

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Northwest Broadcasting, L.P.,) MB Docket No. 15-151
Broadcasting Licenses, Limited Partnership,)
Mountain Licenses, L.P.,) CSR-8910-C
Stainless Broadcasting, L.P.,)
Eagle Creek Broadcasting of Laredo, LLC)
Bristlecone Broadcasting LLC, and)
Blackhawk Broadcasting LLC)
v.)
DIRECTV, LLC)

MEMORANDUM OPINION AND ORDER

Adopted: November 6, 2015

Released: November 6, 2015

By the Chief, Media Bureau:

I. INTRODUCTION

1. We deny a complaint by seven commonly controlled broadcast television stations, herein referred to collectively as Northwest, alleging that DIRECTV violated its duty to negotiate retransmission consent in good faith. Northwest filed an Emergency Complaint for Failure to Negotiate Retransmission Consent in Good Faith and Request for Relief ("Complaint") against DIRECTV, LLC ("DIRECTV"), pursuant to Sections 76.7 and 76.65 of the Commission's rules. During negotiations of its retransmission consent agreement, Northwest provided DIRECTV with pricing information from recent retransmission consent agreements with other multichannel video programming distributors ("MVPDs"). Northwest requested that DIRECTV provide similar pricing information so the parties can establish a fair market value for the Northwest stations' signals. DIRECTV refused to provide the information Northwest requested. Northwest requests that the Commission order DIRECTV to provide data showing the rates it pays other broadcasters under its retransmission consent agreements. For the reasons set forth below, we deny

1 The seven commonly-controlled broadcast television stations are 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.

2Emergency Complaint for Failure to Negotiate Retransmission Consent in Good Faith and Request for Relief, MB Docket No. 15-151, CSR-8910-C (filed June 11, 2015) ("Complaint").

3 Northwest also filed a confidential supplement which contains email correspondence between Northwest and DIRECTV. Letter from Dennis P. Corbett, Counsel for Northwest, Lerman Senter PLLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, Request for Confidential Treatment, MB Docket No. 12-1, CSR-8910-C (filed June 11, 2015). DIRECTV filed an Answer and Northwest filed a Reply and a letter. DIRECTV, LLC, Answer, MB Docket No. 15-151, CSR-8910-C (filed July 1, 2015) ("Answer"); Northwest, Reply to Answer of DIRECTV, LLC, MB Docket No. 15-151, CSR-8910-C (July 13, 2015) ("Reply"). Letter from Dennis P. Corbett, Counsel for Northwest, Lerman Senter PLLC, to William T. Lake, Chief, Media Bureau, Federal Communications Commission, Media Docket No. 15-151, CSR-8910-C (filed Sept. 2, 2015) ("Letter").

Northwest's complaint.

II. BACKGROUND

2. Section 325(b)(3)(C) of the Communications Act of 1934, as amended (the "Act"), obligates broadcasters and multichannel video programming distributors ("MVPDs") to negotiate retransmission consent in good faith.⁴ Specifically, Section 325(b)(3)(C)(iii) of the Act directs the Commission to establish regulations that "prohibit a multichannel video programming distributor from failing to negotiate in good faith for retransmission consent under this section."⁵

3. In its *Good Faith Order*, the Commission adopted rules implementing the good faith negotiation provisions and the complaint procedures for alleged rule violations.⁶ The *Good Faith Order* adopted a two-part test for good faith.⁷ The first part of the test consists of a brief, objective list of negotiation standards which, if violated, constitute a *per se* breach of the duty to negotiate in good faith.⁸ The second part of the test considers the totality of the circumstances. Under this standard, a broadcast television station or MVPD may present facts to the Commission which could, even though they do not allege a violation of the objective standards, constitute a failure to negotiate in good faith.⁹ A television broadcast station or MVPD believing itself aggrieved under the good faith rules may file a complaint pursuant to Section 76.7 of the Commission's rules.¹⁰ The burden of proof in good faith complaints is on

⁴ 47 U.S.C. § 325(b)(3)(C).

⁵ 47 U.S.C. § 325(b)(3)(C)(iii). The good faith negotiation requirement originally was imposed only on television broadcast stations, but a reciprocal obligation was imposed on MVPDs pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004. See *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 (2005) ("*Reciprocal Bargaining Order*").

⁶ *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, First Report and Order, 15 FCC Rcd 5445 (2000) ("*Good Faith Order*"), recon. granted in part, 16 FCC Rcd 15599 (2001).

⁷ *Good Faith Order*, 15 FCC Rcd at 5457, ¶ 30.

