

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

In the Matter of
DIRECTV, LLC; AT&T Services, Inc.,
Complainants,
v.
Deerfield Media, Inc.; Deerfield Media (Port
Arthur) Licensee, LLC; Deerfield Media
(Cincinnati) Licensee, LLC; Deerfield Media
(Mobile) Licensee, LLC; Deerfield Media
(Rochester) Licensee, LLC; and Deerfield Media
(San Antonio) Licensee, LLC; GoCom Media of
Illinois, LLC; Howard Stirk Holdings, LLC; HSH
Flint (WEYI) Licensee, LLC; and HSH Myrtle
Beach (WWMB) Licensee, LLC; Mercury
Broadcasting Company, Inc.; MPS Media of
Tennessee Licensee, LLC; MPS Media of
Gainesville Licensee, LLC; MPS Media of
Tallahassee Licensee, LLC; MPS Media of
Scranton Licensee, LLC; Nashville License
Holdings, LLC; KMTR Television, LLC; Second
Generation of Iowa, LTD; Waitt Broadcasting,
Inc.,
Defendants.
MB Docket No. 19-168
CSR No. 8979-C

MEMORANDUM OPINION AND ORDER

Adopted: November 6, 2019

Released: November 8, 2019

By the Chief, Media Bureau:

I. INTRODUCTION

1. On June 18, 2019, DIRECTV, LLC and AT&T Services, Inc. (collectively, AT&T) filed a good faith negotiation complaint (Complaint) 1 against 18 licensees in nine station groups (the

1 Verified Complaint of DIRECTV, LLC and AT&T Services, Inc. for the Stations Groups' Failure to Negotiate in Good Faith, MB Docket No. 19-169 (filed Jun. 18, 2019). Because of the large amount of confidential information in this proceeding, the Commission adopted a Protective Order that was agreed to by the parties. DIRECTV, LLC; AT&T Services, Inc., Complainants, v. Deerfield Media, Inc., et al, Defendants, MB Docket No. 19-168, Order,

Defendants)² 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 Commission's rules.³ AT&T alleges that the Defendants or their agent failed to negotiate in good faith for consent to carry the signals of 20 broadcast television stations (the Defendant Stations), which are licensed directly or indirectly to the Defendants.⁴ Defendants filed an Answer,⁵ to which AT&T filed a Reply.⁶ AT&T sought expedited treatment for the Complaint,⁷ and after initially opposing expedited treatment,⁸ the Defendants withdrew their opposition.⁹ The Stations' existing retransmission consent agreements with AT&T expired in March of this year, and after the expiration of a series of extensions, the Stations went dark for AT&T video subscribers, including subscribers to both DIRECTV and AT&T U-verse (U-verse). As of the release date of this Order, these subscribers have been without access to the Defendant Stations' signals through DIRECTV and U-verse for approximately five months.¹⁰ For the reasons set forth below, we find that Defendants' violated the per se good faith negotiation standards. We therefore grant AT&T's Complaint, and direct the parties to commence good faith negotiation.¹¹

II. BACKGROUND

A. Relevant Law and Commission Rules

2. Section 325(b)(3)(C) of the Act obligates broadcasters and multichannel video programming distributors (MVPDs) to negotiate retransmission consent in good faith.¹² Specifically, section 325(b)(3)(C)(ii) directs the Commission to establish regulations that:

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2019 WL 3037164 (MB Jul. 9, 2019). Where necessary, Confidential and Highly Confidential information has been identified, redacted, and marked with the double-bracketed letters "C" ([[C]]) and "HC" ([[HC]]) respectively, throughout this Memorandum Opinion and Order.

² The named Defendants are Deerfield Media, Inc., Deerfield Media (Port Arthur) Licensee, LLC, Deerfield Media (Cincinnati) Licensee, LLC, Deerfield Media (Mobile) Licensee, LLC, Deerfield Media (Rochester) Licensee, LLC, and Deerfield Media (San Antonio) Licensee, LLC; GoCom Media of Illinois, LLC; Howard Stirk Holdings, LLC, HSH Flint (WEYI) Licensee, LLC, and HSH Myrtle Beach (WWMB) Licensee, LLC; Mercury Broadcasting Company, Inc.; MPS Media of Tennessee Licensee, LLC, MPS Media of Gainesville Licensee, LLC, MPS Media of Tallahassee Licensee, LLC, and MPS Media of Scranton Licensee, LLC; Nashville License Holdings, LLC; KMTR Television, LLC; Second Generation of Iowa, LTD; Waitt Broadcasting, Inc. As Defendants note, Deerfield Media, Inc., though one of the 19 named defendants, is not itself a broadcast licensee. Reply at 31. We therefore dismiss the Complaint with respect to Deerfield Media, Inc.

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

⁴ Complaint at 2-3. One of the 21 "stations" listed by AT&T (WHAM-DT) is in fact a secondary stream of WHAM.

⁵ Defendants' Answer to Good Faith Complaint, MB Docket No. 19-169 (filed Aug. 6, 2019) (Answer).

⁶ Reply in Support of DIRECTV, LLC and AT&T Services, Inc.'s Complaint for Defendants' Failure To Negotiate In Good Faith, MB Docket No. 19-169 (filed Aug. 23, 2019) (Reply).

⁷ Complaint at 7.

⁸ Reply at 43.

⁹ Letter from Marc S. Martin, Perkins Coie LLP, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 19-168 (filed Aug. 28, 2019) (*Letter re: Expedited Treatment*).

¹⁰ On May 30, 2019, carriage deals for most of the Defendant Stations expired, with the remainder expiring on June 10. *See infra* para. 14. At least two of the Defendants, GoCom Media of Illinois, LLC and Second Generation of

prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.¹³

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.¹⁴ The *Good Faith Order* adopted a two-part test for good faith.¹⁵ The first part of the test consists of an objective list of negotiation standards.¹⁶ While the good faith negotiation requirement was originally imposed only on television broadcast stations, a reciprocal obligation was later imposed on MVPDs.¹⁷ Each of these standards apply to “Negotiating Entities,” which the rules define as “a broadcast television station or [MVPD].”¹⁸ If any of the standards on this list are violated by an individual station or MVPD during negotiations, it constitutes a *per se* breach of the duty to negotiate in good faith.¹⁹

3. There are three *per se* standards directly at issue in this case. First, a Negotiating Entity may not refuse to negotiate regarding retransmission consent.²⁰ As the Commission has explained, “[t]his requirement goes to the very heart of Congress’ purpose in enacting the good faith negotiation requirement.”²¹ Broadcasters and MVPDs must actively participate in retransmission consent negotiations, with the intent of reaching agreement, though failure to reach agreement is not itself a violation of the rules or statute.²²

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Iowa, LTD, signed carriage agreements with AT&T prior to the release of this Order. In letters notifying us of those agreements, AT&T asks the Commission to dismiss its claims with respect to GoCom and Second Generation. Letter from Sean Lev, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., to Marlene Dortch, Secretary, Federal Communication Commission (Oct. 7, 2019) (MB Docket No. 19-168); Letter from Kevin J. Miller, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., to Marlene Dortch, Secretary, Federal Communication Commission (Nov. 4, 2019) (MB Docket No. 19-168). We grant those requests, but without prejudice to our right to take enforcement action proposing a forfeiture for the violations of the Act and our rules detailed herein. See *infra* note 11. Resolution of negotiations does not change our analysis of Defendants’ earlier violations of the *per se* standards. See 47 CFR § 76.65(e)(1) (complaints may be filed after a complainant has signed a retransmission consent agreement).

