

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 ) MB Docket No. 19-168
Arthur) Licensee, LLC; Deerfield Media )
(Cincinnati) Licensee, LLC; Deerfield Media ) CSR No. 8979-C
(Mobile) Licensee, LLC; Deerfield Media )
(Rochester) Licensee, LLC; and Deerfield Media ) Account Nos.: MB-202041430002, MB-
(San Antonio) Licensee, LLC; GoCom Media of ) 202041430003, MB-202041430004, MB-
Illinois, LLC; Howard Stirk Holdings, LLC; HSH ) 202041430005, MB-202041430006, MB-
Flint (WEYI) Licensee, LLC; and HSH Myrtle ) 202041430007, MB-202041430008, MB-
Beach (WWMB) Licensee, LLC; Mercury ) 202041430009, MB-202041430010, MB-
Broadcasting Company, Inc.; MPS Media of ) 202041430011, MB-202041430012, MB-
Tennessee Licensee, LLC; MPS Media of ) 202041430013, MB-202041430014, MB-
Gainesville Licensee, LLC; MPS Media of ) 202041430015, and MB-202041430016
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. )

MEMORANDUM OPINION AND ORDER AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: September 2, 2020

Released: September 15, 2020

By the Commission: Commissioner O’Rielly approving in part, concurring in part and issuing a statement;
Commissioner Starks issuing a statement.

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**I. INTRODUCTION**

1. The Commission has before it an Application for Review (AFR) filed on December 9, 2019, by fifteen licensees in eight television broadcast station groups.<sup>1</sup> Defendants seek review of the Media Bureau’s (Bureau) decision that they failed to negotiate in good faith with DIRECTV, LLC, and AT&T Services, Inc. (collectively, AT&T or the Complainant), for consent to carry the signals of 18 broadcast television stations (the Defendant Stations), which are licensed to the Defendants.<sup>2</sup> In the *Bureau Decision*, the Bureau granted AT&T’s complaint (Complaint), finding that Defendants refused to negotiate, unreasonably delayed negotiations, and failed to respond to AT&T’s carriage proposals, each constituting a *per se* breach of the duty to negotiate in good faith.<sup>3</sup> For the reasons set forth below, we

<sup>1</sup> Defendants’ Application for Review, MB Docket No. 19-168 (filed Dec. 9, 2019) (AFR). The applicants include Deerfield Media (Port Arthur) Licensee, LLC; Deerfield Media (Cincinnati) Licensee, LLC; Deerfield Media (Mobile) Licensee, LLC; Deerfield Media (Rochester) Licensee, LLC; Deerfield Media (San Antonio) Licensee, LLC; GoCom Media of Illinois, 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; and Waitt Broadcasting, Inc. (Defendants). The Bureau dismissed the underlying complaint with respect to Deerfield Media, Inc., because it was not the licensee of any of the Defendant Stations, but it nonetheless also joined the Application for Review. *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; Deerfield Media (San Antonio) Licensee, LLC; GoCom Media of Illinois, 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; and Waitt Broadcasting, Inc., Defendants*, MB Docket No. 19-168, Memorandum Opinion and Order, 34 FCC Rcd 10367 (MB 2019) (*Bureau Decision*), *Application for Review filed* (Dec. 9, 2019). Howard Stirk Holdings, LLC (HSH), as well as its subsidiaries HSH Flint (WEYI) Licensee, LLC and HSH Myrtle Beach (WWMB) Licensee, LLC, were named in the underlying complaint but did not join the AFR. *AFR* at Cover Letter page 1. HSH has separately resolved this matter, paying a civil penalty and admitting that its actions, through its agent, Duane Lammers, violated the good faith negotiation rules. *Howard Stirk Holdings, LLC; HSH Flint (WEYI) Licensee, LLC; and HSH Myrtle Beach (WWMB) Licensee, LLC*, Order, MB Docket No. 19-168, DA 20-472 (rel. May 1, 2020) (*HSH Settlement*). After release of the *HSH Settlement*, AT&T filed a letter arguing that HSH’s admission of liability “underscores why the Commission should deny [Defendants’] Application for Review of the Order.” Letter from Kevin J. Miller, Counsel to the Complainants, Kellogg, Hansen, Todd, Figel, & Frederick, P.L.L.C., to Marlene Dortch, Secretary, Federal Communications Commission, at 1 (May 8, 2020) (MB Docket No. 19-168). Defendants respond that, because they “are not parties to the Consent Decree, none of its terms is relevant to their pending application for review of the Bureau’s Order.” Letter from Marc S. Martin, Counsel to the Defendants, Perkins Coie, LLP, to Marlene Dortch, Secretary, Federal Communications Commission at 1 (May 13, 2020) (MB Docket No, 19-168). We did not consider the *HSH Settlement* in reaching our decision today or in issuing the Notice of Apparent Liability herein.

