

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

In the Matter of)	
)	
Buckeye Cablevision, Inc.,)	
)	
Complainant)	File No. CSR-8874-C
)	
<i>Against</i>)	MB Docket No. 14-33
)	
Sinclair Broadcast Group)	
Defendant)	

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

REPLY

BUCKEYE CABLEVISION, INC.

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March 26, 2014

SUMMARY

After 101 days, Sinclair continues to deprive Toledo cable subscribers of WNWO-TV's NBC network programming. Average citizens in Toledo are being harmed, but the Answer confirms that Sinclair remains intransigent – it will not even negotiate with Buckeye unless Buckeye makes an offer that meets Sinclair's unreasonable demands. Indeed, Sinclair will not negotiate with Buckeye unless Buckeye makes an offer that conforms to what Sinclair regards as a "traditional" form of a retransmission consent agreement. Failing to negotiate is a clear violation of the good-faith bargaining rules, and it can only be remedied by Commission action.

This case is not about the rates Sinclair is asking for WNWO-TV. Sinclair's Answer, however, is little more than a long and misleading explanation for why Sinclair believes low-rated WNWO-TV should be the most richly compensated broadcast signal in the Toledo market. While Buckeye disagrees with Sinclair's assessment, Buckeye has not withdrawn from the negotiating process. That is why this case is not about rates – it's about requiring Sinclair to follow the modest good faith bargaining rules that Congress and the FCC have put in place to govern this process. It's about reminding Sinclair that it can't refuse to negotiate or put unfair preconditions on negotiations. The Complaint shows that Sinclair has failed to carry out its good faith bargaining responsibilities, and the Answer shows that Sinclair is committed to maintaining that position. This case is ripe for immediate adjudication, and Toledo viewers should not have to wait an extended period for a resolution.

Buckeye continues to believe that a deal for carriage of WNWO-TV is possible, but it needs Sinclair to re-engage in good faith negotiations. If the Answer is any guide, however, Sinclair has no desire to do so. Sinclair is more intent on trying to get Buckeye's customers to switch to another MVPD than on engaging in good faith negotiations with Buckeye. Apparently, only Commission action can change that.

The Commission should not be fooled by Sinclair's efforts to portray Buckeye as a "bully" trying to force unfairly low retransmission consent rates on WNWO-TV. Sinclair is the party that blew into Toledo demanding more than double the rates received by any other station in the market. And Sinclair is the party that broke off negotiations within hours of Buckeye's latest offer, which represented a substantial increase in the value offered for carriage of WNWO-TV. While Sinclair takes great pains to seem reasonable in its Answer, its slash-and-burn conduct of negotiations with Buckeye has been anything but. Buckeye's subscribers should not be punished because Sinclair apparently can afford a long-term blackout in Toledo due to Sinclair's collection of huge retransmission consent fees for its other 166 stations. The Commission has the authority to curb Sinclair's abuses of its market power, and it should exercise that power in this case.

By refusing to negotiate, Sinclair is trying to make an example of Buckeye. Mess with Sinclair and your subscribers will lose network programming – maybe permanently, as Sinclair's negotiators have hinted. The Commission should not allow Sinclair to use the Commission's rules to make this point. Instead, the Commission should issue an order requiring Sinclair to return to the negotiating table and remind Sinclair that it must negotiate for carriage with the Toledo marketplace in mind and that it cannot force Buckeye to carry its unlaunched cable channels as a condition of carrying WNWO-TV. Given the punishment that Sinclair has already imposed on Toledo cable viewers, Buckeye asks the Commission to act on this matter without further delay.

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Buckeye Cablevision, Inc. ("Buckeye") hereby replies to Sinclair Broadcast Group's ("Sinclair's") Answer to Complaint (the "Answer") in the above captioned proceeding.¹

I. INTRODUCTION

Late-filed and riddled with misstatements, Sinclair's Answer emphatically confirms that Sinclair has no intention to engage in further good-faith negotiations with Buckeye absent Commission intervention. The following undisputed facts establish Sinclair's violation of the core *per se* good-faith duty to negotiate retransmission consent: (1) Sinclair negotiated with Buckeye for only two and one-half months; (2) Buckeye made the last offer of terms exchanged between the parties on February 7, 2014; (3) Sinclair responded by unilaterally terminating negotiations and announcing that fact to the public the day after Buckeye filed the Complaint; and (4) Sinclair has publicly proclaimed that no more negotiations will take place. Sinclair's Answer confirms it has no intention of responding to Buckeye's latest offer. Meanwhile,

¹ See 47 C.F.R. §76.7(c). This reply is timely filed within 10 days of service of the Answer. See *id.* at §§ 1.4(h); 76.7(c)(3).