¹¹ This Memorandum Opinion and Order constitutes only a partial resolution of this matter, in order to expeditiously resolve the underlying dispute. We reserve the right to take enforcement action proposing a forfeiture for the violations of the Act and our rules detailed herein. See *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, CS Docket CS 99-363, 15 FCC Rcd 5445, 5480, para. 82 (*Good Faith Order*), recon. granted in part, Order on Reconsideration, 16 FCC Rcd 15599 (2001) (“[A]s with all violations of the Communications Act or the Commission’s rules, the Commission has the authority to impose forfeitures for violations of Section 325(b)(3)(C)” and the good faith rules).

¹² 47 U.S.C. § 325(b)(3)(C).

¹³ 47 U.S.C. § 325(b)(3)(C)(ii).

¹⁴ *Good Faith Order*, 15 FCC Rcd 5445.

4. Second, a Negotiating Entity must agree to meet at reasonable times and locations and cannot act in a manner that would unduly or unreasonably delay the course of negotiations.²³ In considering a possible violation of this standard, we are conscious that time is frequently of the essence in retransmission consent negotiations.²⁴ We repeatedly have emphasized “that the rules require parties to respond to offers in a timely manner, reasonable within the context of the negotiations at hand,”²⁵ and “that the proximity of the termination of retransmission consent and impending service disruption to customers [will] also be a factor in determining whether a party ha[s] violated the good faith negotiation requirement.”²⁶

5. Finally, Negotiating Entities must respond to retransmission consent proposals and explain their reasons for rejecting any of those proposals.²⁷ The Commission has stated that “[b]lanket rejection of an offer without explaining the reasons for such rejection does not constitute good faith negotiation,” which “requires a [party’s] affirmative participation.”²⁸ The explanation does not have to be justified by documents or evidence, but some explanation must be provided.²⁹

6. The second part of the good faith test considers the “totality of the circumstances.” Under this standard, a broadcaster or MVPD may present facts to the Commission that could constitute a failure to negotiate in good faith, even though they do not allege a violation of the *per se* standards.³⁰ When adopting this standard, the Commission explained that “specific retransmission consent proposals” could be “sufficiently outrageous. . . as to breach [the] good faith negotiation obligation.”³¹

7. A broadcaster or MVPD believing itself aggrieved under the good faith rules may file a complaint pursuant to section 76.7 of the Commission’s rules.³² The burden of proof in good faith complaints is on the complainant.³³

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¹⁵ *Id.* at 5457, para. 30.

¹⁶ 47 CFR §§ 76.65(b)(1)(i)–(ix) (list of *per se* negotiating standards).

¹⁷ 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).

¹⁸ 47 CFR §§ 76.65(b)(1).

¹⁹ *Good Faith Order*, 15 FCC Rcd at 5462-64, paras. 40-46.

²⁰ 47 CFR § 76.65(b)(1)(i).

²¹ *Good Faith Order*, 15 FCC Rcd at 5462, para. 40.

²² *Id.*

²³ 47 CFR § 76.65(b)(1)(iii).

²⁴ *Good Faith Order*, 15 FCC Rcd at 5463, para. 42.

²⁵ *HolstonConnect, LLC v. Nexstar Media Group, Inc., Good Faith Negotiation Complaint*, MB Docket No. 19-60, Memorandum Opinion and Order, DA 19-853, 2019 WL 4200625 at *4, para. 9 (MB Sep. 3, 2019) (*HolstonConnect*).

²⁶ *Northwest Broadcasting, L.P., et al. v. DIRECTV, LLC*, MB Docket No. 15-151, Memorandum Opinion and Order, 30 FCC Rcd. 12449 at 12452, para. 9 (MB 2015) (*Northwest*).

²⁷ 47 CFR § 76.65(b)(1)(v).

²⁸ *Good Faith Order*, 15 FCC Rcd at 5464, para. 44.

B. Factual Summary³⁴

8. The Defendants are made up of nine separate station groups (Defendant Station Groups) that operate the 20 Defendant Stations, among others. The Defendant Stations serve a diverse array of communities across the United States, and they collectively carry all of the major commercial broadcast networks as well as other network and independent programming.³⁵ Each of the Defendants has one or more agreements with Sinclair Broadcast Group (Sinclair), under which Sinclair “operates, programs [and/]or provides sales services” to the Defendant Stations.³⁶ Together these agreements give Sinclair a relationship with, and stake in the success of, each of the Defendant Stations, but Sinclair itself is not a party to this proceeding.³⁷ DIRECTV and U-verse are AT&T-subsidary MVPDs serving over 23 million subscribers nationwide, including subscribers in each of the designated market areas (DMA) to which the Defendant Stations are licensed.³⁸ AT&T’s DIRECTV and U-verse, and the Defendants Stations, are all “Negotiating Entities” for the purposes of the Commission’s retransmission consent rules.³⁹ AT&T and the Defendants were parties to retransmission consent agreements that expired on [[HC]] REDACTED [[HC]].⁴⁰

9. [[C]] REDACTED [[C]]several negotiators from AT&T reached out to the Defendants, seeking a representative from each station group with whom to negotiate.⁴¹ Defendants responded that all the groups would be represented by the same individual, Duane Lammers of Max Retrans, [[C]] REDACTED [[C]]⁴² In a series of calls and emails in early [[C]] REDACTED [[C]], Mr. Lammers stated that the Defendants were [[HC]] REDACTED [[HC]] along with the [[C]] REDACTED [[C]].⁴³ [[C]] REDACTED⁴⁴ REDACTED [[C]]⁴⁵ Like the Defendants, [[C]] REDACTED [[C]] but it is not a party to this proceeding. Over the first half of March 2019, various AT&T negotiators sent separate proposed

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²⁹ *Coastal Television Broadcasting Company LLC, v. MTA Communications, LLC Good Faith Negotiation Complaint*, MB Docket No. 18-208, Memorandum Opinion and Order, 33 FCC Rcd 11025, 11026, para. 10 (MB 2018) (*Coastal*).

³⁰ 47 CFR § 76.65(b)(2).

³¹ *Good Faith Order*, 15 FCC Rcd at 5458, para. 32.

³² 47 CFR §§ 76.65(c), 76.7.

³³ *Id.* § 76.65(d).

