

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

In the Matter of)	
)	
Coastal Television Broadcasting Company LLC)	
)	MB Docket No. 18-208
v.)	
)	CSR No. 8961-C
MTA Communications, LLC)	
)	
Good Faith Negotiation Complaint)	

MEMORANDUM OPINION AND ORDER

Adopted: November 2, 2018

Released: November 2, 2018

By the Chief, Media Bureau:

I. INTRODUCTION

1. On June 29, 2018, Coastal Television Broadcasting Company LLC (Coastal) filed a Good Faith Negotiation Complaint (Complaint) against MTA Communications, LLC (MTA) pursuant to Section 325(b)(3)(C) of the Communications Act of 1934, as amended (the Act), and Sections 76.7 and 76.65 of the Federal Communications Commission's (Commission) rules.¹ Coastal alleges that MTA failed to negotiate retransmission consent in good faith for carriage of Coastal's broadcast television station KTBY, Anchorage, Alaska, a Fox Network affiliate (KTBY).² MTA filed an Answer³ to which Coastal filed a Reply.⁴ For the reasons set forth below, we deny Coastal's Complaint.

II. BACKGROUND

2. Section 325(b)(3)(C) of the Act obligates broadcasters and multichannel video programming distributors (MVPDs) to negotiate retransmission consent in good faith.⁵ Specifically, Section 325(b)(3)(C)(iii) 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, and it shall not be a failure to negotiate in good faith if the distributor enters into retransmission consent agreements

¹ 47 U.S.C. § 325(b)(3)(C); 47 CFR §§ 76.7, 76.65.

² Complaint at 1-2.

³ MTA Communications, LLC, Answer (filed July 19, 2018) (Answer).

⁴ Coastal Television Broadcasting Company LLC, Reply to Answer to Good Faith Negotiation Complaint (filed July 30, 2018) (Reply).

⁵ 47 U.S.C. § 325(b)(3)(C).

containing different terms and conditions, including price terms, with different broadcast stations if such different terms and conditions are based on competitive marketplace considerations.⁶

3. In its *Good Faith Order*, the Commission adopted rules implementing the good faith negotiation standard in Section 325 and complaint procedures for alleged violations of these rules.⁷ The *Good Faith Order* adopted a two-part test for good faith.⁸ The first part of the test consists of an objective list of negotiation standards. If any of the standards on this list are violated, it constitutes a *per se* breach of the duty to negotiate in good faith.⁹ The two *per se* standards directly at issue in this case are (1) acting in a manner that unreasonably delays retransmission consent negotiations; and (2) failure of a negotiating entity to respond to a retransmission consent proposal of the other party, including the reasons for the rejection of any such proposal.¹⁰

4. The second part of the good faith test considers the totality of the circumstances. Under this standard, a broadcast television station or MVPD may present facts to the Commission which could constitute a failure to negotiate in good faith, even though they do not allege a violation of the objective standards.¹¹ 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.¹² The burden of proof in good faith complaints is on the complainant.¹³

5. Coastal's station, KTBY, carries Fox Network programming as well as an "extensive slate of syndicated programming and locally-produced and focused programs, including local news and non-news programming."¹⁴ MTA is an MVPD that provides service in the Anchorage designated market area (DMA) to which KTBY is licensed.¹⁵ Both Coastal and MTA are "Negotiating Entities" for purposes of the Commission's retransmission consent rules.¹⁶ Coastal and MTA were parties to a retransmission consent agreement that expired on December 31, 2017.¹⁷ The parties began negotiating a

⁶ 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*).

⁷ *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).

⁸ *Good Faith Order*, 15 FCC Rcd at 5457, para. 30.

⁹ *Id.* at 5462-64, paras. 40-46.

¹⁰ 47 CFR § 76.65(b)(1)(iii), (v).

¹¹ *Good Faith Order*, 15 FCC Rcd at 5458, para. 32; 47 CFR § 76.65(b)(2).

¹² 47 CFR §§ 76.65(c), 76.7.

¹³ *Id.* § 76.65(d).

¹⁴ Complaint at 2.

¹⁵ *Id.*

¹⁶ *Id.* at 2, 4; Answer at 11.

