



## II. BACKGROUND

2. Section 325(b)(3)(C) of the Communications Act of 1934, as amended (the Act), obligates broadcasters and MVPDs to negotiate retransmission consent in good faith.<sup>6</sup> 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, and it shall not be a failure to negotiate in good faith if the distributor enters into retransmission consent agreements containing different terms and conditions, including price terms, with different broadcast stations if such different terms and conditions are based on competitive marketplace considerations.<sup>7</sup>

3. In its *Good Faith Order*, the Commission adopted rules implementing the good faith negotiation provisions and complaint procedures for alleged rule violations.<sup>8</sup> The *Good Faith Order* adopted a two-part test for good faith.<sup>9</sup> The first part of the test consists of an objective list of negotiation standards which, if violated, constitute a *per se* breach of the duty to negotiate in good faith.<sup>10</sup> The three *per se* standards at issue in the Complaint are (1) the refusal by a negotiating entity to put forth more than a single, unilateral proposal; (2) the 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; and (3) the refusal of a negotiating entity to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> The burden of proof in good faith complaints is on the complainant.<sup>14</sup>

5. On August 2, 2018, HolstonConnect notified Nexstar that it planned to launch its cable service on October 1, 2018, and Nexstar emailed a draft retransmission consent agreement to HolstonConnect on September 7, 2018.<sup>15</sup> The parties engaged in negotiations throughout the fall and

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<sup>6</sup> 47 U.S.C. § 325(b)(3)(C).

<sup>7</sup> *Id.* § 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*).

<sup>8</sup> See *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, Order on Reconsideration, 16 FCC Rcd 15599 (2001).

<sup>9</sup> *Good Faith Order*, 15 FCC Rcd at 5457, para. 30.

<sup>10</sup> *Id.* at 5462-64, paras. 40-46.

<sup>11</sup> 47 CFR §§ 76.65(b)(1)(iii)-(v).

<sup>12</sup> *Good Faith Order*, 15 FCC Rcd at 5458, para. 32; 47 CFR § 76.65(b)(2).

<sup>13</sup> 47 CFR §§ 76.65(c), 76.7.

<sup>14</sup> *Id.* § 76.65(d).

<sup>15</sup> Complaint at 6; Opposition at 3. Nexstar and HolstonConnect have no previous retransmission consent agreement. Complaint at 5-6; Opposition at 3.

winter, but they did not reach an agreement.<sup>16</sup> HolstonConnect filed its Complaint on March 4, 2019, and the parties continued to negotiate after that date, with Nexstar providing its most recent counterproposal on March 27, 2019.<sup>17</sup> The Complaint alleges that Nexstar has failed to negotiate retransmission consent in good faith by: (1) refusing to put forth more than a single, unilateral proposal; (2) failing to respond to a retransmission consent proposal of the other party, including the reasons for the rejection of any such proposal; and (3) refusing to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations.<sup>18</sup> HolstonConnect also alleges that Nexstar has breached the duty to negotiate in good faith under the totality of the circumstances test.<sup>19</sup> HolstonConnect asks the Commission to find that Nexstar did not negotiate in good faith, order Nexstar to make WATE and WJHL available to HolstonConnect at fair and reasonable rates, enjoin Nexstar from using tying arrangements as a condition for carrying WATE and WJHL, impose sanctions or forfeitures on Nexstar, order Nexstar to reimburse HolstonConnect for its costs, and provide any other relief that the Commission deems appropriate.<sup>20</sup>

### III. DISCUSSION

6. We conclude that HolstonConnect has failed to demonstrate that Nexstar violated the Commission's good faith negotiation rules. At the outset, we reiterate our longstanding precedent that absent other factors, disagreement over the rates, terms, and conditions of retransmission consent – even fundamental disagreement – is not indicative of lack of good faith.<sup>21</sup> As we have also repeatedly stated, nothing in the Act or our implementing rules requires that parties negotiating retransmission consent actually reach agreement.<sup>22</sup>

7. We find that the record does not demonstrate that Nexstar violated the *per se* good faith negotiation rule prohibiting a “single, unilateral proposal.”<sup>23</sup> While HolstonConnect alleges that Nexstar is engaging in prohibited “‘take it or leave it’ demands,”<sup>24</sup> the record does not support this claim.<sup>25</sup> The facts agreed upon by both parties indicate that Nexstar offered a reduction in price twice during the course of negotiations.<sup>26</sup> HolstonConnect objects to Nexstar's counterproposal that would have added an additional year to the length of the agreement, a term that it states would lead to an “exorbitant rate.”<sup>27</sup> However, 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.<sup>28</sup> The record indicates

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<sup>16</sup> Complaint at 7-9.