³⁴ Except where specifically noted, this summary is based on undisputed statements by the parties or the communications between the parties that have been placed into the record. Complainants submitted, under protective seal, a significant amount of written communication. Defendants relied upon citations to this submission in their Answer and have not disputed its authenticity. Where the instant Order references specific messages or attachments from that submission, they are identified by the Complainant-provided Bates number.

³⁵ Complaint at 2, Answer at 30-32.

³⁶ Complaint at 11 (quoting the website of a Defendant Station, WHAM Rochester, *About WHAM*, <https://13wham.com/station/contact>); *see also* Answer at 27.

³⁷ *Id.*

³⁸ Complaint at 7.

³⁹ *Id.* at 2, 4; Answer at 11.

renewal agreements to each of the Defendant Station Groups and to [[C]] REDACTED [[C]], each with different terms.⁴⁶

10. AT&T's negotiators followed up with Mr. Lammers on the status of each of these separate proposals, but Mr. Lammers had provided no response to any of them as the [[C]] REDACTED [[C]] expiration of the existing agreements approached.⁴⁷ On [[C]] REDACTED⁴⁸ REDACTED⁴⁹ REDACTED⁵⁰ REDACTED⁵¹[[C]]

11. On [[C]] REDACTED [[C]]⁵² Mr. Lammers identified these edits to the [[HC]] REDACTED [[HC]]⁵³ The attached draft agreement contained no reference to any station group other than [[C]] REDACTED [[C]], and no reference to any of the proposals made by AT&T with respect to any of the Defendant Stations.⁵⁴ Exhibit A, the "List of Stations" covered by the agreement, had been left blank by AT&T, and marked [[HC]] REDACTED [[HC]]⁵⁵ It was completed in the draft Mr. Lammers sent back, and included only [[C]] REDACTED [[C]] – no Defendant Stations.⁵⁶ Finally, Mr. Lammers [[HC]] REDACTED⁵⁷ REDACTED⁵⁸ REDACTED⁵⁹[[HC]]

12. In mid-April, AT&T sent new proposals, first for [[C]] REDACTED [[C]]⁶⁰ and a few days later for each of the Defendant Station Groups.⁶¹ Each proposal the AT&T negotiators sent was [[HC]] REDACTED [[HC]]⁶² On April 25, just [[HC]] REDACTED [[HC]] hours after receiving the last of AT&T's updated proposals regarding the Defendant Stations,⁶³ Mr. Lammers sent another round of edits to what had originally been AT&T's [[C]] REDACTED [[C]] proposal, along with a copy of the list of the stations he was representing.⁶⁴ Similar to the draft he sent earlier in [[C]] REDACTED [[C]], this was identified as being [[HC]] REDACTED [[HC]]⁶⁵ Like that earlier draft, the April 25 draft contained no reference to any station group other than [[C]] REDACTED [[C]], and no reference to any of the

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⁴⁰ Complaint at 12.

⁴¹ Complaint at 15, Answer at 33. [[HC]] REDACTED [[HC]] Vice President Linda Burakoff. ATT000584. AT&T's [[C]] REDACTED [[C]] in addition to Ms. Burakoff, each of whom provided a Declaration in support of the Complaint, were Dallia Kim (with respect to [[C]] REDACTED [[C]]), Michael Pace ([[C]] REDACTED [[C]]), and Hongfeng (Julia) Dai ([[C]] REDACTED [[C]]).

⁴² Complaint at 14-15, Answer at 33.

⁴³ ATT000026-27. *See also* ATT000025, ATT000574, etc. Stations other than the Defendant Stations and the [[C]] REDACTED [[C]] Stations were identified as being part of the negotiating group, but they are not at issue in this proceeding.

⁴⁴ [[C]] REDACTED [[C]].

⁴⁵ ATT000574.

⁴⁶ ATT000048 - ATT000216.

⁴⁷ Complaint at 16, Answer at 34.

⁴⁸ ATT000223.

⁴⁹ *Id.*; *see also* Complaint at 16, Answer at 34.

⁵⁰ *See, e.g.*, ATT000224, ATT000228.

⁵¹ Complaint at 17, Answer at 35; Complaint at 17, Answer at 35-36; Complaint at 20, ATT000714-756.

proposals made by AT&T with respect to any of the Defendant Stations.⁶⁶ Again like that earlier draft, the Exhibit A “List of Stations” covered by the agreement was updated in the draft Mr. Lammers sent back, but included only [[C]] REDACTED [[C]] Stations – no Defendant Stations.⁶⁷ And once again, Mr. Lammers [[C]] REDACTED [[C]] [[HC]] REDACTED⁶⁸ [[HC]] Finally, once again, one of the other AT&T negotiators (Mr. Pace) followed up with Mr. Lammers seeking comments on the proposals AT&T had sent regarding carriage of the Defendant Stations, and Mr. Lammers responded that [[HC]] REDACTED [[HC]]⁶⁹

13. On May 7, AT&T sent a [[HC]] REDACTED [[HC]] and emphasized to Mr. Lammers that [[HC]] REDACTED⁷⁰ [[HC]] [[C]] REDACTED [[C]] [[HC]] REDACTED⁷¹ [[HC]] [[C]] REDACTED [[C]] [[HC]] REDACTED⁷² [[HC]] On May 10, Mr. Lammers sent a draft in response to [[C]] REDACTED⁷³ REDACTED⁷⁴ REDACTED [[C]] [[HC]] REDACTED⁷⁵ REDACTED⁷⁶ REDACTED⁷⁷ [[HC]]

[[C]] REDACTED [[C]] [[HC]] REDACTED⁷⁸ [[HC]] [[C]] REDACTED [[C]] [[HC]] REDACTED⁷⁹ [[HC]] [[C]] REDACTED [[C]] [[HC]] REDACTED [[HC]]⁸⁰

14. In late [[C]] REDACTED [[C]] and its outside counsel sent formal letters to Max Retrans, expressing [[C]] REDACTED [[C]]⁸¹ [[C]] REDACTED [[C]] [[HC]] REDACTED [[HC]] [[C]]⁸² REDACTED [[C]] [[HC]] REDACTED⁸³ [[HC]] [[C]] REDACTED⁸⁴ REDACTED [[C]] [[HC]] REDACTED [[HC]] [[C]] REDACTED⁸⁵ REDACTED [[C]]. The [[C]] REDACTED [[C]] Station agreements as well as the bulk of the Defendant Station agreements expired on May 30, with the

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⁵² Complaint at 16, Answer at 10-11, ATT000231-250.

⁵³ ATT000231.

⁵⁴ ATT000232-250.

⁵⁵ ATT000038, ATT000046.

⁵⁶ ATT000248.

⁵⁷ ATT000231.

⁵⁸ ATT000253-254.

⁵⁹ ATT000252.

⁶⁰ ATT000563 [[HC]] REDACTED [[HC]].

⁶¹ Complaint at 16, Answer at 11; *see also* ATT000255-394, 418-552.

⁶² ATT000255-394, 418-552; *see specifically, e.g.*, ATT000327, ATT000514.

⁶³ ATT000418.