¹⁷ Complaint at 2.

renewal of their retransmission consent agreement in November 2017.¹⁸ On December 30, 2017, having failed to reach a renewal agreement, Coastal offered to extend the existing agreement for five days.¹⁹ MTA declined the extension offer, and made a new offer to Coastal with a fee proposal lower than what MTA had previously offered during renewal negotiations.²⁰ The parties did not reach an agreement and KTBY's signal was removed from MTA's service on January 1, 2018.²¹ The parties continued communicating via email at the start of January 2018, but these negotiations did not result in a renewal agreement and communications ceased.²² The parties resumed negotiations in the spring of 2018, but on June 22 MTA stated that the parties were at an impasse and it "would not be making a counter-offer and was no longer interested in negotiating."²³

6. On June 29, 2018, Coastal filed the Complaint alleging that MTA has failed to negotiate retransmission consent in good faith by: (1) unreasonably delaying retransmission consent negotiations; (2) failing to respond to retransmission consent proposals, including the reasons for the rejection of proposals; and (3) violating the totality of the circumstances test.²⁴ Coastal asks the Commission to order MTA to negotiate retransmission consent for KTBY in good faith, and to impose forfeitures and other relief as the Commission deems appropriate.²⁵

III. DISCUSSION

7. At the outset, we emphasize our previous conclusion 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.²⁶ We also note that nothing in the Act or our implementing rules requires that parties negotiating retransmission consent reach agreement.²⁷

¹⁸ *Id.* at 2-3; Answer at 3-4.

¹⁹ Complaint at 3; Answer at 6. The extension offer provided that the final negotiated contract terms would be effective as of January 1, 2018, regardless of the date of contract execution. Answer at 6.

²⁰ Complaint at 3 (stating that "Coastal had attempted to accept" MTA's previous proposal); Answer at 6.

²¹ Complaint at 3; Answer at 7.

²² Complaint at 3; Answer at 7-8.

²³ Complaint at 4; Answer at 9. MTA states that on January 4, 2018, Coastal posted an article on its website that inaccurately stated that Coastal offered MTA a 15-day extension, whereas the extension offer was only for 5 days. Answer at 8. MTA also states that on February 23, 2018, Coastal posted a video about the impasse on Facebook and directed viewers to contact MTA's Director of Product Management & Marketing via his work contact information that Coastal published. *Id.*

²⁴ Complaint at 4-6.

²⁵ *Id.* at 6.

²⁶ See *HITV License Subsidiary, Inc. v. DIRECTV, LLC*, Memorandum Opinion and Order, 33 FCC Rcd 1137, 1140, para. 7 (MB, Feb. 5, 2018) (*HITV Order*); *Mediacom Commun. Corp. v. Sinclair Broad. Grp., Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 47, 50, para. 6 (MB 2007).

²⁷ See *HITV Order*, 33 FCC Rcd at 1140, para. 7. Coastal argues that the Answer is subject to dismissal because it is more than 10 pages long and does not include a summary and table of contents with page references, in violation of 47 CFR § 1.49(b) and (c). Reply at 1, n.1. Although Coastal accurately describes this requirement, in the interest of a complete record we waive it here. See, e.g., *HITV Order*, 33 FCC Rcd at 1140, n.32.

8. We find that MTA did not violate the *per se* good faith negotiation rule prohibiting unreasonable delays in negotiations.²⁸ The rule requires parties to respond to offers on a timeline that is reasonable in the specific context of the negotiations at hand.²⁹ The period during which Coastal alleges MTA “refused to provide a counter-offer”³⁰ was in fact preceded by emails from MTA that contained and discussed MTA’s counter-offers, and MTA also requested that Coastal clarify the parameters of the ongoing negotiations on the issue of retransmission consent fees and other terms.³¹ Instead of providing such clarification, Coastal requested another counter-offer, arguing that the good faith rules require “a specific counter-proposal, not an ill-defined statement of ‘parameters.’”³² We disagree. Nowhere in the good faith rules does such a requirement exist. Rather, the rule plainly prohibits unreasonable delays in negotiations, and we find that it was not unreasonable for MTA to withhold making another counter-offer in the absence of a reply from Coastal to MTA’s reasonable inquiries.³³ Coastal also alleges that MTA unreasonably delayed negotiations because it failed “to accept that Coastal had essentially agreed to its previous counter-offer.”³⁴ Specifically, Coastal points to an email exchange from December 6, 2017, in which Coastal claims it attempted to accept MTA’s offer, adding that “MTA did not acknowledge this acceptance.”³⁵ We find this claim to be without merit. Although Coastal asserts that it “essentially” agreed to MTA’s December 6 offer only to be ignored, the record shows that the parties agreed to, and did in fact, continue negotiations and nothing more.³⁶