106,000 Toledo cable households are deprived of access to NBC network programming with no end to this dispute in sight. Toledo is a relatively small media market that does not receive much national attention when a station goes dark. And that's why Toledo viewers must rely on the Commission to enforce the rules; rules that are in place to protect the television viewing public. There is no reason to further delay a decision in this case. The Commission should immediately grant the Complaint and order Sinclair to negotiate.

Sinclair's effort to play the victim in its Answer is both absurd and offensive to the Toledo television viewing public Sinclair is licensed to serve. Sinclair came to Toledo just five months ago, with its November 2013 purchase of ratings basement dweller WNWO-TV. Sinclair promptly demanded to become the highest compensated broadcaster in Toledo, with rates that would have been double what any other station receives from Buckeye. And Sinclair further demanded that Buckeye commit to future carriage of Sinclair's unlaunched cable networks – whatever they may turn out to be. Now that it is addressing the Commission, however, Sinclair tries to portray its conduct as reasonable and Buckeye as a “bully.” The reality is that Sinclair is a national conglomerate and Buckeye a small local cable operator trying to protect its customers from the huge rate increases that would result from Sinclair doubling its retransmission consent rates every three years.² The only party in this relationship throwing its

² In its disingenuous efforts to paint Buckeye as a bad actor, Sinclair makes several references to a past retransmission consent dispute Buckeye had with another Toledo television station. *See Answer at ii.* While that negotiation is irrelevant here, it is worth noting that it involved similar circumstances as the current dispute. A nationwide conglomerate bought the underperforming Toledo Fox affiliate and tried to demand higher retransmission consent rates for that station than Buckeye was paying for Toledo's market-leading stations. That negotiation also involved the now-discredited practice of joint retransmission consent agreements for multiple non-commonly owned local TV affiliates and the disputed operation of an after-acquired station clause in Buckeye's retransmission consent agreement with the national conglomerate. In any event, the case settled after a month-long blackout at rates that are less than half those originally demanded by Sinclair here. Buckeye is not embarrassed to stand up for its customers against

weight around is Sinclair, which now says that it is willing to negotiate – but only when Buckeye makes an offer that Sinclair likes.³ That cavalier approach constitutes a refusal to engage in good-faith negotiations, which is a flagrant violation of the Commission’s good faith bargaining rules.

In addition, Sinclair’s demand that Buckeye carry whatever future cable networks Sinclair decides to launch is so far outside what retransmission consent is supposed to be about that it constitutes a separate, egregious showing of bad faith. Sinclair’s nonsensical argument that the “market” for retransmission consent in Toledo includes national, cable-exclusive programming networks when Sinclair’s programming is locally licensed and available free-over-the-air cannot be seriously considered as a defense to its manifest bad faith failure to negotiate.

Sinclair’s Answer struggles to convince the Commission that this case is all about retransmission consent rates and that Buckeye is trying to get the agency to intervene and set rates. That is not true. This case is about Sinclair’s open, public refusal to negotiate retransmission consent. Buckeye recognizes that the current rules do not permit the Commission to judge or approve retransmission consent rates in individual deals, and the Complaint requests

national conglomerates who come to Toledo to try to pad their bottom-lines on the backs of Buckeye’s subscribers.

³ Sinclair also complains that Buckeye is using its parent company’s ownership of the *Toledo Blade* to gain an unfair advantage in negotiations. See Answer and 2, 12 and nn.4, 8. That is preposterous. The ombudsman’s report that Sinclair refers to actually says that the *Blade*’s coverage has been fair. Unlike the *Blade*, WNWO-TV has been using its signal to air polemical, one-sided, and dishonest “news” stories and advertisements about the dispute. See *The Reason WNWO Is Off Buckeye Cable*, <http://www.youtube.com/watch?v=9h1Vpo3EruE>; *Say No To Buckeye; Keep WNWO*; <http://www.youtube.com/watch?v=2LIF1LQX3JI>; *Sinclair Hosts Town Hall To Discuss Negotiations With Buckeye Cable*, <http://www.youtube.com/watch?v=hZ8dQjee8IU>. That Sinclair, a national conglomerate with a market capitalization of \$2.6 billion, is somehow being treated unfairly due to the *Blade*’s balanced coverage of this dispute is not credible.

no such relief. Buckeye has simply asked the Commission to require Sinclair to negotiate and to confirm negotiating standards that are already a part of the Commission's rules.

