLAINT

BUCKEYE CABLEVISION

Michael D. Basile
Jason E. Rademacher
Cooley LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004

February 18, 2014

SUMMARY

For two months now, Buckeye's 106,000 cable subscribers in the Toledo, Ohio area have been forced to go without NBC programming from local affiliate WNWO-TV due to the exorbitant demands and bad faith bargaining tactics employed by Sinclair Broadcast Group ("SBG"), culminating in SBG's statement that negotiations are "at an end."[1] For two months now, Buckeye's 106,000 cable subscribers in the Toledo, Ohio area have been forced to go without NBC programming from local affiliate WNWO-TV due to the exorbitant demands and bad faith bargaining tactics employed by Sinclair Broadcast Group ("SBG"), culminating in SBG's statement that negotiations are "at an end."[2] This case is primarily about the average cable subscribers at home in Toledo. These people matter. These are the people that SBG is failing to serve; and the FCC should step in to protect them.

SBG purchased WNWO-TV in the fall of 2013, and it immediately disrupted the Toledo retransmission consent market, initially demanding rates that were at least double those received by the other major local network affiliates. In addition, SGB sought to compel Buckeye to carry SBG's planned (but thus far unlaunched) cable channels. SBG demanded all this despite the fact that WNWO is among the lowest rated major network affiliates in the Toledo market. When Buckeye balked at the unprecedented size and scope of SBG's demands and asked for an extension to continue negotiations, SBG refused and pulled WNWO's signal from Buckeye's cable system on December 15, 2013.

Until recently, SBG continued to negotiate with Buckeye, including making a new offer on February 5, 2013 (which Buckeye promptly countered), but less than 48 hours later, SBG

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1 *See* Exhibit 1 In the interests of respecting the confidentiality of the parties' communications, Exhibit 1 is being filed herewith along with a request for confidentiality.

2 *See* Exhibit 1.

unilaterally terminated negotiations. In so doing, SBG violated one of the few bedrock requirements of good faith retransmission consent negotiations by refusing to negotiate. SBG, which claims to serve the public interest as licensee of WNWO has elected to abandon its Toledo viewers by refusing to even negotiate retransmission consent. This is a clear violation of the FCC's rules, and the FCC should order SBG to return to bargaining until a deal for carriage of WNWO is concluded.

Moreover, the FCC must ensure that when SBG returns to the bargaining table, it does so in good faith, focused on reaching a deal that reflects "competitive marketplace conditions." Thus far, SBG's conduct has failed to meet that standard. SBG's insistence on tying carriage of its currently non-existent cable channels to carriage of WNWO is a prime example of SBG's bad faith. Retransmission consent is intended to enhance broadcasters' local service, not help parties like SBG use carriage of their broadcast stations as leverage to gain greater distribution of affiliated cable channels. And it is an insult to Toledo television viewers that Sinclair is denying viewers access to WNWO programming as leverage to promote new, speculative cable programming ventures. SBG's tying scheme clearly constitutes bad faith, and the FCC should so find.

SBG also has violated the good faith rules by refusing to acknowledge the current competitive conditions in the retransmission consent market in Toledo. Specifically, SBG has expressly refused to consider both WNWO's poor performance in the market and the current per-subscriber valuation of other broadcast TV stations carried to Toledo viewers. While SBG has claimed that its rate demands would be even higher in other markets, that claim merely highlights SBG's refusal to acknowledge competitive marketplace conditions in Toledo. SBG's initial rate demands were more than double the highest-compensated stations Buckeye carries, and its most recent offer is still nearly double those rates. Meanwhile WNWO languishes at or near the bottom of the ratings garnered by Toledo's Big-4 affiliates, and its local news programming is typically watched by an audience that is much smaller than the audiences watching its competitors' news. The FCC must direct SBG to conduct its negotiations consistent with marketplace conditions in Toledo, not one of SBG's many other markets.

Conduct like SBG's shows that nationwide conglomerates are poisoning the retransmission consent marketplace. Congress enacted retransmission consent and the good faith bargaining law to ensure a sustainable retransmission consent marketplace in local communities throughout the country. But companies like SBG do not care about local markets. Only a company that didn't care how long it had to wait for carriage of WNWO could make the kinds of demands that SBG has made. And only a company like SBG that owns and controls 167 stations nationwide can afford not to care. Indeed, a company as large as SBG has an incentive to ignore local market conditions in order to promote its "one rate fits all markets" approach. Under these circumstances, the FCC's best course to preserve a functioning retransmission consent marketplace is to enforce its good faith bargaining rules vigorously. Unless the FCC steps in, it can expect more blackouts and more angry and confused cable customers as SBG increasingly throws its 167-station weight around. Toledo television viewers are counting on the FCC to enforce the rules and inform SBG that its negotiating tactics are out-of-line. After going two months without local NBC programming, Toledo viewers are entitled to no less.

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COMPLAINT

By its attorneys and pursuant to 47 U.S.C. § 325(b)(3)(C)(iii) and Sections 76.7 and 76.65(c) of the FCC's rules,[3] Buckeye Cablevision ("Buckeye") hereby files this complaint against Sinclair Broadcast Group ("SBG"), licensee of WNWO-TV, Toledo, Ohio ("WNWO"). Buckeye seeks relief from SBG's bad faith in negotiating for retransmission of WNWO.