9. Nor do we find that MTA unreasonably delayed negotiations when it “continually presented counter-offers proposing even lower fees than their previous offers,” which Coastal alleges was “clearly designed to delay the resolution of negotiations.”³⁷ To the contrary, the record indicates that MTA reasonably adjusted its proposed rates based on feedback from its member owners opposing

²⁸ See 47 CFR § 76.65(b)(1)(iii). Coastal states in a footnote that this behavior also may violate Section 76.65(b)(1)(i), which deems it a *per se* violation of the good faith negotiation rules if a Negotiating Entity refuses “to negotiate retransmission consent.” Complaint at 5, n.3; 47 CFR § 76.65(b)(1)(i). We disagree. The record indicates that the parties’ retransmission consent negotiation involved multiple back-and-forth communications. See *supra* Section II. Such discussions clearly demonstrate that there was not a complete refusal to negotiate. See *HITV Order*, 33 FCC Rcd at 1140, n.33.

²⁹ See *Northwest Broad., L.P., et al., v. DIRECTV, LLC*, Memorandum Opinion and Order, 30 FCC Rcd 12449, 12452, para. 9 (MB 2015) (*Northwest Order*) (“reasonable response times and unreasonable delays will be gauged by the breadth and complexity of the issues contained in an offer”) (quoting *Good Faith Order*, 15 FCC Rcd at 5463, para. 42).

³⁰ Complaint at 4.

³¹ See Answer at 4-5, 7-8.

³² Reply at 2.

³³ See Answer at 7-8. We agree with Coastal that a party is not required to negotiate against itself, but that is not what occurred here; rather, MTA responded to Coastal’s offer with reasonable questions that went unanswered. See Reply at 2.

³⁴ Complaint at 4.

³⁵ *Id.* at 3.

³⁶ *Id.*; Answer at 5, Exh. D.

³⁷ Complaint at 4-5.

programming rate increases.³⁸ Nothing in our good faith retransmission consent rules prohibits a party from adjusting its bargaining position during the course of the negotiation, as circumstances change.

10. In addition, we disagree with Coastal's allegation that MTA has violated the *per se* good faith negotiation rules by failing to respond to Coastal's proposals, including the reasons for the rejection of a proposal.³⁹ The applicable rule addresses the "[f]ailure of a Negotiating Entity to respond to a retransmission consent proposal of the other party, including the reasons for the rejection of any such proposal."⁴⁰ MTA states that during the parties' "nearly six-month long negotiation . . . MTA exchanged many offers and counteroffers with Coastal."⁴¹ As noted above, MTA responded to one of Coastal's offers by asking for clarification regarding the parameters of the bargaining range, and Coastal refused to provide such clarification.⁴² In addition, Coastal's Complaint concedes that MTA provided reasoning for its rejection of Coastal's offer, which was "that it believed its customers were opposed to price increases."⁴³ However, Coastal argues that MTA's reasoning is "self-serving" and "unconvincing" given how close the parties were to reaching an agreement earlier in negotiations.⁴⁴ Specifically, Coastal argues that MTA acted in bad faith because either it was unaware of the price its members would accept at the start of negotiations, or it knew its members would not agree to rates that it proposed nonetheless.⁴⁵ We disagree. The good faith rules require a party to "provide an explanation for rejecting the other party's offer but . . . not . . . to justify its explanations by document or evidence."⁴⁶ We find that MTA's explanation of concerns about its members' opposition to price increases is reasonable, even if its bargaining position evolved during the course of the negotiation. The record indicates that MTA communicated with its members about potential programming price increases for KTBY, and MTA conveyed these concerns to Coastal during the negotiations.⁴⁷ We also disagree with Coastal's assertion that MTA responded to Coastal's counter offer by declaring "that it would no longer negotiate."⁴⁸ The record clearly shows that MTA responded to Coastal's offer and explained to Coastal that the parties had reached a fundamental negotiating impasse due to disagreement on rates.⁴⁹

³⁸ Answer at 6, 9-10, 12. MTA also states that all its offers were at least 7.5 percent higher than what MTA paid for KTBY programming in 2017. *Id.* at 12.

³⁹ Complaint at 5; Reply at 3-4.

⁴⁰ 47 CFR § 76.65(b)(1)(v).

⁴¹ Answer at 1.

⁴² *Id.* at 7-8, 14.

⁴³ Complaint at 5.

⁴⁴ Reply at 3-4.