The Answer shows that Sinclair has no respect for the Commission's rules and considers itself invulnerable to punishment for misconduct that has only a modest impact on Sinclair's bottom line but deprives more than 100,000 TV viewers of service that the law requires Sinclair to provide. Apparently Sinclair believes that as long as it puts reasonable-sounding words on paper, it can't be punished, regardless of its actual conduct. But Commission precedent shows that there are limits beyond which Commission licensees like Sinclair may not go in ignoring the Commission's rules and openly flouting the Commission's authority.⁴ The Commission should remind Sinclair of that reality by ordering it to negotiate in good faith, without abusive preconditions and with the Toledo market as the measure of the value of WNWO-TV.

II. THE ANSWER IS UNTIMELY AND SHOULD BE DISMISSED WITHOUT CONSIDERATION.

Sinclair's Answer violates the Commission's pleading rules and should be dismissed. Section 76.7(b)(2) of the Commission's rules establishes that answers must be filed within 20 days of service of the complaint.⁵ Buckeye's Complaint was served on Sinclair by electronic and U.S. Mail on February 18, 2014, and Sinclair admitted in an Initial Response that it received the Complaint on that date.⁶ Accordingly, Sinclair's Answer was due at the Commission no later

⁴ See *RKO General, Inc.*, 78 FCC 2d 1 (1980) (subsequent history omitted).

⁵ 47 C.F.R. §76.7(b)(2).

⁶ See Letter from Clifford M. Harrington, Counsel for Sinclair, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated Feb, 21, 2014, at n.1 (the "Initial Response"). Even if Sinclair had not admitted to receiving service electronically on February 18, 2014, that date still would be the appropriate date for determining the timeliness of Sinclair's reply because, under the Commission's rules, service by mail is complete upon mailing. See 47 C.F.R. §1.47(f).

than March 10, 2014. Sinclair filed the Answer on March 13, 2014, three days after the date required by the rules.⁷

Absent authorization from the Commission or some overriding public interest, pleadings filed outside the periods permitted by the rules may be dismissed.⁸ Indeed, even in cases that have presented important Constitutional claims not present here, the Commission has returned defective pleadings without further consideration.⁹

That result is particularly appropriate here because the public interest would be further disserved by accepting Sinclair's late-filed pleading. Sinclair has been denying Toledo cable customers access to WNWO-TV's signal since December 15, 2013. Those viewers should not have to wait even one single day longer for an order requiring Sinclair to resume negotiating. They certainly shouldn't have to wait on account of Sinclair's negligence. Moreover, accepting Sinclair's Answer is not necessary to developing a complete record in this proceeding.

Buckeye's main allegation – that Sinclair wrongfully terminated negotiations after just two and

⁷ Buckeye filed a supplement to the Complaint on February 20, 2014. *See* Letter from Michael D. Basile, Counsel for Buckeye, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated Feb. 20, 2014 (the "Supplement"). The Supplement should have no impact on the required filing date for Sinclair's Answer. But even if it did, Sinclair's response should have been filed no later than March 12, 2014.

⁸ *See, e.g., Winstar Broadcasting Corp.*, 20 FCC Rcd 2043, 2049 (2005); Amendment of the Commission's Rules Regarding the 37.0 – 38.6 GHz and 38.6 – 40.0 GHz Bands, *Memorandum Opinion and Order*, 15 FCC Rcd 10565, 10566 (2000); *Star Wireless*, 28 FCC Rcd 243 paras. 11-13 (Wireless. Telecomm'cns Bur. 2013); *Sainte Partners II, LP*, 20 FCC Rcd 14723 para. 4 (Wireless Telecomm'cns Bur. 2005); *Corpus Christi*, 19 FCC Rcd 21871 n.8 (2004). *See also TVT License, Inc.*, 22 FCC Rcd 13591 n.1 (treating late-filed oppositions as informal requests for Commission action and deciding not to address them on the merits).