<sup>2</sup> See generally *Bureau Decision*, 34 FCC Rcd 10367.

<sup>3</sup> *Id.* at 10368, 10383; see also Verified Complaint of DIRECTV, LLC and AT&T Services, Inc. for the Station Groups’ Failure to Negotiate in Good Faith, MB Docket No. 19-168 (filed June 18, 2019) (Complaint). The Bureau acted without prejudice to the Commission’s right to pursue enforcement action in the future. *Bureau Decision*, 34 FCC Rcd at 10369, nn.10-11.

deny the AFR. Further, in light of our finding today that the *Bureau Decision* was correctly decided on all issues, we propose a penalty of \$512,228 (five hundred twelve thousand, two hundred twenty-eight dollars) against each of the eighteen stations.<sup>4</sup>

## II. BACKGROUND

### A. The Obligation to Negotiate in Good Faith for Retransmission Consent

2. Section 325(b)(3)(C) of the Communications Act of 1934, as amended (the Act), obligates broadcasters and multichannel video programming distributors (MVPDs) to negotiate retransmission consent in good faith.<sup>5</sup> Specifically, section 325(b)(3)(C)(ii) directs the Commission to establish regulations that:

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.<sup>6</sup>

In its *Good Faith Order*, the Commission adopted rules implementing the good faith negotiation standard in section 325 and setting forth complaint procedures for alleged violations of these rules.<sup>7</sup> While the good faith negotiation requirement was originally imposed only on television broadcast stations, a reciprocal obligation was later imposed on MVPDs.<sup>8</sup> The *Good Faith Order* establishes a two-part test for good faith.<sup>9</sup> The first part of the test consists of an objective list of negotiation standards.<sup>10</sup> Each of these standards apply to “Negotiating Entities,” which the rules define as “a broadcast television station or [MVPD].”<sup>11</sup> An individual station or MVPD’s violation of any of these standards during negotiations constitutes a *per se* breach of the duty to negotiate in good faith.<sup>12</sup>

3. The *per se* standards, which follow “well established precedent in the field of labor law,” are a “brief, objective list of negotiation standards” that were intended to “give[] immediate guidance to the parties to retransmission consent negotiations that certain conduct will not be tolerated.”<sup>13</sup> They were “derived [by the Commission] from [National Labor Relations Board] precedent, commenters’ proposals and the Section 251 interconnection requirements.”<sup>14</sup> In the event a complaint alleges that one of these

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<sup>4</sup> The proposed forfeiture per licensee is directly proportional to the number of its stations implicated in the violation of the good faith rules. *See infra* para. 59.

<sup>5</sup> 47 U.S.C. § 325(b)(3)(C).

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

<sup>7</sup> *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, CS Docket No. 99-363, 15 FCC Rcd 5445 (*Good Faith Order*), *recon. granted in part*, Order on Reconsideration, 16 FCC Rcd 15599 (2001).

<sup>8</sup> *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) (implementing the statutory directive to impose such a reciprocal good faith bargaining obligation).

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

<sup>10</sup> 47 CFR §§ 76.65(b)(1)(i)–(ix) (list of *per se* negotiating standards).

<sup>11</sup> 47 CFR §§ 76.65(b)(1).

<sup>12</sup> *Good Faith Order*, 15 FCC Rcd at 5462-64, paras. 40-46.

<sup>13</sup> *Id.* at 5457, paras. 30-31.