I. INTRODUCTION

Since midnight on December 15, 2013, SBG has deprived Buckeye's 106,000 subscribers in and around Toledo, Ohio of access to NBC network programming on WNWO. Removing its newly-acquired WNWO from Buckeye's system was practically SBG's first act as owner of the station – quite an introduction to the Toledo viewers that SBG is legally required to serve. SBG revoked Buckeye's authority to carry WNWO because Buckeye insisted that any deal must take

[3] 47 U.S.C. §325(b)(3)(C)(iii); 47 C.F.R. §§76.7, 76.65(c).

account of actual market conditions in Toledo – including WNWO's low viewership among Toledo's network affiliates, the rates Buckeye paid to Barrington Broadcasting for carriage of WNWO before SBG purchased the station, and the rates Buckeye pays to other, and more popular TV stations in the market. SBG persistently refused to acknowledge the market conditions in Toledo and WNWO's place in that market, claiming that if Toledo were a larger market, SBG would be asking for higher rates. But SBG's demands were already far outside what could conceivably be supported by the Toledo retransmission consent market. Consider: SBG initially demanded twice the retransmission consent compensation that Buckeye pays for any other broadcast station in the market, despite the facts that (1) WNWO's local news programming is watched by only a fraction of the audience commanded by Toledo's top network affiliates; and (2) NBC was the lowest rated of the Big-4 networks during the most recent 2012-2013 television season. SBG also demanded that Buckeye commit to carry undefined cable networks that SBG might launch at some undetermined time in the future. In a properly functioning free market, businesses cannot get away with demanding the highest price for one of the worst products. But SBG's outrageous demands and disregard for service to the public reveal its strategy of using its ever-increasing size to demand unrealistic and unsupported compensation that bears no relation to a rational and competitive market.

This Complaint, however, is not about SBG's unreasonably high rate demands. The FCC has made clear that it is not inclined to intervene in retransmission consent rate disputes, and Buckeye respects that position. SBG will have to answer to Toledo viewers for the damage it has inflicted on them in pursuit of higher profits.

Instead, this Complaint alleges three specific negotiating tactics employed by SBG that violate the FCC's good faith bargaining rules. First, on February 7, 2014, SBG unilaterally terminated negotiations for carriage of WNWO. SBG took this action despite the fact that both sides had exchanged new offers, each making substantial movement in their positions, in the preceding 48 hours. The FCC's rules unequivocally require broadcasters and cable operators to negotiate. SBG's refusal to do so is a clear violation of those rules, and the Commission should order SBG to recommence negotiations.

Second, SBG has demanded that Buckeye commit to carry (and, in SBG's most recent offer, pay for) cable networks that SBG has not yet launched as a condition of carrying WNWO. Moreover, SBG has demanded that Buckeye provide these theoretical networks to subscribers that are not even located in WNWO's market. SBG's insistence on tying carriage of a local network affiliate (especially a poorly rated one like WNWO) to carriage of other commonly owned non-broadcast programming is a perversion of Congress's retransmission consent system – which was designed to promote the health of local stations, not national conglomerates – and obviously violates the good faith standard.

Third, SBG has openly declared that it is essentially unconcerned with the prevailing competitive marketplace conditions in Toledo. Instead, SBG conducts the negotiations apparently based on a national strategy of driving retransmission consent rates to extreme and unprecedented levels to support its insatiable drive to dominate the broadcast television market. SBG would rather have a station it owns fail than change its unbending negotiating strategy. But the FCC's rules require parties to negotiate retransmission consent with the goal of reaching a deal that reflects competitive marketplace conditions.[4] SBG's decision to ignore the Toledo marketplace violates that standard. As TV broadcasting's largest station group with a growing nationwide footprint, SBG believes it can ignore the Toledo market and demand non-market

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[4] Implementation of the Satellite Home Viewer Improvement Act of 1999, *First Report and Order*, 15 FCC Rcd 5445, 5458 (2000) ("*Good Faith Order*"); *see also* 47 C.F.R. § 76.65(a).

compensation because it can spread any losses from a blackout in Toledo over the 167 stations that SBG owns or operates. SBG's demands for carriage and compensation without regard to station performance or what other stations in the market receive as compensation amounts to a naked attempt to use the company's nationwide size and scale to dictate terms to Buckeye. SBG's refusal to acknowledge the realities of the Toledo market and negotiate with Buckeye in that context also constitutes bad faith.

The FCC should step in and protect the Toledo's cable viewers. To this end and as more fully laid out below, Buckeye requests that the FCC issue an order requiring SBG immediately to (1) resume negotiations with Buckeye for carriage of WNWO that take due account of competitive marketplace conditions in Toledo; and (2) withdraw its demands that Buckeye carry SBG's cable channels as a condition of carrying WNWO. The Commission also should impose such other sanctions as the Commission deems necessary and appropriate to address the damage SBG has inflicted upon viewers in the Toledo market.

In support thereof, Buckeye states the following:

II. BACKGROUND

A. The Parties

1. Buckeye is a cable operator serving 106,000 subscribers in Toledo and the surrounding communities, approximately 9,000 subscribers in southeastern Michigan, and approximately 15,000 subscribers in Sandusky, Ohio. Buckeye is an operating subsidiary of Block Communications, Inc. ("Block"), which also owns (1) the Toledo Blade, the largest daily newspaper in Toledo; and (2) several television broadcast stations in small and medium markets across the United States.[5] Buckeye has carried WNWO in Toledo for many years, most recently

[5] For additional information, *see* Block Communications, Inc., http://blockcommunications.com/.

pursuant to a retransmission consent agreement with SBG's predecessor, Barrington Broadcasting, the final extension of which agreement expired at midnight on December 15, 2013.