⁹ *See* Complaints Against Various Licensees Regarding Their Broadcast of the Fix Television Network Program *Married By America* on April 7, 2003, *Order*, 23 FCC Rcd 5699 (Enf. Bur. 2008) (dismissing petition for reconsideration of indecency fines due to non-compliance with pleading rules). The Commission permits parties to request an extension of time, but such motions must be noticed to the opposing party and filed seven days before a responsive pleading is due. *See* 47 C.F.R. §1.46. In this case, Sinclair filed its pleading without requesting leave to file late, without notifying Buckeye that its response would be untimely, and without even acknowledging that the Answer was being filed out-of-time.

one-half months -- was admitted by Sinclair in its Initial Response.¹⁰ Nothing in the Answer is necessary to adjudication of whether Sinclair's has refused to negotiate in violation of the rules.

In accordance with the rules, the Commission should dismiss the Answer, deem the allegations in the Complaint admitted, and grant the relief sought in the Complaint.

III. SINCLAIR ESSENTIALLY CONCEDES ITS BAD FAITH, AND THE COMMISSION SHOULD GRANT THE COMPLAINT.

Even assuming the Answer should be considered – and it should not – Sinclair's arguments on the merits of Buckeye's Complaint leave no doubt that Sinclair is in plain violation of the good faith bargaining rules and will not negotiate unless ordered to do so by the Commission. Accordingly, the Commission should grant Buckeye the relief it seeks.

A. The Answer Confirms Sinclair's Refusal to Negotiate in Violation of the Good Faith Requirements.

Sinclair argues that it has satisfied its duty to negotiate and has no further good faith obligations.¹¹ According to Sinclair, the Commission has recognized that impasse is possible, and this means that Sinclair's declaration that the parties have reached such an impasse and its subsequent refusal to negotiate cannot be a violation of the rules. Sinclair's construction of the rules is absurd. It is undisputed that the parties negotiated for just two and one-half months before Sinclair announced that it was terminating negotiations. That is hardly the "unending procession of extended negotiations" that the Commission has recognized signify an impasse.¹²

¹⁰ The Initial Response bizarrely claims that the Sinclair's press release announcing that it would not negotiate was somehow authorized by the Commission. Initial Response at 2. Sinclair's claim that the Commission's "concerns that the public remain informed" authorized Sinclair to announce to Toledo that it would henceforth violate the Commission's rules is a clear demonstration of the low level of respect Sinclair has for the Commission and its rules.

¹¹ See Answer at paras. 22-27.

¹² Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Reciprocal Bargaining Obligation, Report and Order, 20 FCC Rcd 10339 at para. 14 (2005).

Sinclair’s mechanical recitation of that standard and assertion that it has been satisfied show again Sinclair’s contempt for the Commission and its rules. Sinclair tries to embellish this argument by suggesting that Buckeye wasn’t negotiating seriously anyway – it describes Buckeye’s offers as “illusory” 16 times and “chimerical” twice.¹³ But the fact is that Buckeye made several *bona fide* offers, each incrementally more valuable than the last. Sinclair offered significant concessions for the first time just two days before it terminated negotiations. That’s not an impasse; it’s an active negotiation, and the duty to negotiate requires both parties to bargain until that active negotiation is exhausted. Sinclair has failed to meet that standard.

Second, Sinclair audaciously claims that it “never indicated to Buckeye that it was not prepared to continue negotiating.”¹⁴ The last words from Sinclair’s negotiator to Buckeye were “I view negotiations to be at an end. All the best.”¹⁵ That communication is in the record of this proceeding and it includes no suggestion that the negotiations would continue if Buckeye made another offer.¹⁶ Actually, that communication was in response to Buckeye’s latest offer, which is still in front of Sinclair and to which Sinclair has not responded. A few days after that communication, Sinclair announced to Toledo through a press release that negotiations were over.¹⁷ Again, there was no suggestion in that press release that Sinclair was “prepared to

¹³ See Answer, *passim*.

¹⁴ See Complaint at para. 35.

¹⁵ See *id.* at Exhibit 1.

¹⁶ Sinclair now claims that its description of negotiations as “at an end” were really just a solicitation of another “legitimate” offer. *Id.* at n.23. The communication is in the record and includes no solicitation of a new offer. Sinclair then claims that *Buckeye* is seeking to “confuse and mislead the FCC.” *Id.* at 19. On the contrary, Buckeye simply wants the Commission to apply the common sense meaning of Sinclair’s words, which cannot be squared with Sinclair’s obligations under the Commission’s rules.