⁶⁴ Complaint at 17, Answer at 11, ATT000553-574.

⁶⁵ ATT000553.

⁶⁶ ATT000554-573.

remainder expiring on June 10.⁸⁶ All 20 of the Defendant Stations, as well as the [[C]] REDACTED [[C]] Stations, consequently went dark for DIRECTV and U-verse subscribers.

15. Between [[C]] REDACTED [[C]] and the expiration of the [[C]] REDACTED [[C]] Stations' agreements, the parties apparently exchanged at least one further round of proposed edits.⁸⁷ On [[C]] REDACTED⁸⁸ REDACTED [[C]] [[HC]] REDACTED [[HC]]⁸⁹ On June 3, Mr. Lammers provided AT&T for the first time with proposals that by their terms applied to the Defendant Stations. [[HC]] REDACTED [[HC]]⁹⁰ Each proposal consisted solely of [[HC]] REDACTED [[HC]]⁹¹ None of the proposed [[HC]] REDACTED [[HC]] were identical to either those in the [[C]] REDACTED [[C]] proposal sent by Mr. Lammers [[C]] REDACTED [[C]] days earlier, or the [[HC]] REDACTED [[HC]] draft sent by Mr. Lammers (the last "Joint Parties" draft in the record).⁹²

16. [[C]] REDACTED [[C]] [[HC]] REDACTED⁹³ [[HC]] [[C]] REDACTED [[C]]

[[HC]] REDACTED⁹⁴ [[HC]]

[[C]] REDACTED [[C]] [[HC]] REDACTED⁹⁵[[HC]]

17. On June 18, 2019, AT&T filed the Complaint alleging that Defendants have failed to negotiate retransmission consent in good faith by: (1) refusing to negotiate regarding retransmission consent; (2) unreasonably delaying retransmission consent negotiations; (3) failing to respond to retransmission consent proposals, including the reasons for the rejection of proposals; and (4) breaching confidentiality and/or relying upon a breach of confidentiality to establish its negotiating position, in

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⁶⁷ ATT000571.

⁶⁸ ATT000553.

⁶⁹ ATT000579-580.

⁷⁰ Answer at 11-12, ATT000582-583.

⁷¹ ATT000584.

⁷² *Id.*

⁷³ ATT000604-626.

⁷⁴ ATT000605-625.

⁷⁵ ATT000604.

⁷⁶ *Id.*

⁷⁷ ATT000604.

⁷⁸ *Id.*

⁷⁹ ATT000649-677.

⁸⁰ *See, e.g.*, ATT000678; ATT000704.

⁸¹ Complaint at 19, Answer at 13.

⁸² ATT000726; see also ATT000720, ATT000747, etc.

violation of the totality of the circumstances test.⁹⁶ AT&T asks us to order Defendants to immediately [[C]] REDACTED [[C]] negotiate retransmission consent in good faith, under the following conditions:

[[C]] REDACTED⁹⁷[[C]]

Finally, AT&T asks us to impose forfeitures and other relief as the Commission deems appropriate, and asks us to give the Complaint expedited treatment.⁹⁸

18. After the Complaint was filed, the parties reached an independent agreement for carriage of the [[C]] REDACTED [[C]] Stations, which were made available again to AT&T subscribers. With only two exceptions, the Defendant Stations remain without a carriage agreement and unavailable to subscribers via DIRECTV or U-verse.⁹⁹

III. DISCUSSION

19. We find that Defendants' actions, including a persistent refusal to negotiate, an unreasonable delay of negotiations, and a failure to respond to AT&T's proposals, violated each of the *per se* good faith standards raised in AT&T's Complaint. Because we find three clear violations of the *per se* negotiating standards, and because of the pending civil proceeding, we need not address, and decline to reach, the separate question of whether Defendants also committed a violation under the totality of the circumstances standard.¹⁰⁰

20. Defendants have focused their response in this case on the claim that they, along with [[C]] REDACTED [[C]], were "negotiating jointly" with AT&T.¹⁰¹ While Defendants concede that they did not respond to the "Defendant-specific agreement proposals Complainants had delivered," they maintain

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⁸³ ATT000720-723, ATT000725-727.

⁸⁴ ATT000720.

⁸⁵ ATT000728.

⁸⁶ Complaint at 20; Answer at 37.

⁸⁷ See ATT000725 [[HC]] REDACTED [[HC]] and ATT000770-782 (redlined against a 5/24 AT&T draft).

⁸⁸ ATT00759-782.

⁸⁹ *Id.*

⁹⁰ ATT000783-794, 796-810.

⁹¹ *Id.*; see also Complaint at 21, Answer at 37.

⁹² ATT000783-794, 796-810; ATT000762-763; ATT000607-608.

⁹³ ATT000795, ATT000811.

⁹⁴ ATT000841.

⁹⁵ ATT000840.

⁹⁶ Complaint at 4-6.

⁹⁷ Complaint at iii.

⁹⁸ *Id.*

that under the good faith rules no such response “was necessary in light of Max Retrans’s [*sic*] joint representation of Defendants.”¹⁰² Defendants appear to have the understanding that their common agent, as the representative of both Defendants and [[C]] REDACTED [[C]], had wide latitude to decide how and when to negotiate with AT&T about each station participating in the joint negotiation. More fundamentally, they appear to also believe that so long as their common agent was actively engaged in negotiation with respect to any member of the joint negotiation group, all members of the group were in compliance with their good faith negotiation obligations.¹⁰³

21. As explained below, we disagree with the premise of this defense. To be sure, it is not impermissible for Defendant Stations to participate in joint negotiations with AT&T. Nothing in the Act or the Commission’s good faith rules prohibits broadcast stations located in different markets from jointly negotiating for retransmission consent. As Defendants observe, Congress and the Commission expressly limited the ban on joint negotiation to stations located in the same local market.¹⁰⁴ However, stations in different markets that choose to negotiate jointly do not gain any special status under the good faith rules; each such station remains ultimately responsible for its own compliance. As AT&T has emphasized, its “legal claim is not that the Station Groups [[C]] REDACTED [[C]]. It is that they each *refused* to negotiate for carriage of their stations, [[C]] REDACTED [[C]]¹⁰⁵ That Defendants may have decided to engage in a joint negotiation with AT&T is not relevant to the question of whether they, on their own or through their common agent, complied with their individual obligations to abide by the *per se* standards. For the reasons discussed below, we conclude that they did not.

22. *Refusal to Negotiate.* We first find that each of the Defendants failed in its individual obligation to negotiate, or have its common agent negotiate, with respect to retransmission of its Station signals. The record in this case shows that Mr. Lammers made not a single offer or proposal, formal or informal, that could have resulted in the carriage of the Defendant Stations, even if accepted unchanged by AT&T. Moreover, the record shows that this refusal to negotiate persisted for some time even after

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⁹⁹ Answer at 15, Reply at 11; *see supra* note 10.