<sup>17</sup> *Id.* at 9, 22; Opposition at 6.

<sup>18</sup> Complaint at 11-13.

<sup>19</sup> *Id.* at 13-19.

<sup>20</sup> *Id.* at 21.

<sup>21</sup> See *Coastal Television Broad. Co. LLC v. MTA Commun., LLC*, Memorandum Opinion and Order, 33 FCC Rcd 11025, 11027, para. 7 (MB 2018) (*Coastal Order*); *HITV License Subsidiary, Inc. v. DIRECTV, LLC*, Memorandum Opinion and Order, 33 FCC Rcd 1137, 1140, para. 7 (MB 2018) (*HITV Order*); *Mediacom Commun. Corp. v. Sinclair Broad. Grp., Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 47, 50, para. 6 (MB 2007).

<sup>22</sup> See *HITV Order*, 33 FCC Rcd at 1140, para. 7; *Coastal Order*, 33 FCC Rcd at 11027, para. 7.

<sup>23</sup> 47 CFR § 76.65(b)(1)(iv).

<sup>24</sup> Complaint at 12.

<sup>25</sup> *Id.* at 7; Opposition at 4-5, Exh. 2.

<sup>26</sup> Complaint at 7, 9; Opposition at 4-5.

<sup>27</sup> Complaint at 9.

<sup>28</sup> *Coastal Order*, 33 FCC Rcd at 11029, para. 9.

that Nexstar made multiple counterproposals, and that these counterproposals were not identical, clearly demonstrating that Nexstar put forth more than a single, unilateral proposal. While HolstonConnect claims that Nexstar's requirement that it carry unwanted programming as a condition of carrying the broadcast stations at issue was a form of "take it or leave it" bargaining,<sup>29</sup> Nexstar explains that it actually sought to require HolstonConnect to "carry all of the programming streams broadcast by a single station (i.e., all of WATE's programming)," a proposal that Nexstar notes "is in full compliance with the Commission's rules."<sup>30</sup>

8. Next, we find that HolstonConnect has not shown that Nexstar has violated the *per se* good faith negotiation rules by failing to respond to HolstonConnect's proposals, including the reasons for the rejection of any proposal.<sup>31</sup> HolstonConnect states that Nexstar has "rejected HolstonConnect's counterproposals outright, with little or no explanation of the reasons for the rejection other than to assert that it has closed deals for the proposed amount somewhere else."<sup>32</sup> We find that explaining that a proposal is inconsistent with other comparable deals is a sufficient reason for rejecting a proposal. 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."<sup>33</sup> HolstonConnect may believe in good faith that Nexstar's proposal is inconsistent with "the going rates in the Knoxville and Tri-Cities markets for comparable programming," while Nexstar may at the same time believe in good faith that its proposal is consistent with other deals it has closed.<sup>34</sup> Attributing different values to the stations at issue is not inconsistent with the duty to negotiate retransmission consent in good faith.<sup>35</sup>

9. We also find that Nexstar did not violate the rule prohibiting unreasonable delays in retransmission consent negotiations.<sup>36</sup> Bureau cases explain that the rules require parties to respond to offers in a timely manner, reasonable within the context of the negotiations at hand.<sup>37</sup> HolstonConnect alleges that Nexstar "refused to engage in further negotiations and did not respond" to attempts to negotiate.<sup>38</sup> The record does not reflect that Nexstar prevented negotiations from advancing.<sup>39</sup> To the contrary, Nexstar was responsive to communication via phone and email, and it received and responded

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<sup>29</sup> Complaint at 12.

<sup>30</sup> Opposition at 11.

<sup>31</sup> Complaint at 12. The Commission's rules provide that it is a violation of the duty to negotiate retransmission consent agreements in good faith if a negotiating entity fails "to respond to a retransmission consent proposal of the other party, *including the reasons for the rejection of any such proposal.*" 47 CFR § 76.65(b)(1)(v) (emphasis added).

<sup>32</sup> Complaint at 12.

<sup>33</sup> See *Northwest Broad. L.P., et al. v. DIRECTV, LLC*, MB Docket No. 15-151, Memorandum Opinion and Order, 30 FCC Rcd 12449, 12453, para. 11 (MB 2015) (*Northwest Order*) (citing *Good Faith Order*, 15 FCC Rcd at 5464, para. 44); *Coastal Order*, 33 FCC Rcd at 11029, para. 10.