2. SBG is the largest television station group in the United States, owning and operating 167 television stations in 77 markets.[6] SBG owns WNWO through SBG's local operating affiliate, WNWO Licensee, LLC.

B. Jurisdiction

3. The FCC has authority to hear this complaint pursuant to Section 76.65(c) of Title 47 of the Code of Federal Regulations, a rule duly adopted to implement Section 325(b)(3) of the Communications Act of 1934, as amended.[7]

4. This Complaint is timely filed within one year of SBG's earliest violation of the good-faith bargaining rules described herein.[8]

C. Statement of Facts

5. This case arises from a negotiation between Buckeye and SBG for carriage of WNWO to Buckeye's cable subscribers served by its Toledo cable system.

6. WNWO is frequently the lowest-rated major-network affiliate in Toledo, and it has been a serial underperformer for many years. WNWO routinely exchanges the Toledo ratings basement among network affiliates with Fox affiliate WUPW(TV), but neither station garners ratings that approach the market leaders. **[***BEGIN CONFIDENTIAL INFORMATION** [redacted]

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6 *See* Sinclair Broadcast Group, http://www.sbgi.net/.

7 *See* 47 C.F.R. § 76.65; 47 U.S.C. § 325(b)(3). This Complaint also complies with the procedural requirements of Section 76.7 of the Commission's rules. 47 C.F.R. § 76.7.

8 *See* 47 C.F.R. §76.65(e)(2).

[redacted][9] [redacted] **END CONFIDENTIAL INFORMATION***]**

7. Moreover, a closer look at WNWO's viewership demonstrates that almost all of its viewership tunes in when the station is airing national NBC and syndicated programming – when WNWO airs local programming, particularly news programming, few Toledo viewers are tuning in. [***BEGIN CONFIDENTIAL INFORMATION** [redacted][10] [redacted]

[9] The FCC has recognized that the 9:00 AM – Midnight weekly rating/share is the relevant daypart for determining a station's "all-day" ratings. *See* 47 C.F.R. §73.3555(b)(1)(i). Exhibit 2 includes relevant pages from Nielsen's November 2013 report for the Toledo market, which are submitted pursuant to a request for confidentiality filed herewith. [*** **BEGIN CONFIDENTIAL INFORMATION** [redacted] **END CONFIDENTIAL INFORMATION***]**

[10] [*** **BEGIN CONFIDENTIAL INFORMATION.** [redacted] **END CONFIDENTIAL INFORMATION***]**

[redacted] **END CONFIDENTIAL INFORMATION***]**

8. Of course, ratings aren't everything, and WNWO could make a claim to being an important part of the Toledo newsgathering ecosystem if it were producing award-winning programming or had a high reputation for top-shelf newsgathering among Toledo viewers. That is not the case. The third most-liked review on WNWO's Facebook page states: "W[NWO] is very small town and is far less professional than the other three Toledo stations." The next most-liked commenter writes "NBC programming is NBC programming . . . people watch the other stations for weather . . . hopefully SBG will pull[] their head out and get it back on Buckeye because I'd be perfectly happy pulling a NBC signal from another city."[11]

9. Other than local news, WNWO airs little local programming that serves the needs and interests of Toledo viewers.

10. The ratings and reputation of WNWO have been relatively consistent over the past several years.

11. Quite simply, the only value that WNWO offers to Buckeye is that the station has a monopoly on local distribution of NBC programming. For the 2012-2013 television

[11] *See* Facebook, WNWO, *available at* https://www.facebook.com/NorthWestOhio (visited Feb. 12, 2014).

season, NBC was the fourth-rated major network, further diminishing WNWO's value to Toledo cable viewers.[12]

12. Despite its historically weak performance, prior to December 15, 2013, WNWO was carried pursuant to the terms of a retransmission consent agreement between Buckeye and Barrington Toledo License LLC ("Barrington") dated September 1, 2008 (the "2008 Agreement"), and an extension thereto dated August 31, 2013. The 2008 Agreement required Buckeye to compensate Barrington for its carriage of WNWO.

13. By its terms, the 2008 Agreement was set to expire on August 31, 2008.

14. On July 11, 2013, Buckeye contacted Barrington to discuss a new retransmission consent agreement to replace the 2008 Agreement. Barrington responded that due to the pending sale of WNWO, SBC would have to approve any deal and Barrington could not guarantee that any new deal Buckeye and Barrington might reach would be assigned to SBG.

15. Buckeye and Barrington nonetheless exchanged offers through July and mid-August 2013. Buckeye proposed substantial fee increases over the 2008 Agreement, but Barrington countered with a per-sub fee demand of more than 6 times what Buckeye proposed. Buckeye responded that it could not agree to payment of such high retransmission fees for a station with such low viewership in Toledo, but responded with an incentive-based compensation proposal that would pay Barrington more if WNWO improved its ratings performance. Barrington rejected this approach, offering a slightly lower rate instead.

16. In mid-August 2013, Buckeye and Barrington agreed that since Barrington could not complete a long-term deal without SBG's approval, the parties should enter into a brief

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[12] *See* Dominic Patten, 2012-2013 Season Network Rankings: CBS Sweeps in Final Numbers; ABC, CBS & Fox Tie in May Sweep, DEADLINE.COM, May 22, 2013, *available at* http://www.deadline.com/2013/05/network-tv-final-rankings-2012-2013-season-full-list/.

extension of the 2008 Agreement and that Buckeye would negotiate a long-term agreement directly with SBG, or whatever entity owned that station at that point in time.

17. On August 31, 2013, Buckeye and Barrington entered into an extension of the 2008 Agreement on the same terms and conditions through midnight on December 15, 2013.