¹⁰⁰ AT&T has filed a civil case against Defendants’ agent that alleges trade secret theft and breach of contract. Civil Complaint, *AT&T Services, Inc. & DIRECTV, LLC v. Max Retrans LLC*, Civil Complaint, *AT&T Services, Inc. & DIRECTV, LLC v. Max Retrans LLC*, No. 19-01925 (E.D. Mo. July 11, 2019). (E.D. Mo. July 11, 2019). AT&T’s allegations are very serious, and may support a finding that Defendants violated the totality of the circumstances good faith standards if borne out by the court’s analysis of the contracts at issue. *See infra* para. 34. Accordingly, we reserve the right to return to these issues after the question has been addressed by the court.

¹⁰¹ Defendants argue that “[a]lthough Complainants refer to [several] *per se* violations. . . the Complaint focuses predominately on a separate issue — joint negotiation among broadcasters in different geographic markets — that the Commission has repeatedly declined to make a *per se* violation. . . Complainants cannot properly transform Defendants’ reliance on a common and permissible method of negotiation into a violation of the Commission’s rules.” Answer at 17-18; *see also id.* at 21-22 (citing *Amendment of the Commission’s Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, 3357, para. 10 (2014)).

¹⁰² Answer at 34.

¹⁰³ Answer at 18-21, 34-37.

¹⁰⁴ Answer at 21-22, 47 CFR §§ 76.65(b)(1)(viii).

¹⁰⁵ Reply at 1 (emphasis in original).

AT&T reached an agreement with [[C]] REDACTED [[C]],¹⁰⁶ which was the Defendants' stated condition precedent to engaging in negotiations with AT&T for carriage of Defendant Stations.¹⁰⁷ Defendants' willful refusal to engage meaningfully with AT&T over a prolonged period, despite AT&T's repeated requests for them to do so, violated their fundamental obligation to "participate in retransmission consent negotiations with the intent of reaching agreement."¹⁰⁸

23. Compliance with the first *per se* standard in the good faith rules requires that each Negotiating Entity participate (directly or through its agent) in the retransmission consent negotiation.¹⁰⁹ This requirement "goes to the very heart of Congress' purpose" in directing the Commission to establish these rules,¹¹⁰ by ensuring that broadcasters and MVPDs actually have an opportunity to reach agreement.¹¹¹ Nothing in the Act, the Commission's rules, or Bureau precedent excuses a Negotiating Entity from meeting this standard simply because it is using an agent in common with other parties, or "jointly negotiating." Yet, this is the excuse Mr. Lammers provided throughout the relevant negotiations when pressed to discuss proposals to carry the Defendant Stations. He failed to comply with the good faith obligation to engage in negotiations on behalf of the Defendant Stations and said that such engagement was contingent on completion of the [[C]] REDACTED [[C]] deal. Regardless of whether [[C]] REDACTED [[C]] and Defendants were "negotiating jointly," Mr. Lammers' actions in this case amount to an impermissible refusal to negotiate.

24. Mr. Lammers had the authority to negotiate on behalf of the Defendant Stations, and he repeatedly claimed to be doing so when he sent draft carriage proposals [[HC]] REDACTED [[HC]] and/or when those proposals contained headers reading [[HC]] REDACTED [[HC]]¹¹² However, as detailed above, every one of those proposals in fact was addressed expressly and exclusively to amendment of the existing [[C]] REDACTED [[C]] carriage agreements.¹¹³ For example, Mr. Lammers disregarded AT&T's [[C]] REDACTED [[C]] Defendant Station proposals by sending an [[C]] REDACTED [[C]] that applied only to [[C]] REDACTED [[C]].¹¹⁴ AT&T responded by offering updated proposals with respect to each of the Defendant Station Groups, redlined against the [[C]] REDACTED

¹⁰⁶ Reply at 11 (indicating that negotiations did not begin until early August); *Letter re: Expedited Treatment* (indicating that negotiations had still not begun as of August 28).

¹⁰⁷ ATT000604, ATT000840.

¹⁰⁸ *Good Faith Order*, 15 FCC Rcd at 5462, para. 40.

¹⁰⁹ *Good Faith Order*, 15 FCC Rcd at 5462, para. 40. See also, e.g., *Echostar Satellite Corporation v. Young Broadcasting, Inc., et al*, File No. CSR-5655-C, Memorandum Opinion and Order, 16 FCC Rcd 15070, 15077, paras. 16, 19 (CSB 2001) (finding that the defendant had not violated this requirement because "he was an active participant" in the negotiation. That defendant made multiple proposals that could have resulted in carriage of the signal at issue as part of his "regular contact with [the Complainant] regarding retransmission consent" over several months) (*Echostar*).

¹¹⁰ *Good Faith Order*, 15 FCC Rcd at 5462, para. 40.

¹¹¹ *Id.* at para. 24 ("We believe that, by imposing the good faith obligation, Congress intended that the Commission develop and enforce a process that ensures that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process.").

¹¹² ATT000231-250, ATT000553-574, ATT000605-625.

¹¹³ *Supra* paras. 11-13.

¹¹⁴ ATT000231-250.

[[C]] draft even though, by its terms, it applied only to [[C]] REDACTED [[C]].¹¹⁵ Despite this evident effort on AT&T's part to treat the "Joint Parties" draft as if it applied to all of the Joint Parties, Mr. Lammers again ignored AT&T's proposals. He sent a second "Joint Parties Draft" less than a day after receiving the last of the AT&T redlines for Defendant Stations on [[C]] REDACTED [[C]], and like all other such drafts it did not address in any way the Defendant Stations or AT&T's proposals regarding carriage of those stations.¹¹⁶ Some, though not all, of Mr. Lammers' proposed drafts were accompanied by a list of the stations he was representing.¹¹⁷ These lists were sent alongside the proposals as separate documents rather than as part of them,¹¹⁸ and were not intended to identify the stations to which the proposed agreement would apply (which is done by Exhibit A in each proposed agreement).¹¹⁹ We agree with AT&T that [[HC]] REDACTED [[HC]]¹²⁰ This complete refusal to discuss terms for Defendant Stations persisted until at least early June, when Mr. Lammers finally made only limited proposals related to these stations. Throughout the period at issue, whenever pressed by AT&T about his silence on the Defendant Stations, he made clear that the "Joint Parties" drafts were the only responses that would be provided with respect to any of the jointly represented stations.¹²¹ Indeed, each time Mr. Lammers sent any of the allegedly "Joint" proposals to AT&T, he sent it only to the negotiators handling [[C]] REDACTED [[C]] despite the fact that AT&T had separate negotiators assigned to the Defendant Stations.¹²² This suggests a disinterest in actually negotiating for carriage of the Defendant Stations, and is reflective of Mr. Lammers' exclusive focus on [[C]] REDACTED [[C]].