⁸ *Id.* at 5462-64, ¶¶ 40-46. First, a broadcast television station or MVPD ("Negotiating Entity") may not refuse to negotiate retransmission consent. Second, a Negotiating Entity must appoint a negotiating representative with authority to make binding representations on retransmission consent issues. Third, a Negotiating Entity must agree to meet at reasonable times and locations to negotiate retransmission consent and cannot act in a manner that would unreasonably delay the course of negotiations. Fourth, a Negotiating Entity may not put forth a single, unilateral proposal. Fifth, a Negotiating Entity may not fail to respond to the other party's retransmission consent proposal, and must provide the reasons for rejecting any such proposal. Sixth, a Negotiating Entity is prohibited from executing an agreement with any party requiring the Negotiating Entity not to enter into a retransmission consent agreement with any other television broadcast station or MVPD. Seventh, a Negotiating Entity must agree to execute a written retransmission consent agreement that sets forth the full understanding of the broadcaster and the MVPD. Eighth, coordination of negotiations or negotiation on a joint basis by two or more television broadcast stations in the same local market (as defined in 17 U.S.C. 122(j)) to grant retransmission consent to a multichannel video programming distributor, unless such stations are directly or indirectly under common de jure control permitted under the regulations of the Commission. Finally, a television broadcast station may not impose limitations on the ability of a multichannel video programming distributor to carry into the local market (as defined in 17 U.S.C. § 122(j)) of such station a television signal that has been deemed significantly viewed, within the meaning of § 76.54 of this part, or any successor regulation, or any other television broadcast signal such distributor is authorized to carry under 47 U.S.C. 338, 339, 340 or 534, unless such stations are directly or indirectly under common de jure control permitted by the Commission. *Id.*; 47 C.F.R. § 76.65(b)(1)(i)-(ix).

⁹ *Good Faith Order*, 15 FCC Rcd at 5458, ¶ 32; 47 C.F.R. § 76.65(b)(2).

¹⁰ 47 C.F.R. §§ 76.65(c), 76.7.

the complainant.¹¹

4. DIRECTV has been carrying the signals of the seven broadcast companies pursuant to a January 1, 2011 retransmission consent agreement.¹² This agreement was set to expire in February 2015.¹³ Northwest and DIRECTV began negotiating a new agreement in November 2014.¹⁴ Between November 2014 and March 26, 2015, DIRECTV made five carriage offers to Northwest.¹⁵ On April 3, 2015, Northwest responded to DIRECTV's March 26, 2015 offer.¹⁶ DIRECTV responded again on April 15, 2015.¹⁷ Northwest made one final offer to DIRECTV on May 17, 2015.¹⁸ DIRECTV responded with an offer on May 21, 2015 and a revised offer on May 29, 2015.¹⁹

5. On May 8, 2015, Northwest provided DIRECTV with data from more than 15 of the retransmission consent agreements it entered into in 2015, with the identity of the MVPDs involved redacted, in an effort to establish a fair market value for the retransmission of its signals.²⁰ DIRECTV refused to pay the amount that Northwest requested, stating that the amount is far greater than what it pays under any other agreement.²¹ In response, Northwest has requested that DIRECTV disclose the rates it pays other broadcasters. DIRECTV has refused to provide this information, stating that it has never received such a request and, therefore, has never given a station access to this confidential information in the course of retransmission consent negotiations.²² DIRECTV states that Northwest's May 17, 2015 offer contains rates "substantially higher, on a per-subscriber basis, than any retransmission consent agreement DIRECTV has negotiated with any broadcaster anywhere."²³ DIRECTV maintains that it responded to Northwest's offer on May 21, 2015, offering to increase the fees that would be paid to Northwest. According to DIRECTV, when Northwest did not reply to this offer, it subsequently made another counteroffer on May 29, 2015, offering Northwest even more favorable rates. Northwest did not provide a response to the May 29 offer either.²⁴

6. On September 2, 2015, Northwest filed a letter with the Commission to request a resolution of their Complaint and asked the Commission to require disclosure of relevant AT&T retransmission consent data now that the AT&T/DIRECTV merger has been consummated.²⁵

¹¹ 47 C.F.R. § 76.65(d).

¹² Complaint at 2.

¹³ DIRECTV and Northwest have extended the retransmission consent agreement beyond the original expiration date.

¹⁴ Reply at 5.

¹⁵ *Id.* at 2.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Northwest made this offer after providing DIRECTV with data from its 2015 retransmission consent agreements. *See infra* ¶ 5.

¹⁹ *See infra* ¶ 5.

²⁰ Complaint at 3.

²¹ Reply at 3, 7.

²² Reply at 4.

²³ Reply at 7.

²⁴ Reply at 3-4. Neither party disputes this version of events.