18. On November 18, 2013, the FCC approved SBG's purchase of WNWO from Barrington. The purchase was consummated on November 22, 2013.

19. On November 26, 2013, SBG contacted Buckeye by phone and offered an extension of the parties' retransmission consent relationship. Later that day, SBG provided its initial offer, which called for per-subscriber fees in the first year that would have been considerably more than <u>double</u> what Buckeye pays for any other Toledo station, and that includes deals that Buckeye has entered into within the past year. Notably, SBG's proposed first-year rates were more than 80% higher than Barrington's last offer in August 2013. In addition, SBG's proposal would have required Buckeye to carry any cable network launched by SBG on Buckeye's expanded basic service tier.

20. On November 27, 2013, pursuant to a prior agreement with Barrington, Buckeye ceased carrying WNWO to its Sandusky cable subscribers. In retaliation, SBG claimed that Buckeye was breaching the 2008 Agreement and revoked its November 26, 2013 offer of an extension, apparently without checking with Barrington and certainly without asking Buckeye to determine whether Buckeye's actions were warranted.

21. On December 2, 2013, after checking with Barrington, SBG acknowledged that Buckeye's discontinuation of carriage in Sandusky had been previously agreed to and that SBG's accusations against Buckeye were unfounded. SBG's negotiator

claimed confusion over whether some of Buckeye's Sandusky customers were located in the Toledo DMA as an excuse for his erratic behavior.

22. Buckeye responded to SBG's offer on December 10, 2013, proposing a three-tier rate structure that would guarantee a rate commensurate with other broadcast stations attaining WNWO's current ratings and pay higher rates if WNWO improved its local news ratings. Buckeye offered SBG increased initial rates over its previous offer to Barrington – rates that were frankly unjustified by WNWO's current performance when compared to other broadcasters in the market – with the potential for nearly doubling those rates by the end of the agreement if its local news programming approached the ratings achieved by the top news stations in the Toledo market. Buckeye also rejected SBG's demand that it launch whatever cable networks SBG might add, stating that it would consider carriage of such networks if and when they actually became available.

23. On December 12, 2014, SBG countered with a small decrease in its rate demand but rejected Buckeye's offer of a tiered rate-structure. In a conversation that day, SBG's negotiator indicated that SBG didn't want WNWO to go dark and that it wanted to "partner" with Buckeye. But its negotiators stated that any deal would have to include a certain rate and carriage of SBG's future cable networks. The rate that SBG was demanding at that point was, in fact, more than twice what Buckeye is currently paying for any Toledo broadcast station. SBG's negotiators said these two elements were "must have" items for SBG before it would grant any extension.

24. On December 14, 2013, Buckeye responded with an updated contract proposal that retained the tiered-structure based on future ratings and increased the rate offer in all tiers in all years of the agreement.

25. Later in the day on December 14, 2013, SBG rejected Buckeye's proposal. SBG's negotiator stated in an email that he was not interested in negotiating based on other retransmission consent agreements in the Toledo market and that he intended to negotiate based on SBG's estimation of the value of WNWO's signal without reference to the station's ratings or the prevailing retransmission consent rates in the Toledo market.[13] SBG reiterated its demand for outrageous retransmission consent fees in all years of the proposed contract – at per-subscriber rates that are far higher than any that Buckeye is aware of any major cable operator paying in any market for a broadcast TV station. SBG also reiterated its demand that Buckeye provide a blind guarantee that it would carry any cable network that SBG might launch.

26. On December 15, 2013, as expiration of the 2008 Agreement approached, the parties exchanged emails and held a conference call, but neither side made any further movement towards the other on rates or terms. Buckeye requested an extension and a face-to-face meeting. SBG responded that the parties were not close enough to a deal to justify an extension and offered to host a face-to-face meeting at SBG's headquarters in Baltimore at some future date. At 8:59 PM Eastern Time, SBG demanded that Buckeye cease carriage of WNWO at midnight. Buckeye complied.

27. In the days immediately following expiration of the 2008 Agreement, SBG levied a number of network non-duplication allegations against Buckeye. Following its shoot-first-ask-questions-later pattern of behavior, SBG hurled numerous accusations at Buckeye rather than working with it to resolve the problem. This episode is exhaustively described in the record developed through SBG's complaint in that matter (MB Docket No. 13-317) and will not

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[13] At other points in the negotiation, SBG claimed that if Buckeye were located in another market, SBG would be asking for even higher compensation. SBG did not, however, explain the marketplace factors in Toledo that supported its demands.

be repeated here. It should be noted here, however, that SBG's complaint was filed even though SBG knew that Buckeye had already remedied the technical problems that led to SBG's allegations and appears to have been filed for the sole purpose of exerting pressure on Buckeye to agree to SBG's retransmission consent demands.

28. On December 16, 2013, Block's Chairman, Allan Block spoke by telephone with David Smith, SBG's President and Chief Executive Officer. Mr. Block proposed that one way of bridging the economic gap between the parties' retransmission consent offers would be to explore a deal that would involve SBG's acquisition of Block's station KTRV-TV in Nampa, Idaho, near Boise, in exchange for four years of retransmission consent for WNWO. Mr. Block suggested that while the station had struggled in recent years, it could undoubtedly be more economically run as part of SBG's larger broadcast operation. In addition, Mr. Block indicated that the station would qualify for a failing station waiver and could be paired with SBG's Boise station, KBOI-TV, to realize even greater efficiencies and that SBG could use its size and scope to achieve increased profitability for the station. Mr. Block also stated his opinion that under SBG's management, KTRV-TV would have a good chance of securing the FOX affiliation in the Boise market, which the station had previously held.