25. It appears that Mr. Lammers never intended the "Joint Parties" responses to actually cover the Defendant Stations, which he knew, by his own admission, would require separate negotiation of material issues and separate carriage agreements/amendments.¹²³ Mr. Lammers' only gestures toward Defendant Station-specific negotiation in the record, the [[HC]] REDACTED [[HC]] he sent on June 3, contain different proposed rates than those in the [[C]] REDACTED [[C]] draft he had sent just days earlier.¹²⁴ If he had truly intended the "Joint Parties" drafts, [[C]] REDACTED [[C]], to cover all of the parties, we would have expected to continue to see [[HC]] REDACTED [[HC]]. The differences reflect his recognition of the need for distinct negotiation and distinct deals. The "Joint Parties" responses were each intended to be no more than what they appeared to be – proposed amendments to the existing [[C]] REDACTED [[C]] agreements. Defendants' Answer emphasizes that their position was and remains that no "response to the Defendant-specific agreement proposals Complainants had delivered was necessary in light of Max Retrans's *[sic]* joint representation of defendants."¹²⁵ The record does not demonstrate,

¹¹⁵ See, e.g., ATT000255-394, 327-345, 418-552.

¹¹⁶ *Supra* para. 12.

¹¹⁷ See, e.g., ATT000574, 626; *c.f.*, ATT000231-250.

¹¹⁸ See, e.g., ATT000553, ATT000604 [[HC]] REDACTED [[HC]].

¹¹⁹ See, e.g., ATT000248. *NB* ATT000767 ([[HC]] REDACTED [[HC]]).

¹²⁰ ATT000604.

¹²¹ See, e.g., ATT000252, ATT000579-580, ATT000678, ATT000704.

¹²² ATT000231, ATT000553, ATT000604.

¹²³ See ATT000604 ([[HC]] REDACTED [[HC]]) (emphasis added).

¹²⁴ *Supra* para. 15.

¹²⁵ Answer at 34-35, para. 36; *see also*, e.g., 34-35, paras. 34, 37, 38, etc.

however, that Mr. Lammers' representation actually resulted in any negotiation with respect to the Defendant Stations, joint or otherwise, for months after the initial AT&T proposals were sent.

26. Mr. Lammers was explicit and open about the rationale behind his behavior; his strategy did [[HC]] REDACTED¹²⁶ REDACTED¹²⁷ REDACTED¹²⁸ REDACTED [[HC]]¹²⁹ While he actively negotiated with AT&T for carriage of the [[C]] REDACTED [[C]] Stations, Mr. Lammers took the Defendant Stations off the table and refused to even discuss any terms relating to their carriage until virtually all of them had gone dark.

27. Defendants place a great deal of stock in the fact that AT&T "repeatedly agreed to [[C]] REDACTED [[C]]¹³⁰ We agree with AT&T that its [[C]] REDACTED [[C]] the agreements in this manner does not exonerate Defendants' refusal to negotiate. We note that in another retransmission dispute adjudicated by the Bureau, the record showed "many back-and-forth communications between the parties, including multiple extension agreements," and this evidence contributed to the Bureau's finding that there was no failure to negotiate.¹³¹ In that case, however, the Defendant made multiple offers that would have, if accepted by the Complainant, resulted in carriage of the station in question.¹³² That stands in sharp contrast to the instant case, in which Defendants' common agent never actually addressed the carriage of Defendants' Stations because he was only willing to engage in "back-and-forth communications" with respect to the [[C]] REDACTED [[C]] Stations.¹³³ AT&T asserts that it [[C]] REDACTED [[C]] not to continue ongoing negotiations, but in the hope that Defendants would begin negotiations.¹³⁴ Indeed, after months of refusal to negotiate by Mr. Lammers, AT&T proposed [[C]] REDACTED [[C]]¹³⁵ Mr. Lammers refused, and at that point AT&T determined it [[HC]] REDACTED [[HC]]¹³⁶ Even after all of Defendants' Stations had gone dark, Mr. Lammers continued to exclusively

¹²⁶ ATT000840.

¹²⁷ *Id.*

¹²⁸ ATT000841.

¹²⁹ ATT000604.

¹³⁰ Answer at 19. [[HC]] REDACTED [[HC]] Neither party to this proceeding addresses this language directly, or grants it any significance, and every other fact in the record demonstrates Defendants' refusal to negotiate (and, as discussed below, unreasonable delay). Good faith disputes are "highly fact-specific," and must be evaluated on the entirety of the record. *Good Faith Order*, 15 FCC Rcd at 5478, para. 77. Furthermore, the Commission's good faith rules specifically contemplate scenarios in which parties sign carriage contracts despite the lack of good faith of one Negotiating Entity, and they do not foreclose good faith complaints in that situation. 47 CFR 76.65(b)(2)(e)(1). Although these [[C]] REDACTED [[C]] agreements are not the type of agreements contemplated by the rules, the parallels are relevant, as is the fact that we do not allow parties to bargain away their right to complain of a lack of good faith. *Good Faith Order*, 15 FCC Rcd at 5470, para. 58. Given the entirety of the record in this case, we find that the [[C]] REDACTED [[C]] agreement language used in this case does not foreclose AT&T's right to argue that Defendants refused to negotiate and unreasonably delayed negotiations. We also note that nothing in this [[C]] REDACTED [[C]] language even arguably forecloses AT&T's claim with respect to Defendants' failure to respond to AT&T's proposals, and that the failure to respond alone is a sufficient basis for our finding in this Order that Defendants violated the good faith standards. *Infra* at paras. 32-33, 35.

¹³¹ *HITV License Subsidiary, Inc. v. DIRECTV, LLC Good Faith Negotiation Complaint*, MB Docket No. 17-292, Memorandum Opinion and Order, 33 FCC Rcd. 1137, 1140, n.33 (MB 2018) (*HITV*).

¹³² *Id.* at para. 8.

[[HC]] REDACTED [[HC]] and emphasized that [[C]] REDACTED [[C]] [[HC]] REDACTED [[HC]] [[C]] REDACTED [[C]] deal was complete.¹³⁷

28. Defendants offer several affirmative defenses, including that Complainants have failed to state a claim upon which relief can be granted.¹³⁸ As is made clear throughout this Order, we do not find that argument compelling, because AT&T has substantiated its allegation that Defendants violated the *per se* good faith standards. Defendants also contend that AT&T should be barred from complaining about Defendants' actions in 2019, because "the same conduct. . . was how the [retransmission consent] agreements were originally jointly negotiated. . . in 2016."¹³⁹ We agree with AT&T that its "conduct in [[C]] REDACTED [[C]] is legally irrelevant because AT&T's Complaint does *not* seek relief from any conduct that occurred in [[C]] REDACTED [[C]]."¹⁴⁰ Similarly, AT&T's Complaint is not time-barred,¹⁴¹ because the attempted negotiations and violations of the good faith standard they protest in this proceeding occurred in 2019, not in 2016. As AT&T put it, while Defendants "used a [[C]] REDACTED [[C]] as a go-between with AT&T[[C]] REDACTED [[C]] did not actually negotiate for these parties."¹⁴² That repeated, extended, and willful refusal to negotiate constituted a violation of the *per se* good faith standard requiring active participation in negotiations for retransmission consent.