⁴⁵ *Id.* at 3.

⁴⁶ *Northwest Order*, 30 FCC Red at 12453, para. 11 (citing *Good Faith Order*, 15 FCC Red at 5464, para 44).

⁴⁷ See Answer at 6, 9, 14-15. MTA adds that Coastal's website and Facebook posts about the parties' dispute, which referenced MTA's negotiator's contact information, "galvanized MTA members" in opposition to rate increases for KTBY programming. *Id.* at 9-10.

⁴⁸ Complaint at 5.

⁴⁹ Answer at 10, 14-15, Exh. J. Coastal also asserts that MTA "failed to explain why it was unwilling to negotiate further." Complaint at 5. We reiterate that the good faith rules do not require parties negotiating retransmission

11. Finally, we reject Coastal’s allegation that MTA has violated the totality of the circumstances test for good faith retransmission consent negotiation.⁵⁰ Under the totality of the circumstances test, separate from the objective, *per se* good faith standards, “a Negotiating Entity may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station or [MVPD] breached its duty to negotiate in good faith.”⁵¹ In setting this standard, the Commission explained that it “will entertain complaints under the totality of the circumstances test alleging that specific retransmission consent proposals are sufficiently outrageous, or evidence that differences among MVPD agreements are not based on competitive marketplace considerations, as to breach a broadcaster’s good faith negotiation obligation. However, complaints which merely reflect commonplace disagreements encountered by negotiating parties in the everyday business world will be promptly dismissed by the Commission.”⁵² Coastal points to “MTA’s continued refusal to negotiate for terms, and its repeated attempts to in fact move the parties even farther from an agreement,” as the basis for violating the totality of the circumstances test.⁵³ We find that Coastal failed to meet its burden of proving that MTA did not negotiate in good faith under the totality of the circumstances test. As noted above, MTA did not continually refuse to negotiate; to the contrary, it engaged in multiple back-and-forth discussions with Coastal and sought clarification of the parameters of the negotiation, which Coastal opted not to provide.⁵⁴ When MTA informed Coastal that it was not going to pursue further negotiations, it made clear that it was due to the fundamental negotiating impasse between the parties due to rates.⁵⁵ It also was not a violation of the totality of the circumstances test for MTA to adjust the rate it was offering Coastal during negotiations. The record indicates that MTA’s offers evolved due to member feedback, making the current dispute nothing more than a commonplace disagreement over price like that encountered by numerous negotiating parties in the everyday business world.⁵⁶

12. For these reasons, we find no violation of the Commission’s *per se* good faith standards, nor the totality of the circumstances test.⁵⁷ Given the guidance provided herein, we urge the parties to

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consent to reach agreement, and absent more, fundamental disagreement over rates is not indicative of a lack of good faith. *See supra* para. 7.

⁵⁰ Complaint at 5-6.

⁵¹ 47 CFR § 76.65(b)(2).

⁵² *Good Faith Order*, 15 FCC Rcd at 5458, para. 32.

⁵³ Complaint at 5-6.

⁵⁴ Answer at 7-8.

⁵⁵ Answer at 10, 14-15, Exh. J.

⁵⁶ Answer at 6, 9-10, 12.

⁵⁷ MTA asks the Commission to award it costs and attorneys’ fees in an effort “to send a clear message to broadcasters that” it is unacceptable to file a complaint to “bully” the other party “into paying inflated rates.” *Id.* at 2, 17. Section 325(b)(3)(C) does not grant the Commission the authority to impose costs and attorneys’ fees for violations of the good faith retransmission consent requirements. Although the Commission does possess the authority to impose forfeitures for good faith violations, we decline to do so here.

return to the bargaining table and recommence negotiations “in an atmosphere of honesty, purpose and clarity of process.”⁵⁸

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that Coastal Television Broadcasting Company LLC’s Good Faith Negotiation Complaint against MTA Communications, LLC, filed pursuant to Section 325(b)(3)(C) of the Act, 47 U.S.C. § 325(b)(3)(C), and Sections 76.7 and 76.65 of the Commission’s rules, 47 CFR §§ 76.7 and 76.65, **IS DENIED**.

14. This action is taken pursuant to delegated authority under Section 0.283 of the Commission’s rules.⁵⁹

FEDERAL COMMUNICATIONS COMMISSION

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Chief, Media Bureau

⁵⁸ *Good Faith Order*, 15 FCC Rcd at 5455, para. 24.

⁵⁹ 47 CFR § 0.283.