²⁵ Letter from Dennis P. Corbett, Counsel for Northwest, Lerman Senter PLLC, to William T. Lake, Chief, Media Bureau, Federal Communications Commission, Media Docket No. 15-151, CSR-8910-C (filed Sept. 2, 2015).

III. DISCUSSION

7. We find that the record fails to establish a violation of our existing good faith rules. Northwest argues that DIRECTV's refusal to disclose the amounts it pays to other broadcasters constitutes both a *per se* violation and a violation of the totality of the circumstances standard of the good faith rules.²⁶ As a remedy for DIRECTV's bad faith negotiations, Northwest requests that the Commission order discovery pursuant to Section 76.7 of the Commission's rules to require DIRECTV to provide its retransmission consent agreement pricing information so that a market price can be established for a retransmission consent agreement between Northwest and DIRECTV.²⁷ We discuss Northwest's arguments below.

8. *Per se violation.* The record fails to establish a *per se* good faith violation. Northwest contends that DIRECTV's actions violate the "*per se* good faith negotiation rule prohibiting a party from unreasonably delaying negotiations."²⁸ Northwest states that DIRECTV has refused to provide background facts necessary to successfully complete retransmission consent agreement negotiations.²⁹ In response, DIRECTV contests Northwest's characterization and states that it has provided multiple, timely offers to Northwest, including two consecutive offers in May 2015 to which Northwest did not reply.³⁰ DIRECTV argues that it is not required to provide confidential information about its other retransmission consent negotiations in order to successfully complete negotiations with Northwest.³¹

9. In the *Good Faith Order*, the Commission said that "reasonable response times and unreasonable delays will be gauged by the breadth and complexity of the issues contained in an offer."³² The Commission has also stated that the proximity of the termination of retransmission consent and impending service disruption to customers would also be a factor in determining whether a party had violated the good faith negotiation requirement. The uncontested record demonstrates that DIRECTV has provided offers and counter-offers throughout the negotiations and even made offers more favorable to Northwest in the absence of a counter-offer by Northwest. As to Northwest's argument that DIRECTV caused a delay by not providing the "background facts" requested, as discussed below,³³ we do not find any evidence that DIRECTV acted in a manner that unduly delayed the course of negotiation.

10. *Totality of the Circumstances.* We find that Northwest failed to meet its burden of proving that DIRECTV did not negotiate retransmission consent in good faith under the totality of the circumstances test. Northwest claims that DIRECTV's actions violate the totality of the circumstances test as codified in Section 76.65(b)(2) of the Commission's rules by failing to "base its price demands on demonstrable competitive marketplace considerations."³⁴ Specifically, Northwest claims that DIRECTV has violated two Commission requirements related to marketplace considerations. First, Northwest

²⁶ Complaint at iii, 9-11.

²⁷ 47 C.F.R. § 76.7.

²⁸ Complaint at iii, 10.

²⁹ *Id.* at 10.

³⁰ Reply at 4.

³¹ Reply at 4, 10-14.

³² *Good Faith Order*, 15 FCC Rcd at 5463 at ¶ 42.

³³ *See infra* ¶ 9.

³⁴ Complaint at 10. The Media Bureau stated in *Mediacom* that where counts alleging totality of the circumstances and marketplace consideration violations together were factually interrelated, the Commission would address them together. *Mediacom Communications Corp. v. Sinclair Broadcasting Group, Inc.*, 22 FCC Rcd 35, 39 ¶ (MB 2007) ("*Mediacom*").

claims that DIRECTV violated the requirement that parties “refrain from insisting on terms that are not consistent with competitive marketplace considerations”³⁵ by giving counter-offers only supported by DIRECTV’s statement that its counter-offers are consistent with marketplace conditions.³⁶ Second, Northwest claims that DIRECTV has violated the Commission’s requirement as stated in the *Good Faith Order* that retransmission consent negotiations be conducted in “an atmosphere of honesty, purpose, and clarity of process,” by withholding facts about competitive market conditions “with the apparent purpose of evading a true negotiation over a true market price.”³⁷

11. We reject these claims raised by Northwest. The Commission stated in the *Good Faith Order* that one party to a retransmission consent negotiation must provide an explanation for rejecting the other party’s offer but is not required to justify its explanations by document or evidence.³⁸ In addition, the *Mediacom* decision addressed a retransmission consent dispute with a similar set of facts and supports DIRECTV’s interpretation of the *Good Faith Order* requirements.³⁹ In that dispute, Mediacom accused Sinclair of negotiating in bad faith by insisting on terms that Mediacom claimed were inconsistent with competitive marketplace considerations.⁴⁰ Mediacom also accused Sinclair of refusing to disclose the amounts it agreed to receive in retransmission consent agreements with other cable companies.⁴¹ The Media Bureau rejected Mediacom’s argument stating that:

good faith negotiation requires both parties to explain their reasons for putting forth or denying an offer. In this instance, however, Mediacom appears to expand this requirement to the point that Sinclair must empirically prove that its offers are consistent with marketplace considerations or violate the good faith rules. Mediacom and Sinclair are sophisticated, well-established media corporations that can determine for themselves whether particular proposals reflect market conditions. Accordingly, we decline to expand the requirement in this manner.⁴²