29. *Unreasonable Delay of Negotiations.* We agree with AT&T that each of the Defendant Negotiating Entities failed in its individual obligation to negotiate in a timely manner with respect to retransmission of its Station signals. With respect to this *per se* standard, AT&T argues that

[e]ven if [[HC]] REDACTED [[HC]] were deemed both a sufficient negotiation and a response, it is not enough to negotiate and respond *eventually*. . . Refusing to provide [[C]] REDACTED [[C]] a response until [[C]] REDACTED [[C]] the existing agreement had expired (or, for three Stations, was about to expire), despite receiving initial proposals in March, qualifies as a refusal to negotiate 'at [a] reasonable time[.]'.¹⁴³

(...continued from previous page)

¹³³ *Supra* paras. 11-13.

¹³⁴ Complaint at 20.

¹³⁵ *See supra* para. 14.

¹³⁶ Complaint at 20.

¹³⁷ ATT000841.

¹³⁸ Answer at 43.

¹³⁹ Answer at 19. Defendants also take the position that AT&T is "equitably estopped from arguing that Defendants' use of a common agent in connection with the 2019 [retransmission consent] negotiations violates the good faith obligation," but since AT&T does not make this argument we need not reach this question. Answer at 46; Reply at 1.

¹⁴⁰ Reply at 28 (emphasis in original). [[C]] REDACTED [[C]]

¹⁴¹ Answer at 44-46.

¹⁴² Reply at 1.

¹⁴³ Complaint at 24-25, citing 47 CFR § 76.65(b)(1)(iii) (emphasis in original).

Defendants provide no specific response to this allegation, simply maintaining the position that they were, in fact, jointly negotiating throughout the relevant period, and therefore not engaging in delay.¹⁴⁴ As discussed above, negotiations with respect to the [[C]] REDACTED [[C]] Stations by Defendants' common agent did not excuse Defendants from their obligations to negotiate, or have their agent negotiate, in good faith.¹⁴⁵ Negotiating Entities must not unreasonably delay negotiations,¹⁴⁶ and must "respond to offers in a timely manner, reasonable within the context of the negotiations at hand."¹⁴⁷ As the Bureau has previously explained, "the proximity of the termination of retransmission consent and impending service disruption to customers [will] also be a factor in determining whether a party had violated the good faith negotiation requirement."¹⁴⁸

30. In this case, the service disruption had already begun before Mr. Lammers made any effort to engage in negotiations with respect to Defendant Stations. An impasse, even one that results in a blackout, is not alone sufficient to demonstrate bad faith.¹⁴⁹ We also do not find that an [[C]] REDACTED [[C]] week delay in making any response to a proposal, as in this case, will always necessarily be unreasonable.¹⁵⁰ In this case, however, Defendants had proposals from AT&T for [[C]] REDACTED [[C]] before the expiration of the existing agreements, and refused to engage at all for [[C]] REDACTED [[C]] afterward, until most of the Defendant Stations had gone dark. Crucially, this delay was an intentional refusal to negotiate that served as a central element of Mr. Lammers' negotiation strategy.¹⁵¹ AT&T repeatedly invited and encouraged Mr. Lammers to engage in negotiation with respect to the Defendant Stations, even treating Mr. Lammers' [[C]] REDACTED [[C]] draft as though it had in fact been meant to respond to proposals for all of the "Joint Parties."¹⁵² Despite that, Mr. Lammers persisted in his delay. Indeed, there is some evidence that even after sending his initial, partial, responses, Mr. Lammers continued unreasonably delaying actual negotiation on behalf of the Defendant Stations. Although he observed on [[HC]] REDACTED¹⁵³ REDACTED¹⁵⁴ REDACTED [[HC]]¹⁵⁵

31. This is the most egregious example of delay that we have encountered since the good faith rules were adopted. In every other alleged instance of unreasonable delay, there has been some effort by

¹⁴⁴ Answer at 23; *see supra generally* paras. 20-21, 24-28, discussing and rejecting Defendants' arguments regarding the *per se* violations.

¹⁴⁵ *Supra* paras. 24-26.

¹⁴⁶ 47 CFR § 76.65(2)(b)(iii).

¹⁴⁷ *HolstonConnect*, 2019 WL 4200625 at *4, para. 9.

¹⁴⁸ *Northwest*, 30 FCC Rcd at 12452, para. 9.

¹⁴⁹ *Good Faith Order*, 15 FCC Rcd at 5462, para. 40.

¹⁵⁰ [[C]] REDACTED [[C]] ATT000048 - ATT000216. Hypothetically, such a delay might be reasonable if the proposals had been sent many months prior to expiration of an existing deal, rather than a few [[C]] REDACTED [[C]] prior, or if the parties had agreed to such a delay, rather than it resulting from stonewalling on the part of one party.

¹⁵¹ *Supra* para. 26.

¹⁵² ATT000255-394, 418-552.

¹⁵³ ATT000841.

¹⁵⁴ ATT000840.

¹⁵⁵ ATT000841.

both parties to move toward agreement.¹⁵⁶ Given the facts in this case, we do not hesitate to find that Defendants' willful and extended delay in responding to AT&T violated the *per se* good faith standard prohibiting undue or unreasonable delay.

32. *Failure to Respond to Proposals.* We also agree with AT&T that each of the Defendant Negotiating Entities failed in its individual obligation to respond, or have its common agent respond, to AT&T's proposals with respect to retransmission of its Station signals. "[A] broadcaster, in responding to an offer proposed by an MVPD, must provide reasons for rejecting any aspects of the MVPD's offer" and may not simply ignore or disregard any portion of a proposal.¹⁵⁷ Although Mr. Lammers was the common agent of both the Defendant Station Groups and [[C]] REDACTED [[C]], the record shows that he responded only to proposals with respect to the [[C]] REDACTED [[C]] stations for approximately [[C]] REDACTED [[C]] months, disregarding all proposals having to do with the Defendant Stations.¹⁵⁸ AT&T states that it "has asked many times for responses to its March and April proposals, but [that] the Station Groups have never provided one."¹⁵⁹ Defendants "deny any inference or suggestion by Complainants that Mr. Lammers intended [[C]] REDACTED [[C]] mark-up to be for [[C]] REDACTED [[C]] only,"¹⁶⁰ but also repeatedly "deny . . . that a response to the Defendant-specific agreement proposals Complainants had delivered was necessary in light of Max Retrans's joint representation of defendants."¹⁶¹ At one point, Mr. Lammers even told AT&T to stop [[HC]] REDACTED [[HC]]¹⁶² Defendants argue on the one hand, then, that they did provide responses, while on the other hand arguing that while they did not provide responses, they did not have to do so. Both arguments are fatally flawed.