<sup>14</sup> *Id.* at 5462, para. 39.

actions or practices has occurred, the questions before the Bureau or the Commission are factual. If a party “demonstrate[s] to the Commission that a broadcaster [or MVPD], in the conduct of a retransmission consent negotiation, has engaged in actions violative of an objective negotiation standard, the Commission would find that the broadcaster [or MVPD] has breached its duty to negotiate in good faith.”<sup>15</sup> This obviates the need for the Bureau, or the Commission, to engage in a comprehensive survey of good faith negotiation precedent across multiple fields each time it is alleged that a Negotiating Entity has violated a *per se* good faith standard. Instead, the Bureau or Commission need only consider the record to determine, as a fact-finding exercise, the presence or absence of an “action or practice” that appears on the list of objective standards.<sup>16</sup>

4. There are three *per se* standards directly at issue in this case. First, a Negotiating Entity may not refuse to negotiate regarding retransmission consent.<sup>17</sup> As the Commission has explained, “[t]his requirement goes to the very heart of Congress’s purpose in enacting the good faith negotiation requirement.”<sup>18</sup> 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.<sup>19</sup>

5. 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.<sup>20</sup> In considering a possible violation of this standard, we are conscious that time is frequently of the essence in retransmission consent negotiations in order to avoid service disruption.<sup>21</sup> 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,”<sup>22</sup> 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.”<sup>23</sup>

6. Finally, Negotiating Entities must respond to retransmission consent proposals and explain their reasons for rejecting any such proposals.<sup>24</sup> 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.”<sup>25</sup> The explanation does not have to be justified by documents or evidence, but some explanation must be provided.<sup>26</sup>

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<sup>15</sup> *Id.* at 5457, para. 31.

<sup>16</sup> *Id.*

<sup>17</sup> 47 CFR § 76.65(b)(1)(i).

<sup>18</sup> *Good Faith Order*, 15 FCC Rcd at 5462, para. 40.

<sup>19</sup> *Id.*

<sup>20</sup> 47 CFR § 76.65(b)(1)(iii).

<sup>21</sup> *Good Faith Order*, 15 FCC Rcd at 5463, para. 42.

<sup>22</sup> *HolstonConnect, LLC v. Nexstar Media Group, Inc., Good Faith Negotiation Complaint*, MB Docket No. 19-60, Memorandum Opinion and Order, 34 FCC Rcd 7833, 7836, para. 9 (MB 2019).

<sup>23</sup> *Northwest Broadcasting, L.P., et al., v. DIRECTV, LLC*, MB Docket No. 15-151, Memorandum Opinion and Order, 30 FCC Rcd 12449, 12452, para. 9 (MB 2015) (*Northwest*).

<sup>24</sup> 47 CFR § 76.65(b)(1)(v).

<sup>25</sup> *Good Faith Order*, 15 FCC Rcd at 5464, para. 44.

<sup>26</sup> *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*).

7. The second part of the good faith test considers the “totality of the circumstances.” Under this standard, broadcasters or MVPDs 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.<sup>27</sup> When adopting this standard, the Commission explained that “specific retransmission consent proposals” could be “sufficiently outrageous . . . as to breach [the] good faith negotiation obligation.”<sup>28</sup>

8. 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.<sup>29</sup> The burden of proof in good faith complaints is on the complainant.<sup>30</sup> The instant complaint is only the second good faith complaint that was not withdrawn, dismissed, or denied since the rules were established and the first one that the Commission has had the opportunity to consider.<sup>31</sup> As with all violations of the Communications Act or the Commission’s rules promulgated under the Act, the Commission has the authority to impose forfeitures for violations of the good faith rules.<sup>32</sup>

### **B. The Record<sup>33</sup>**

9. As the specific details in the record are essential to our decision in both the Memorandum Opinion and Order and the Notice of Apparent Liability, below we provide a full overview of the relevant facts. We note that this discussion closely tracks the one in the *Bureau Decision*, and like that discussion, it reflects undisputed statements by the parties and/or the communications between the parties that were placed into the record.<sup>34</sup>

10. The Defendant licensees are each part of one of eight station groups (Defendant Station Groups) that operate the 18 Defendant Stations, among others. The Defendant Stations serve a diverse array of communities across the United States, from Florida to Oregon, and collectively provide the four major commercial broadcast networks, as well as other network and independent programming, to millions of viewers.<sup>35</sup> Each of the Defendants has one or more agreements with Sinclair Broadcast Group (Sinclair), pursuant to which Sinclair “operates, programs [and/]or provides sales services” to the Defendant Stations.<sup>36</sup> While together these agreements give Sinclair a relationship with, and stake in the

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<sup>27</sup> 47 CFR § 76.65(b)(2).

<sup>28</sup> *Good Faith Order*, 15 FCC Rcd at 5458, para. 32.

<sup>29</sup> 47 CFR §§ 76.65(c), 76.7.