¹⁷ In the Initial Response, Sinclair denied that the press release was in retaliation for Buckeye filing the Complaint. Initial Response at 1-2. Indeed, it claims the press release was released before Sinclair even knew the Complaint was filed. *Id.* at n.1. Sinclair’s complex explanation for how it remained unaware of the Complaint 12 hours after it was received by

continue negotiating.” Buckeye understands that Sinclair wants to portray itself to the Commission as a reasonable negotiating partner, but Sinclair’s can’t make words mean whatever Sinclair wants them to mean. There is no reasonable construction of Sinclair’s statement that negotiations are “at an end” other than as a termination of negotiations.

Finally, Sinclair claims that it is fulfilling its duty to negotiate by waiting for Buckeye to make “a non-illusory offer to Sinclair.”¹⁸ In Sinclair’s view, Buckeye’s offers have been “illusory” because (1) the rates weren’t high enough; and (2) they included proposed terms that are not “market standard in retransmission consent negotiations.”¹⁹ In other words, Buckeye’s offers have been “illusory” because Sinclair doesn’t like them, and Sinclair will be happy to negotiate with Buckeye when Buckeye makes an offer Sinclair likes. Of course, the good faith bargaining rules say absolutely nothing about the form of offers negotiating parties must make. Sinclair is not absolved of its duty to negotiate merely because it doesn’t like the form of Buckeye’s offers.

Moreover, Sinclair also concedes, as it must, that “parties should . . . be able to . . . request new or unusual terms.”²⁰ But somehow, Buckeye’s inclusion of creative ideas to bridge the gap between the parties’ estimation of WNWO-TV’s worth justifies Sinclair walking out on negotiations. And absent from Sinclair’s criticism of Buckeye’s various offers is the undeniable fact that have Buckeye has consistently included in its offers the exact terms that Sinclair claims it wants – a traditional straight per-subscriber fee for retransmission of WNWO-TV. Buckeye has added sweeteners to the offers to allow Sinclair to realize additional value for WNWO-TV’s

counsel is implausible on its face, but in any event, the Commission need not resolve this issue to grant the Complaint.

¹⁸ See Answer at para. 35.

¹⁹ See *id.* at 5.

²⁰ See *id.* at n.19.

underperforming signal, but Sinclair’s claim that Buckeye is seeking a deal that is unlike market-standard retransmission consent agreements is just not true.

In the end, Sinclair’s “illusory offer” argument is just a fancy way of admitting that Sinclair will only negotiate with Buckeye on Sinclair’s terms. But the rules require Sinclair to negotiate with a “sincere desire to reach [an] agreement” that reflects “competitive marketplace considerations.”²¹ Sinclair’s decision to condition future negotiations on Buckeye offering a deal in the form Sinclair prefers fails to meet that standard, as does Sinclair’s entire conduct of this negotiation.

B. Sinclair’s Claim that the Parties Have Reached a Negotiating Impasse Are Meritless.

Sinclair argues that the FCC should find the parties are at an impasse simply because that’s how Sinclair views the state of the negotiation.²² But Sinclair has a fundamental misunderstanding of what an impasse is. The concept of impasse has been elaborated in the labor collective bargaining context, an area of law the Commission has recognized as an “analogous source of law” for determining the scope of parties’ good faith bargaining responsibilities.²³ Precedent developed under the Taft-Hartley Act demonstrates that impasse is reached when “good faith negotiations have exhausted the prospects for conclusion of an agreement.”²⁴ These cases hold that “[i]f either party remains willing to move further toward an agreement, an impasse cannot exist.”²⁵ In determining whether impasse has been reached, the

²¹ Implementation of the Satellite Home Viewer Improvement Act of 1999, 15 FCC Rcd 5445 para. 32 (2000) (the “*Good Faith Order*”).

²² See Answer at 3, 10.

²³ *Good Faith Order*, 15 FCC Rcd 5445 para. 22 (2000) (citing the Labor Management Relations Act (the “Taft-Hartley Act”).

²⁴ See *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).