Similarly, in a later decision addressing a good faith negotiation dispute, the Media Bureau stated that, “absent other factors, disagreement over the rates, terms, and conditions of retransmission consent – even fundamental disagreement – is not indicative of a lack of good faith.”⁴³ In the instant case, Northwest and DIRECTV disagree on the market price for Northwest’s signals. As the Commission has stated in the past, absent more, such a disagreement leading to the inability to conclude a retransmission consent agreement does not amount to bad faith.⁴⁴ Nor does the disagreement require parties to disclose

³⁵ *Reciprocal Bargaining Order*, 20 FCC Rcd at 10353, ¶ 31.

³⁶ Complaint at 9-10.

³⁷ Complaint at iii, 9-11, citing *Good Faith Order*, 15 FCC Rcd at 5455, ¶ 24.

³⁸ *Good Faith Order*, 15 FCC Rcd at 5464 at ¶ 44 (“blanket rejection of an offer without explaining the reasons for such rejection does not constitute good faith negotiation.... However, this standard is not intended as an information sharing or discovery mechanism. Broadcasters are not required to justify their explanations by document or evidence.”).

³⁹ See *Mediacom Communications Corp. v. Sinclair Broadcasting Group, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 35 (MB 2007) (“*Mediacom*”).

⁴⁰ *Mediacom*, 22 FCC Rcd at 41, ¶ 15.

⁴¹ *Id.* at 41, ¶ 14.

⁴² *Id.* at 41, ¶ 15 (MB 2007) (“*Mediacom*”). While this case applies to cable companies, the Commission has stated that the good faith obligations apply to other MVPDs in the same manner as cable companies, as Congress intended. *Reciprocal Bargaining Order* ¶ 8.

⁴³ ACC Licensee, Inc. v. Shentel Telecommunications Company, Emergency Petition for Finding of Bad Faith Retransmission Consent Negotiations and for Enforcement of Customer Notice Rules, *Memorandum Opinion and Order* 27 FCC Rcd 7584, 7587 (MB, 2012) (“*Albritton*”).

⁴⁴ *Mediacom*, 22 FCC Rcd at 45, ¶ 24; *Albritton*, 27 FCC Rcd at 7590 ¶ 15.

confidential information to support their position. For these reasons, we do not find that Northwest has demonstrated that DIRECTV's conduct violated the Commission's requirement that retransmission consent negotiations be conducted in an atmosphere of honesty, purpose, and clarity of process. Without more, we cannot conclude that DIRECTV's conduct violated the good faith negotiation requirements under the totality of the circumstances test.⁴⁵

12. *Northwest's Discovery Request.* We decline to require DIRECTV to release the retransmission consent rates it has negotiated with other broadcasters. As stated above, we do not find under the *per se* standards or the totality of the circumstances test that DIRECTV has been negotiating in bad faith. It is therefore not necessary or proper to compel DIRECTV to provide its confidential retransmission consent agreements to demonstrate that its rates are set pursuant to marketplace considerations.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that Northwest's Emergency Complaint for Failure to Negotiate retransmission Consent in Good Faith and Request for Relief against DIRECTV, LLC filed pursuant to Sections 76.65 and 76.7 of the Commission's rules IS DENIED.

14. This action is take pursuant to delegated authority under Section 0.283 of the Commission's rules.

Federal Communications Commission

William T. Lake
Chief, Media Bureau

⁴⁵ Pursuant to the STELA Reauthorization Act of 2014, the Commission recently issued a Notice of Proposed Rulemaking examining the totality of the circumstances test for determining violations of the good faith requirements in retransmission consent negotiations. *See Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, MB Docket No. 15-216, FCC 15-109 (Sept. 2, 2015). One issue raised in that proceeding is whether "an MVPD's or broadcaster's refusal to provide 'information substantiating reasons for positions taken when requested in the course of bargaining' violates the obligation to negotiate retransmission consent in good faith." *Id.* at ¶ 16 (footnote omitted). The present retransmission consent negotiation dispute is subject to existing Commission rules and precedent. This decision does not prejudice any of the issues raised in the pending proceeding.