33. For the reasons discussed above, regardless of how Mr. Lammers styled the draft proposals he sent in [[C]] REDACTED [[C]], in substance they were responses only to the AT&T [[C]] REDACTED [[C]] proposals.¹⁶³ A single proposed agreement that would have resolved carriage with respect to all of the parties represented by Mr. Lammers, a true "Joint Parties" draft, could in theory have been responsive to all of AT&T's proposals with respect to all of the Station Groups. That is not the situation before us. None of AT&T's Defendant Station proposals garnered any response of any kind from Mr. Lammers in [[C]] REDACTED [[C]],¹⁶⁴ and he made clear that he did not intend to provide one because [[C]] REDACTED [[C]].¹⁶⁵ Mr. Lammers' responses to the [[C]] REDACTED [[C]] proposals did not excuse Defendants from their independent obligations to respond, or have Mr. Lammers respond, to proposals involving their Stations.¹⁶⁶ The only substantive responses provided by Mr. Lammers to

¹⁵⁶ See *HolstonConnect*, 2019 WL 4200625; *Coastal*, 33 FCC Rcd 11025; *Northwest*, 30 FCC Rcd at 12449; and *Echostar*, 16 FCC Rcd 15070.

¹⁵⁷ *Good Faith Order*, 15 FCC Rcd at 5464, para. 44.

¹⁵⁸ *Supra* paras. 11-13, 24-26 and 30.

¹⁵⁹ Complaint at 23.

¹⁶⁰ Answer at 34.

¹⁶¹ Answer at 34-5, para. 36; *see also, e.g.*, Answer at 34-35, paras. 34, 37, 38.

¹⁶² ATT000841.

¹⁶³ *Supra* paras. 24-26.

¹⁶⁴ *Supra* para. 24.

¹⁶⁵ *Supra* para. 26.

¹⁶⁶ 47 CFR § 76.65(b)(1)(v).

AT&T's Defendant Station proposals were the June 3 [[C]] REDACTED [[C]] later.¹⁶⁷ Rate discussions are often central to retransmission consent negotiations, and these proposals were responsive to AT&T's request for [[HC]] REDACTED [[HC]]¹⁶⁸ While necessary to finally begin participating in negotiations, however, they were not sufficient responses to AT&T's proposals. Mr. Lammers did not accept or reject any of AT&T's proposed non-rate terms, much less "provide reasons for rejecting [every] aspect[] of the MVPD's offer."¹⁶⁹ And, as he emphasized, complete responses were [[HC]] REDACTED [[HC]] [[C]] REDACTED [[C]]¹⁷⁰ In this case, Defendants' repeated willful refusal to respond fully to AT&T's good faith proposals constituted a violation of the *per se* good faith standard requiring responses to carriage proposals.

34. *Totality of the Circumstances.* Finally, we agree with Defendants that we should decline to address AT&T's allegation that Defendants have violated the totality of the circumstances test for good faith retransmission consent negotiation.¹⁷¹ Under the totality of the circumstances test, which is 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."¹⁷² 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."¹⁷³ AT&T points to Defendants' explicitly stated intent to [[C]] REDACTED [[C]]¹⁷⁴ Defendants appear to argue that, [[C]] REDACTED [[C]]¹⁷⁵ Defendants, however, primarily emphasize the argument that this question is beyond the scope of this proceeding and the Commission's authority,¹⁷⁶ noting that AT&T has raised this very issue before the court in the Eastern District of Missouri.¹⁷⁷ We decline to prejudge the court's decision on the contractual questions in that case, and we need not reach this issue in order to resolve AT&T's Complaint.

VI. CONCLUSION

35. We find that the Defendants acted in bad faith by refusing to negotiate with AT&T, unreasonably delaying negotiations, and refusing to respond to AT&T's proposals. Any one of those violations on its own would be sufficient to support our finding. We hold that negotiating jointly does not

¹⁶⁷ *Supra* para. 15, ATT000783-794, 796-810.

¹⁶⁸ ATT000720-723, ATT000725-727.

¹⁶⁹ *Good Faith Order*, 15 FCC Rcd at 5464, para. 44.

¹⁷⁰ ATT000841.

¹⁷¹ Complaint at ii, 25-29.

¹⁷² 47 CFR § 76.65(b)(2).

¹⁷³ *Good Faith Order*, 15 FCC Rcd at 5458, para. 32.

¹⁷⁴ Complaint at 17-18.

¹⁷⁵ Answer at 26-27.

¹⁷⁶ *Id.* at 25-26.

¹⁷⁷ Civil Complaint, *AT&T Services, Inc. & DIRECTV, LLC v. Max Retrans LLC*, No. 19-01925 (E.D. Mo. July 11, 2019).

excuse any member of that joint negotiation from its individual obligation to comply with the good faith obligations of the statute and our rules. We decline to reach the [[C]] REDACTED [[C]] issues raised by Complainants in the context of an alleged “totality of the circumstances” violation at this time, but we reserve the right to return to these issues after the question has been addressed in federal court. There is some dispute about the state of the negotiations at this time,¹⁷⁸ but it appears that the Defendant Stations are still not being provided to AT&T subscribers.¹⁷⁹ Given the violations of the good faith negotiation standards we have found in this case, and the guidance provided herein, we urge the parties to expeditiously go to the bargaining table and commence negotiations “in an atmosphere of honesty, purpose and clarity of process.”¹⁸⁰

¹⁷⁸ *See supra* note 106.

¹⁷⁹ *But see supra* note 10.

¹⁸⁰ *Good Faith Order*, 15 FCC Rcd at 5455, para. 24.

V. ORDERING CLAUSES

36. Accordingly, **IT IS ORDERED** that DIRECTV, LLC and AT&T Services, Inc.'s Complaint against Deerfield Media (Port Arthur) Licensee, LLC, Deerfield Media (Cincinnati) Licensee, LLC, Deerfield Media (Mobile) Licensee, LLC, Deerfield Media (Rochester) Licensee, LLC, and Deerfield Media (San Antonio) Licensee, LLC; Howard Stirk Holdings, LLC, HSH Flint (WEYI) Licensee, LLC, and HSH Myrtle Beach (WWMB) Licensee, LLC; Mercury Broadcasting Company, Inc.; MPS Media of Tennessee Licensee, LLC, MPS Media of Gainesville Licensee, LLC, MPS Media of Tallahassee Licensee, LLC, and MPS Media of Scranton Licensee, LLC; Nashville License Holdings, LLC; KMTR Television, LLC; Waitt Broadcasting, Inc., 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 GRANTED** to the extent described above.

37. **IT IS FURTHER ORDERED** that DIRECTV, LLC and AT&T Services, Inc.'s Complaint against Deerfield Media, Inc., 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 DISMISSED**.

38. **IT IS FURTHER ORDERED** that DIRECTV, LLC and AT&T Services, Inc.'s October 7, 2019 Request for Dismissal of their Complaint with respect to GoCom Media of Illinois, LLC, and their November 4, 2019 Request for Dismissal of their Complaint with respect to Second Generation of Iowa, LTD, **ARE GRANTED** to the extent described above.

39. This action is taken pursuant to delegated authority under Section 0.283 of the Commission's rules.¹⁸¹

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey
Chief, Media Bureau

¹⁸¹ 47 CFR § 0.283.