29. On December 17, Buckeye and SBG held a conference call in which SBG mentioned that Buckeye had not responded to SBG's latest offer. SBG reiterated that it would not accept an incentive-based agreement based only on broadcasters' ratings and told Buckeye not to "waste SBG's time" with an offer that was substantially below SBG's most recent offer.

30. On or about December 20, SBG's Mr. Smith contacted Mr. Block and informed him that the company was not interested in acquiring KTRV-TV, but SBG did not make any counteroffer to Mr. Block's offer. In the following weeks, negotiations were at a

standstill as the parties focused on completing the pleading cycle for SBG's network non-duplication complaint.

31. On January 16, 2014, SBG's General Counsel, Barry Faber was extensively quoted in an article in the Toledo Blade concerning the ongoing blackout of WNWO.[14] In the article, Mr. Faber stated that the parties were still negotiating, and he outlined SBG's objections to Buckeye's proposed ratings-based incentive structure for retransmission consent rates. Notably, he claimed that Buckeye pays more to retransmit cable networks than it pays for broadcast stations. Mr. Faber specifically cited the rates Buckeye allegedly pays for three cable networks, implying that SBG's rate demands were comparable to those rates. Only the rate he cited for ESPN – well known as the highest-compensated cable network in the business – is higher than SBG's most recent offer for first year rates. Unbeknownst to Blade readers, SBG's rate proposal was far higher than the other channels he mentioned.[15] Mr. Faber then indicated that SBG was willing to negotiate further and that SBG would entertain any offer Buckeye made.

32. On January 22, 2013, Buckeye contacted SBG and asked whether, in light of Mr. Faber's comments that the parties were still negotiating, SBG intended to make a counteroffer to Mr. Block's offer of December 17, 2013. SBG responded that it was not

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14 *See* Chip Towns, Buckeye Offers Viewers Credit; Cable Company, Broadcast Firm Continue Talks Over Channel 24, *Toledo Blade*, Jan. 16, 2014, *available at* https://www.toledoblade.com/TV-Radio/2014/01/16/Buckeye-offers-viewers-credit.html.

15 Mr. Faber also failed to disclose to Blade readers the many differences between the relative values of the business proposition offered by WNWO versus that offered by the many cable networks that Buckeye carries. For example, WNWO is available free over-the-air to any viewer, whereas cable networks are exclusively available to MVPD subscribers. Moreover, cable networks offer Buckeye advertising spots to sell for its own account while WNWO cannot and does not. And, cable networks tend to target niche audiences that drive subscription to the service that Buckeye sells. In contrast, WNWO is in the business of selling the mass audience that networks and their affiliates are supposed to deliver. WNWO fails to deliver a mass audience but demands to be compensated as if it did.

interested in purchasing other assets of Block Communications as part of a retransmission consent agreement for WNWO and that if Buckeye would make a counter offer to SBG's December 14th offer, SBG would be willing to continue the conversation. For the next eight days, SBG maintained that it had made the most recent "traditional" offer and that if Buckeye wanted to continue negotiations, it would have to respond with a more conventional counterproposal.

33. On January 30, 2014, Buckeye sought to restore some sanity to the negotiating process by inviting SBG to reengage in good faith negotiations. Buckeye restated its request for a counterproposal to Mr. Block's most recent offer. Knowing that SBG representatives would be in Toledo in the coming days, Buckeye requested that the parties meet face-to-face in Toledo on February 3, 2014 to sort out their differences.

34. Later on January 30, 2014, Mr. Faber responded by accusing Buckeye of trying to "set up" a good faith bargaining complaint at the FCC by requesting that SBG respond to Buckeye's most recent offer. Mr. Faber did, however, agree to meet with Buckeye officials at Buckeye's Toledo office.

35. On February 4, 2014, SBG and Buckeye met face-to-face to discuss their retransmission consent differences. The parties discussed their positions and explored alternative solutions to bridge the gap between them. SBG indicated that it still had some flexibility on rates, and did offer to reduce its demands by $0.05 per subscriber. While no deal was struck, the parties left on a positive note, and Buckeye had every expectation that negotiations would continue.

36. SBG submitted to Buckeye a new proposal on February 5, 2014. The new proposal reduced SBG's first year rate demand by 23%. SBG demanded a "signing bonus" that

would recoup some of the rate reduction offered by SBG and continued to demand that Buckeye carry (and pay separate rates for) two cable channels that SBG might launch at some indefinite point in the future. And it demanded that Buckeye launch SBG's cable channels to all Buckeye subscribers – including those outside WNWO's Toledo market. While Mr. Faber's transmittal email acknowledged that the parties had discussed creative solutions to the dispute, he stated that SBG preferred to reach a deal within the "typical parameters" or retransmission consent deals.