<sup>30</sup> *Id.* § 76.65(d).

<sup>31</sup> *See Jorge L. Bauermeister*, Letter, 22 FCC Rcd 4933 (MB 2007) (finding that an MVPD had failed to negotiate in good faith under the totality of the circumstances standard and directing the parties to begin good faith negotiations) (*Bauermeister*).

<sup>32</sup> *Good Faith Order*, 15 FCC Rcd at 5480, para. 82 (citing 47 U.S.C. § 503(b)).

<sup>33</sup> Because of the large amount of confidential information in this proceeding, the Media Bureau 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, 34 FCC Rcd 5286 (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 and Notice of Apparent Liability.

<sup>34</sup> *Bureau Decision*, 34 FCC Rcd at 10371, n.34.

<sup>35</sup> Complaint at 2; *see also* Defendants’ Answer to Good Faith Complaint, MB Docket No. 19-168, at 30-32 (filed Aug. 6, 2019) (Answer).

<sup>36</sup> Complaint at 11 (citing the website of a Defendant Station, WHAM Rochester, *About WHAM*, <https://13wham.com/station/contact>); *see also* Answer at 27. Sinclair describes itself as “[t]he largest and most diversified television broadcasting company in the country today.” Sinclair Broadcast Group, *Welcome to Sinclair Broadcast Group*, <http://sbgi.net/> (last visited Apr. 23, 2019).

success of, each of the Defendant Stations, Sinclair itself is not a party to this proceeding.<sup>37</sup> DIRECTV and U-verse are AT&T-subsidary MVPDs serving over 23 million subscribers nationwide, including subscribers in each of the designated market areas (DMAs) to which the Defendant Stations are licensed.<sup>38</sup> AT&T's DIRECTV and U-verse, and the Defendants' Stations, are all "Negotiating Entities" for the purposes of the Commission's good faith retransmission consent rules.<sup>39</sup> AT&T and the Defendants were parties to retransmission consent agreements that originally expired on [[HC]] REDACTED [[HC]].<sup>40</sup>

11. [[C]] REDACTED [[C]] several negotiators from AT&T reached out to the Defendants, seeking a representative from each station group with whom to negotiate.<sup>41</sup> Defendants responded that all the groups would be represented by the same individual, Duane Lammers of Max Retrans, [[C]] REDACTED [[C]].<sup>42</sup> 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]].<sup>43</sup> [[C]] REDACTED<sup>44</sup> REDACTED [[C]].<sup>45</sup> 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 renewal agreements to each of the Defendant Station Groups and to [[C]] REDACTED [[C]], each with different terms. [[HC]] REDACTED [[HC]] Vice President Linda Burakoff. 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]]).<sup>46</sup>

12. 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.<sup>47</sup> On [[C]] REDACTED<sup>48</sup> REDACTED<sup>49</sup> REDACTED<sup>50</sup> REDACTED [[C]].<sup>51</sup>

13. On [[C]] REDACTED [[C]].<sup>52</sup> Mr. Lammers identified these edits to the [[HC]] REDACTED [[HC]].<sup>53</sup> But the attached draft agreement contained no reference to any station group other

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<sup>37</sup> Complaint at 11.

<sup>38</sup> *Id.* at 7.

<sup>39</sup> *Id.* at 2, 4; Answer at 11.

<sup>40</sup> Complaint at 12.

<sup>41</sup> Complaint at 15; Answer at 33.

<sup>42</sup> Complaint at 14-15; Answer at 33.

<sup>43</sup> 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.

<sup>44</sup> [[C]] REDACTED [[C]]

<sup>45</sup> ATT000574.

<sup>46</sup> ATT000048-216; ATT000584.

<sup>47</sup> Complaint at 16; Answer at 34.

<sup>48</sup> ATT000223.

<sup>49</sup> *Id.*; *see also* Complaint at 16; Answer at 34.

<sup>50</sup> *See, e.g.*, ATT000224, ATT000228.

<sup>51</sup> Complaint at 17, 20; Answer at 35-36; ATT000714-756.