²⁵ See *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991). In making initial determinations of whether an impasse exists, the National Labor Relations Board

relevant issue is whether the parties' objective actions and communications with each other show that further bargaining is likely to be fruitless.²⁶

By these standards, Sinclair and Buckeye plainly have not reached an impasse. Buckeye remains willing to negotiate – it made the most recent offer between the parties, and Sinclair professes its willingness to negotiate as well. Moreover, the following objective evidence indicates that additional negotiations are likely to yield a deal: negotiations took place over only a relatively short period of time, the period immediately before Sinclair refused to continue negotiating produced significant movement towards an agreement from both sides, and Sinclair concedes that its last offer was not its final offer. The reality is that by law, Buckeye and Sinclair never reached impasse.²⁷ Rather, Sinclair tired of negotiating with Buckeye and took unwarranted unilateral action in terminating negotiations. Sinclair's refusal to negotiate under these circumstances would be unlawful under the Taft-Hartley Act and should be deemed a violation of the Commission's good faith rules as well.

C. Sinclair's Demand for Carriage of Its Unlaunched Cable Networks Violates the Good Faith Rules.

By insisting that Buckeye agree to carry one or more of Sinclair's unlaunched cable services as a condition for carriage of WNWO-TV, Sinclair violates the "totality of the

examines a number of factors, including "[t]he bargaining history, the good faith of the parties in the negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting*, 163 NLRB at 478.

²⁶ See *Am. Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968) (impasse exists when "there [is] no realistic possibility that continuation of discussion . . . [would be] fruitful.").

²⁷ See, e.g., *Wayview Care Ctr. v. Nat'l Labor Relations Board*, 664 F.3d 341 (D.C. Cir. 2011) (no impasse where recent negotiations showed substantial movement in negotiations immediately preceding employer's declaration of impasse); *Monmouth Care Center v. NLRB*, 672 F.3d 1085 (D.C. Cir. 2012) (no impasse where brief negotiations failed to yield agreement and employer failed to inform employees' negotiator that latest offer was its best and final offer).

circumstances” test of good faith bargaining. Sinclair falsely claims that it “never required the carriage of these channels (the carriage that Buckeye was providing was simply taken into consideration for pricing the station)” and that “Sinclair’s position was not set in stone.”²⁸ In fact, Sinclair’s negotiators consistently referred to carriage of the future cable channels as a “must-have” and Buckeye’s refusal to accede to this demand was one of the factors that led Sinclair to deny the extension of carriage of WNWO-TV beyond December 15, 2013. None of Sinclair’s offers, however, has given Buckeye the choice of whether or not to carry these channels. Characteristic of the Answer, Sinclair’s claim that it has never sought to require carriage of its cable channels is simply not true.

Similarly, the Commission should dismiss Sinclair’s argument that tying carriage of unlaunched, affiliated networks is consistent with the good faith rules. While the Commission has held that making such carriage a part of retransmission is not a *per se* violation of the rules, it has also warned that the practice is subject to abuse, would be monitored, and could violate the rules based on an appropriate showing of harm.²⁹ This is another obvious case where Sinclair has taken a Commission rule that assumes parties will act in good faith and pushed it far beyond its reasonable limits. What Sinclair is trying to do is get Buckeye (and presumably other cable operators) to effectively finance its launch of a new cable service by demanding both unreasonable retransmission consent fees and guaranteed carriage of unknown, untested networks. Sinclair repeatedly exhorts the Commission to leave this negotiation to the “market,” but no rationally functioning market would permit or reward such practices. The harm here is obvious – over 100,000 customers lack NBC programming in part due to Sinclair’s insistence

²⁸ See Answer at para. 32, n.21.

²⁹ Carriage of Digital Television Broadcast Signals, *First Report and Order*, 16 FCC Rcd 2598 at paras. 34-35 (2001).

that Buckeye finance the launch of its cable networks.³⁰ The Commission should confirm that Sinclair cannot require Buckeye to purchase whatever networks Sinclair one day decides to launch as a condition of carrying WNWO-TV.³¹

D. Sinclair’s Determination To Ignore the Toledo Retransmission Consent Marketplace Violates the Good Faith Bargaining Rules