37. In an effort to build on the momentum of the meeting and SBG's first serious offer in the negotiation, Buckeye presented to SBG a comprehensive new offer on February 7, 2014. Buckeye continued to seek a creative resolution to the dispute. Buckeye's offer retained the incentive structure of Buckeye's previous offers. A base rate would apply if WNWO's ratings continued to underperform other network affiliates in Toledo, but SBG could nearly double its compensation rate by the end of the agreement if it improved its station ratings. Buckeye also offered a separate, alternative arrangement that included the proposal that SBG purchase Block's station KTRV-TV. Unlike the previous offer made by Mr. Block, Buckeye's new proposal offered SBG both KTRV-TV and a monthly per-subscriber rate in exchange for consent to retransmission of WNWO. This alternative offer also incorporated incentives for SBG to invest in WNWO's programming to improve the station's ratings. Buckeye's offers rejected, however, SBG's proposal that it commit to carry cable networks that have not yet been created or launched. Each of Buckeye's two alternative proposals substantially increased the total compensation SBG could potentially realize under the agreement as compared to Buckeye's previous offers. Indeed, if SBG improved WNWO's performance, Buckeye's incentive rate offer would have paid SBG a higher per-subscriber rate in the last two years of the agreement

than SBG had requested in its February 5 offer. Buckeye expected its substantial movement on these issues to be more than sufficient to sustain continued negotiations.

38. Just three hours after receiving Buckeye's new offer, SBG replied with a terse, three sentence email unilaterally terminating negotiations. SBG claimed that the parties have a "fundamental disagreement" and concluded that SBG "view[s] negotiations as at an end."[16]

III. ARGUMENT

A. SBG's Unilateral Termination of Negotiations Is *Per Se* Bad Faith.

39. The FCC's good-faith bargaining rules include few concrete and enforceable requirements, but they do include an absolute duty to negotiate.[17]

40. Until February 7, 2014, both Buckeye and SBG had fulfilled this bedrock requirement of continuing to engage in negotiations. While the parties did not see eye-to-eye about the proper resolution of their dispute, they did exchange offers, hold conference calls, and attend meetings with reasonable regularity between late November and early February 2014, although there was virtually no contact between December 15, 2013 and mid-January 2014.

41. SBG's unilateral decision to terminate negotiations on February 7, 2014 clearly violates its duty to negotiate. While the FCC has recognized that impasse is a possible outcome of any retransmission consent negotiation,[18] there is no evidence that such an impasse was reached here. In the days before SBG terminated negotiations, the parties had met and exchanged offers that represented substantial moves from their previous positions.

16 *See* Exhibit 1.

17 *See* 47 C.F.R. § 76.65(b)(1)(i).

18 *See ACC Licensee, Inc. v. Shentel Telecommunications Company*, 27 FCC Rcd 7584 para. 15 (2012);

42. The FCC has correctly held that "fundamental disagreement" on the terms of retransmission consent does not constitute bad faith.[19] Buckeye agrees, and it does not allege that SBG has engaged in bad faith negotiation merely because it has asked for rates that are outrageously high or has refused to consider the alternative deal structures that Buckeye has proposed. SBG's choices are bad for Toledo television viewers, and they are bad business decisions, but they do not, in and of themselves, constitute bad faith negotiations. Congress and the FCC have left SBG the choice of refusing to allow Buckeye to carry WNWO on reasonable terms. Under current rules, SBG can continue to insist on per-subscriber rates that are far higher than what any other Toledo station is receiving. And SBG can maintain this position despite WNWO's low ratings. That is SBG's right.

43. But the FCC's rules prohibit SBG from refusing to negotiate. The very basis of broadcasters' retransmission consent right is that they will negotiate with MVPDs to ensure that all viewers will have access to their signals. If the FCC permits broadcasters to unilaterally terminate negotiations, particularly when all indications are that progress is being made, then it will be abandoning its duty under the Communications Act to ensure that good faith negotiations at least take place.

44. Buckeye is not asking the FCC to dictate any particular outcome in this matter, but the FCC must confirm that SBG violated the rules when it terminated negotiations in this case.

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19 *See Mediacom Communications Corporation v. Sinclair Broadcast Group*, 22 FCC Rcd 47 para. 6 (2007).

B. SBG's Conduct Violates the FCC's "Totality of the Circumstances" Test for Bad Faith Negotiations.

45. In addition to its refusal to negotiate, SBG's conduct of its negotiations violates the good-faith bargaining rules in two particular respects. First, SBG has negotiated in bad faith by requiring Buckeye to agree to carriage of cable networks that SBG plans to launch at some point in the future. Second, SBG's express refusal to consider fairly the Toledo market in formulating its retransmission consent demands also amounts to bad faith.

(1) SBG's Demands for Tying Carriage of WNWO to Guaranteed Future Carriage of SBC's Unlaunched Cable Networks Constitutes Bad Faith.

46. SBG's insistence that Buckeye commit to carry its unlaunched cable channels as a condition of carrying WNWO should be considered bad faith under the FCC's "totality of the circumstances" test.

47. The FCC has recognized that insisting on negotiating carriage of multiple TV stations in a single deal may constitute bad faith.[20] In *Mediacom*, SBG avoided a bad faith determination by offering separate negotiations for its various stations after the complaint was filed.[21]

48. In this case, SBG's conduct is much worse and much less correctible. SBG has been granted by Congress the right to require Buckeye to negotiate for carriage of WNWO. That right was granted to promote localism and ensure the health of local television stations. It was not granted to provide SBG with leverage to build a cable programming business. Permitting SBG to abuse its retransmission consent rights by using them to extract carriage commitments for cable networks that SBG may launch in the future would hardly be in

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[20] *See id.* at paras. 7-8.

[21] *See id.*

keeping with Congress's intent or the spirit of the FCC's good faith bargaining rules. Moreover, SBG's most recent demand that Buckeye carry cable channels outside WNWO's market as a condition of carrying WNWO is little more than an opportunistic manipulation of its retransmission consent rights to guarantee carriage of cable channels that no viewer has ever seen or may ever want.