<sup>34</sup> Complaint at 12.

<sup>35</sup> See, e.g., Opposition at 9 ("HolstonConnect's demand that Nexstar conform to rates provided by other broadcast stations in the applicable markets is counter to the Commission's acknowledgement that proposals that are different from other broadcasters are presumptively legitimate").

<sup>36</sup> The Commission's rules provide that it is a violation of the duty to negotiate retransmission consent agreements in good faith if a negotiating entity refuses "to negotiate retransmission consent," or if it refuses "to meet and negotiate retransmission consent at reasonable times and locations, or act[s] in a manner that unreasonably delays retransmission consent negotiations." 47 CFR § 76.65(b)(1)(i), (iii).

<sup>37</sup> See *Northwest Order*, 30 FCC Rcd at 12452, para. 9 ("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); *Coastal Order*, 33 FCC Rcd at 11028, para. 8.

<sup>38</sup> Complaint at 13.

to counteroffers in a timely fashion.<sup>40</sup> The record demonstrates that Nexstar was responsive to HolstonConnect's communications, and that Nexstar attempted to contact HolstonConnect repeatedly to no reply.<sup>41</sup> HolstonConnect also alleges that Nexstar "flatly refused to work with HolstonConnect to craft a mutually acceptable agreement."<sup>42</sup> This argument conflates the willingness to negotiate with the ability to reach an agreement, and it is without merit. The record demonstrates that there was clear back-and-forth negotiation between the parties,<sup>43</sup> but ultimately they were unable to reach an agreement, which our retransmission consent rules contemplate as a potential outcome.

10. Finally, we reject HolstonConnect's allegation that Nexstar has violated the totality of the circumstances test for good faith retransmission consent negotiations.<sup>44</sup> Under the totality of the circumstances test, "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."<sup>45</sup> In setting out 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."<sup>46</sup> HolstonConnect alleges that Nexstar is demanding outrageous rates for programming,<sup>47</sup> that Nexstar is demanding carriage of unwanted channels at exorbitant rates,<sup>48</sup> and that the combination of these two demands "amounts to an abuse of market power" foreclosing marketplace entry to HolstonConnect and therefore violating the totality of the circumstances test.<sup>49</sup> We are not persuaded, based on the record, that HolstonConnect has met its burden in demonstrating a "totality of the circumstances" claim based on these facts.

11. The record does not support a finding that Nexstar's proposed retransmission consent rates are grounds for a finding of bad faith under the totality of the circumstances test. HolstonConnect asserts that the rates offered by Nexstar are "vastly higher" than rates offered by other Big Four broadcasters in the same markets.<sup>50</sup> It argues that Nexstar's rates are creating a cost-prohibitive barrier to its marketplace entry, which "not only threaten[s] the development of HolstonConnect's cable service, but also impair[s] HolstonConnect's ability to deliver broadband Internet access service for residents and

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<sup>39</sup> *Id.* at 6-8; Opposition at 3-4, 6, Exh. 2.

<sup>40</sup> Complaint at 6-8; Opposition at 3-4, 6, Exh. 2; *see* Opposition at 2, n.2 ("it is [HolstonConnect's] designated representative that has wasted time by going weeks without responding to Nexstar, as well as repeatedly missing scheduled phone calls").

<sup>41</sup> Opposition at Exh. 2.

<sup>42</sup> Complaint at 13.

<sup>43</sup> *Id.* at 6-8; Opposition at 3-4, 6, Exh. 2.

<sup>44</sup> Complaint at 13-19.

<sup>45</sup> 47 CFR § 76.65(b)(2).

<sup>46</sup> *Good Faith Order*, 15 FCC Rcd at 5458, para. 32.

<sup>47</sup> Complaint at 14-15.

<sup>48</sup> *Id.* at 15-16.

<sup>49</sup> *Id.* at 17-19.