The Complaint also asked the Commission to instruct Sinclair that it is required to bargain for retransmission of WNWO-TV in the Toledo DMA – not for a generic Sinclair station wherever it operates. Sinclair claims that it is already doing so, but the facts and Sinclair’s arguments demonstrate the opposite. First, Sinclair claims its negotiations duly account for the Toledo market because Buckeye pays more for national linear cable networks than Sinclair is asking for WNWO-TV.³² Sinclair is not a national linear cable network with well-known programming that cable subscribers expect when they buy Buckeye’s cable services. In contrast, WNWO-TV is a relatively unpopular local programming channel that viewers watch only because it carries NBC network programming. Moreover, national linear cable networks are not available free over-the-air like WNWO-TV. Buckeye has long maintained that national linear cable services overcharge for their programming, but without those networks, Buckeye wouldn’t have a service to sell. WNWO-TV can make no such claim. It is worth noting that Buckeye

³⁰ The Commission should also ignore Sinclair’s argument that its attempt to tie carriage of WNWO-TV to its unlaunched cable networks is irrelevant because the parties are too far apart on rates to reach a deal anyway. Answer at para. 32. Sinclair cannot violate the Commission’s rules merely because it thinks an agreement is out of reach. When the parties begin negotiating again, Sinclair must understand what rules govern those negotiations. A Commission order on this issue is imperative.

³¹ Sinclair’s historical arguments about the prevalence of tying in retransmission consent negotiations and the presence of cable networks affiliated with broadcast companies is disingenuous. Complaint at paras. 17, 32. No national broadcast networks have affiliates in Toledo, so Buckeye’s carriage of networks affiliated with those networks have nothing to do with the unlawful tying of retransmission consent to carriage of unlaunched affiliated cable channels.

³² See Answer at para. 6, 8, 17, 20.

actually pays less for nearly all its cable networks than Sinclair has asked for WNWO-TV. So Sinclair's claim that its offers reflect marketplace considerations as long as there is some programming service charging more than WNWO-TV is simply wrong.

The real marketplace for WNWO-TV's signal is the market for retransmission of TV broadcast signals in Toledo, Ohio. And Sinclair is asking to be by far the top-compensated local major network affiliate, despite the fact that its viewership is consistently at or near the bottom of Toledo broadcast stations. Again, that evidence is in the record, though Sinclair doesn't discuss it at all.³³ Under Buckeye's proposals, Sinclair would be guaranteed substantial compensation for WNWO-TV that would place it at or near the top of station compensation in the Toledo market. What Sinclair objects to is Buckeye's efforts to add more potential compensation for retransmission of WNWO-TV if the station pulls itself out of the ratings basement. Sinclair wants that money up front; Buckeye would prefer to pay it if and when Sinclair improves WNWO-TV's historical poor performance.

This is hardly an unbridgeable gap, and Buckeye has proposed innovative ways to get the parties to a value proposition both sides can accept. Sinclair denigrates Buckeye's offers to create value for Sinclair without overcompensating it for WNWO-TV on a per-subscriber basis, but it is simply not true that Buckeye has asked the FCC to "order Sinclair to consent to carriage terms Buckeye dictates."³⁴ Buckeye has not asked the FCC to order Sinclair to agree; it has asked the FCC to order Sinclair to negotiate based on marketplace considerations. Sinclair has failed to carry out its responsibility to conduct such negotiations on its own, so the only alternative is a Commission order that it do so.

³³ See Complaint at Exhibit 2.

³⁴ See Answer at para. 26.

IV. BUCKEYE RENEWS ITS REQUEST FOR EXPEDITED RESOLUTION OF THIS MATTER.

At this point, WNWO-TV has been withheld from Toledo viewers for over three months, and Buckeye has heard nothing from Sinclair's negotiators since they terminated negotiations on February 7, 2014. 106,000 Toledo cable subscribers have now been without NBC network programming for 101 days, and Sinclair will not even deign to negotiate with Buckeye.

This case demands immediate Commission action. Sinclair walked away from good faith bargaining, and the Commission should instruct it that the good faith rules require it to return to good faith bargaining. Negotiations are the only way this dispute will be resolved, and the Commission should require that Sinclair reengage.

V. CONCLUSION

For the foregoing reasons and those laid out in the Complaint, Buckeye requests that the Commission order Sinclair to negotiate with Buckeye for retransmission of WNWO-TV consistent with marketplace considerations in Toledo.

Respectfully Submitted,

BUCKEYE CABLEVISION, INC.

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

March 26, 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 26th day of March 2014 to the following:

Chairman Tom Wheeler*
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Commissioner Mignon Clyburn*
Federal Communications Commission
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