49. As Buckeye's offers in this negotiation make clear, Buckeye has sought to address SBG's exorbitant rate demands by proposing creative proposals designed to bridge the negotiating gap. But Buckeye has striven to offer these elements as a choice, not as a demand. SBG, on the other hand, has ridiculed Buckeye's creative approaches as "weird" and insisted that it is only interested in concluding a conventional retransmission consent agreement, yet it continues to demand its own unrelated appendages to a deal, like carriage of unlaunched cable networks.

50. The FCC should find that SBG's requirement that Buckeye carry its cable systems as a condition of carrying WNWO violates SBG's duty to negotiate in good faith.

(2) SBG's Refusal To Bargain For an Agreement That Reflects Competitive Marketplace Conditions in Toledo Constitutes Bad Faith.

51. The main sticking point in this negotiation has been Sinclair's refusal to negotiate based on actual, quantifiable conditions in the Toledo market. On December 14, 2013, SBG's negotiator explicitly stated that he would not consider other deals in the Toledo market or WNWO's performance in the market in formulating SBG's rate demands. Sinclair's insistence on negotiating this deal divorced from its market context is the main reason the parties have not reached a deal.

52. Under the good faith bargaining rules, Buckeye and Sinclair share a mutual responsibility to negotiate with a "sincere desire to reach [an] agreement" that reflects

"competitive marketplace conditions."[22] Sinclair's negotiating strategy has been to ignore competitive marketplace conditions and to instead use the leverage that derives from its 167-TV station portfolio to force a deal on Buckeye that has nothing to do with the Toledo market and everything to do with SBG's nationwide business model and its attempt to obtain similar rates in every market.

53. At various points in the negotiation, SBG has claimed that if Buckeye were located in another market, SBG would be asking for even higher compensation. This is not bargaining informed by "competitive marketplace conditions." Sinclair's demands are not supported by any Toledo marketplace considerations, and SBG cannot change that fact by claiming that its demands would be higher in another market.

54. Retransmission consent was introduced to protect the rights and interests of local television stations in their local markets. It was not enacted to help national conglomerates like SBG use their size and scale to extract the highest possible rates from cable operators serving small and mid-sized communities like Toledo. SBG's efforts to leverage its 167-TV station portfolio to force an unfair deal on Buckeye are a perversion of the retransmission consent ideal, and that simply cannot constitute good faith.

55. In keeping with Congress's retransmission consent formula, Buckeye has negotiated with SBG for carriage of WNWO, an underperforming affiliate of the fourth-rated network in a mid-sized market. SBG has the duty to conduct its negotiations the same way. While SBG is not required to make a deal with Buckeye, it is required to actually negotiate for carriage of WNWO based on WNWO's position in the Toledo market.

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[22] Implementation of the Satellite Home Viewer Improvement Act of 1999, *First Report and Order*, 15 FCC Rcd 5445, 5458 (2000) ("*Good Faith Order*"); *see also* 47 C.F.R. § 76.65(a).

56. While Buckeye is not asking the FCC to mandate that SBG accept Buckeye's ratings-based approach to structuring a deal, the FCC should direct SBG to explain how its demands actually reflect competitive marketplace conditions in Toledo and to ensure that any future offers reflect those conditions.[23]

VI. PRAYER FOR RELIEF

57. WHEREFORE, Buckeye respectfully requests that the FCC issue an order that includes the following relief:

(a) A finding that SBG has breached its duty to negotiate for retransmission of WNWO in good faith;

(b) A requirement that SBG immediately recommence good faith negotiations with Buckeye;

(c) A requirement that SBG cease demanding that Buckeye commit to future carriage of SBG's future cable networks as a condition of carrying WNWO

(d) A requirement that SBG negotiate retransmission consent for WNWO with due regard for the competitive marketplace in the Toledo market; and

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[23] The FCC has ample authority to require such an explanation pursuant to 47 C.F.R. § 76.65(b)(1)(v), which requires a party to explain its reasons for rejecting an offer made by another party.

(e) Such other relief as the FCC deems just and appropriate.

Respectfully Submitted,

BUCKEYE CABLEVISION, INC.

Michael D. Basile
Jason E. Rademacher
Cooley LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004

February 18, 2014

EXHIBIT

1

Exhibit 1 Submitted Subject To Request For Confidentiality.

EXHIBIT

2

Exhibit 2 Submitted Subject
To Request For Confidentiality.

DECLARATION OF ALLAN J. BLOCK

1. My name is Allan J. Block and the Chairman of Block Communications, Inc., the parent company of Buckeye Cablevision, Inc. ("Buckeye").

2. During the past few months, I have been involved in discussions with Sinclair Broadcast Group regarding retransmission of WNWO-TV on Buckeye's cable system serving communities in the Toledo, Ohio Designated Market Area.

3. I have reviewed the foregoing Complaint and the facts contained therein are true and correct to the best of my knowledge, information, and belief formed after reasonable inquiry.

4. I declare under penalty of perjury that the foregoing is true and correct.

Allan J. Block

Allan J. Block
Chairman
Block Communications, Inc.
405 Madison Ave.
Suite 2100
Toledo, OH 43604
(419)724-6035

February 14, 2014

DECLARATION OF JEFFREY L. ABBAS

1. My name is Jeffrey L. Abbas and I am President and General Manager of Buckeye Cablevision, Inc. ("Buckeye").

2. As part of my duties with Buckeye, I am frequently involved in retransmission consent negotiations with television broadcasters. I have been one of Buckeye's negotiators involved in discussions with Sinclair Broadcast Group (and previously with Barrington Broadcasting) regarding retransmission of WNWO-TV on Buckeye's cable system serving communities in the Toledo, Ohio Designated Market Area.