<sup>50</sup> *Id.* at 15.

businesses in rural East Tennessee.<sup>51</sup> The record indicates that fundamentally, this dispute is a disagreement over price,<sup>52</sup> which is the type of commonplace business disagreement that the Commission does not deem a violation of its rules. HolstonConnect's status as a small cable operator and new market entrant affords it no differential treatment, as our good faith negotiation standards apply equally to broadcasters and cable operators of all sizes.<sup>53</sup>

12. In addition, we do not find a violation of the totality of the circumstances test resulting from what HolstonConnect characterizes as Nexstar's attempt to subject it to an "abusive tying arrangement" by demanding that it "carry additional stations not desired by HolstonConnect or its customers."<sup>54</sup> The Commission has established that "proposals for carriage conditioned on carriage of any other programming, such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same market or a different market," are presumptively consistent with competitive marketplace negotiations.<sup>55</sup> HolstonConnect has not satisfied its burden of proving that Nexstar's proposals, including its tying proposal, were inconsistent with competitive marketplace considerations.<sup>56</sup> The record indicates that HolstonConnect and Nexstar have gone back and forth with negotiations over pricing, channels involved, and length of contract.<sup>57</sup>

13. For the above reasons, we find no violation of the Commission's *per se* good faith standards, nor the totality of the circumstances test.<sup>58</sup> Given the guidance provided herein, we urge the parties to return to the bargaining table and recommence negotiations "in an atmosphere of honesty, purpose and clarity of process."<sup>59</sup>

#### IV. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that HolstonConnect, LLC's Complaint against Nexstar

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<sup>51</sup> *Id.* at 16 (emphasis in original). *See also id.* at 3 ("to provide widespread gigabit broadband Internet access service in rural East Tennessee on an economically sound basis, HolstonConnect must be able to obtain essential cable television programming . . . at reasonable and non-discriminatory rates, terms, and conditions").

<sup>52</sup> *See, e.g., id.* at 17; Opposition at 12.

<sup>53</sup> *See, e.g., Good Faith Order*, 15 FCC Rcd at 5496-98, para. 23. We also reject HolstonConnect's request for "limited discovery" to examine the retransmission agreements of Nexstar with other MVPDs in the same DMAs to ascertain rates. Complaint at 22. The Commission has stated that a retransmission consent disagreement does not "require parties to disclose confidential information to support their position." *Northwest Order*, 30 FCC Rcd at 12453-54, para. 11; *ATC Broad. LLC et al. v. Gray Television Licensee, Inc.*, CSR-8010-C, Memorandum Opinion and Order, 24 FCC Rcd 1645, 1650, para. 11 (MB 2009) (citing *Mediacom Comm. Corp. v. Sinclair Broad. Group*, 22 FCC Rcd 35, 41, para. 15 (MB 2007)).

<sup>54</sup> Complaint at 20.

<sup>55</sup> *Good Faith Order*, 15 FCC Rcd at 5469, para. 56.

<sup>56</sup> Complaint at 13-19.

<sup>57</sup> *Id.* at 6-8; Opposition at 3-4, n. 6.

<sup>58</sup> HolstonConnect asks that the Commission award it costs and attorney's fees as well as "any other relief that the commission deems appropriate." Complaint at 21. Because we have found no good faith violation in this case, we decline to impose any forfeitures. HolstonConnect also requests that this proceeding be designated as "Permit-but-Disclose" for *ex parte* purposes. *See* HolstonConnect, Emergency Request for Designation as "Permit-but-Disclose" Proceeding (filed Mar. 13, 2019) (Emergency Request). We do not see any reason to designate this proceeding as permit-but-disclose. HolstonConnect's desire to "launch a new, competitive cable television service, as a necessary adjunct to its CAF II-supported deployment of gigabit broadband service in East Tennessee," is not a time-sensitive policy issue; rather, it is an issue that a new entrant may face in the regular course of business. *See id.* at 3. Further, the parties' filings provide ample information to support the conclusions herein. Because there is no need for staff to discuss or obtain additional "information needed to resolve these issues expeditiously," a permit-but-disclose *ex parte* designation is not appropriate. *See Comment Sought on Mediacom Communications Corporation's Emergency Retransmission Consent Complaint; Establishment of "Permit-but-Disclose" Ex Parte Procedures*, CSR

(continued...)

Media Group, Inc, filed pursuant to sections 76.7 and 76.65 of the Commission's rules, 47 CFR §§ 76.7 and 76.55, **IS DENIED**.

15. **IT IS FURTHER ORDERED** that HolstonConnect, LLC's Emergency Request for Designation as "Permit-but-Disclose" Proceeding **IS DENIED**.

16. This action is taken pursuant to delegated authority under section 0.283 of the Commission's rules.<sup>60</sup>

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey  
Chief, Media Bureau

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7058-C, Public Notice, 21 FCC Rcd 13114 (MB 2006) (granting request for modification of *ex parte* designation for a retransmission consent adjudication).

<sup>59</sup> *Good Faith Order*, 15 FCC Rcd at 5455, para. 24.

<sup>60</sup> 47 CFR § 0.283.