3. I have reviewed the foregoing Complaint and the facts contained therein are true and correct to the best of my knowledge, information, and belief formed after reasonable inquiry.

4. I declare under penalty of perjury that the foregoing is true and correct.

Jeffrey L. Abbas

Jeffrey L. Abbas
President and General Manager
Buckeye Cablevision, Inc.
5555 Airport Highway, Ste. 110
Toledo, OH 43615
419-724-9802

February 14, 2014

DECLARATION OF BRAD MEFFERD

1. My name is Brad Mefferd and I am Chief Administrative Officer of the Buckeye Cablevision, Inc. ("Buckeye").

2. As part of my duties with Buckeye, I frequently am involved in retransmission consent negotiations with television broadcasters. I have been one of Buckeye's negotiators involved in discussions with Sinclair Broadcast Group (and previously with Barrington Broadcasting) regarding retransmission of WNWO-TV, Toledo, Ohio, on Buckeye's cable system serving communities in the Toledo Designated Market Area.

3. I have reviewed the foregoing Complaint and the facts contained therein are true and correct to the best of my knowledge, information, and belief formed after reasonable inquiry.

4. I declare under penalty of perjury that the foregoing is true and correct.

Brad Mefferd
Chief Administrative Officer
Buckeye Cablevision, Inc.
5555 Airport Highway, Suite 110
Toledo, OH 43615
(419) 724-9802

Executed on: February 14, 2014

CERTIFICATE OF SERVICE

I, Rayya Khalaf, legal secretary with the law firm of Cooley LLP hereby certify that copies of the foregoing "Complaint" were served as specified below on the 18th day of February 2014 to the following:

Steven Broeckaert**
Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Mary Beth Murphy**
Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Simon Banyai**
Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Clifford M. Harrington*
Pillsbury Winthrop Shaw Pittman, LLP
2300 N Street, NW
Washington, DC 20037
Counsel for Sinclair Broadcast Group

Rayya Khalaf
Rayya Khalaf

* Via Electronic Mail and U.S. Mail
** Via Electronic Mail and Hand Delivery

Cooley LLP

Jason E. Rademacher
T: +1 202 776 2370
jrademacher@cooley.com

VIA HAND DELIVERY

February 18, 2014

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

RE: Buckeye Cablevision Complaint Against Sinclair Broadcast Group
Request for Confidential Treatment – Confidential Attachments

Dear Ms. Dortch:

On behalf of Buckeye Cablevision ("Buckeye"), attached please find an unredacted and original version of Buckeye's Complaint (the "Complaint") in the in the above-referenced proceeding. Pursuant to Sections 0.457(d) and 0.459(a)(2), 47 C.F.R. §§ 0.457(d); 0.459(a)(2) of the Commission's rules, Buckeye hereby requests that the Commission withhold from public inspection, and accord confidential treatment to the information marked as Confidential in the attached Complaint and Exhibits 1 and 2 thereto. A copy of the Complaint with the relevant portions of the text of the Complaint and the Exhibits redacted was filed today through the Commission's Electronic Comment Filing Service.

The redacted passages in the Complaint and Exhibit 2 thereto include information provided by Nielsen Media Research that is provided to Buckeye on a confidential basis. Nielsen has agreed to permit Buckeye to include that data in the Complaint on the condition that Buckeye make every effort to ensure that such information is not made available to the general public. The information consists of television ratings provided by Nielsen for the Toledo market. Such information falls squarely within Section 0.457(d) of the Commission's rules, as well as Exemption 4 of the Freedom of Information Act ("FOIA"),[1] and thus should not routinely be made available for public inspection. Exemption 4 of FOIA provides that the statute's public disclosure requirement "does not apply to matters that are (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential."[2] The attached information should be afforded confidentiality under Exemption 4 because it is sensitive commercial information that Buckeye uses to formulate strategy in the Toledo market. Buckeye has obtained this information only subject to contractual confidentiality provisions. The

[1] *See* 5 U.S.C. § 552(b)(4).

[2] *Id.* The Commission's rules mirror this language. *See* 47 C.F.R. § 0.457(d).

multichannel video distribution market is highly competitive and the information for which confidentiality is sought would be very valuable to Buckeye's competitors and future negotiating partners. Disclosure would permit interested parties insights into Buckeye's evaluation of the retransmission consent marketplace as well as into Buckeye's negotiating strategies. Such material customarily would not be released to the public by Buckeye, none of the information has been publicly disclosed, and any release of the information contained therein would cause substantial harm to Buckeye's competitive position.

Exhibit 1 consists of a communication from Sinclair Broadcast Group ("SBG") to Buckeye that was part of the companies' retransmission consent negotiation. Buckeye customarily keeps such communications private to protect the integrity of the negotiating process and to avoid revealing important elements of each side's negotiating strategy. Buckeye includes Exhibit 1 only because it alleges that the email included therein is evidence of a violation of the FCC's rules by SBG. Public disclosure of this and other correspondence between Buckeye and SBG is unwarranted and would not serve any public interest. Therefore, Exhibit 1 also satisfies 0.457(d) of the Commission's rules and should not be publicly disclosed.

Accordingly, Buckeye requests that the documents for which confidentiality is sought be kept confidential by the Commission for a period of five years. By the end of that period, the retransmission consent market is likely to have changed sufficiently that the value of these documents will have declined to an extent where public disclosure is unlikely to be commercially damaging.

Please contact me if you have any questions about this matter.

Very truly yours,

Jason E. Rademacher

JR:rkk

Attachment