<sup>52</sup> Complaint at 16; Answer at 10-11; ATT000231-250.

than [[C]] REDACTED [[C]], and no reference to any of the proposals made by AT&T with respect to any of the Defendant Stations.<sup>54</sup> Exhibit A, the “List of Stations” covered by the agreement, had been left blank by AT&T, and marked [[HC]] REDACTED [[HC]]<sup>55</sup> It was completed in the draft Mr. Lammers sent back, included only [[C]] REDACTED [[C]], and made no reference to the Defendant Stations.<sup>56</sup> Finally, Mr. Lammers [[HC]] REDACTED<sup>57</sup> REDACTED<sup>58</sup> REDACTED [[HC]]<sup>59</sup>

14. In mid-April, AT&T sent new proposals, first for [[C]] REDACTED [[C]]<sup>60</sup> and a few days later for each of the Defendant Station Groups.<sup>61</sup> Each proposal the AT&T negotiators sent was [[HC]] REDACTED [[HC]]<sup>62</sup> On April 25, 2019, just [[HC]] REDACTED [[HC]] hours after receiving the last of AT&T’s updated proposals regarding the Defendant Stations,<sup>63</sup> 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.<sup>64</sup> Similar to the draft he sent earlier in [[C]] REDACTED [[C]], this was identified as being [[HC]] REDACTED [[HC]]<sup>65</sup> Like that earlier draft, the April 25, 2019, draft 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.<sup>66</sup> 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 and made no reference to the Defendant Stations.<sup>67</sup> And, once again, Mr. Lammers [[C]] REDACTED [[C]] [[HC]] REDACTED [[HC]]<sup>68</sup> 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]]<sup>69</sup>

15. On May 7, 2019, AT&T sent a [[HC]] REDACTED [[HC]] and emphasized to Mr. Lammers that [[HC]] REDACTED [[HC]]<sup>70</sup> [[C]] REDACTED [[C]] [[HC]] REDACTED [[HC]]<sup>71</sup>

(Continued from previous page) \_\_\_\_\_

<sup>53</sup> ATT000231. Mr. Lammers’ reference to [[HC]] REDACTED [[HC]] here and elsewhere, appears to have meant the [[C]] REDACTED [[C]] stations and all other stations being represented by Mr. Lammers with respect to AT&T, including the Defendant Stations.

<sup>54</sup> ATT000232-250.

<sup>55</sup> ATT000038, ATT000046.

<sup>56</sup> ATT000248.

<sup>57</sup> ATT000231.

<sup>58</sup> ATT000253-254.

<sup>59</sup> ATT000252.

<sup>60</sup> ATT000563 [[HC]] REDACTED [[HC]]

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

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

<sup>63</sup> ATT000418.

<sup>64</sup> Complaint at 17; Answer at 11; ATT000553-574.

<sup>65</sup> ATT000553.

<sup>66</sup> ATT000554-573.

<sup>67</sup> ATT000571.

<sup>68</sup> ATT000553.

<sup>69</sup> ATT000579-580.

<sup>70</sup> Answer at 11-12; ATT000582-583.

<sup>71</sup> ATT000584.

[[C]] REDACTED [[C]] [[HC]] REDACTED [[HC]]<sup>72</sup> On May 10, 2019, Mr. Lammers sent a draft in response to [[C]] REDACTED<sup>73</sup> REDACTED<sup>74</sup> REDACTED [[C]] [[HC]] REDACTED<sup>75</sup> REDACTED<sup>76</sup> [[HC]]<sup>77</sup> [[C]] REDACTED [[C]] [[HC]] REDACTED [[HC]]<sup>78</sup> [[C]] REDACTED [[C]] [[HC]] REDACTED [[HC]]<sup>79</sup> [[C]] REDACTED [[C]] [[HC]] REDACTED [[HC]]<sup>80</sup>

16. In late [[C]] REDACTED [[C]] and its outside counsel sent formal letters to Max Retrans, expressing [[C]] REDACTED [[C]]<sup>81</sup> [[C]] REDACTED [[C]] [[HC]] REDACTED [[HC]] [[C]] REDACTED<sup>82</sup> REDACTED [[C]] [[HC]] REDACTED [[HC]]<sup>83</sup> [[C]] REDACTED<sup>84</sup> REDACTED [[C]] [[HC]] REDACTED [[HC]] [[C]] REDACTED<sup>85</sup> REDACTED [[C]] The [[C]] REDACTED [[C]] Station agreements, as well as the bulk of the Defendant Station agreements, expired on May 30, 2019, with the remainder expiring on June 10, 2019.<sup>86</sup> All 20 of the Defendant Stations, as well as the [[C]] REDACTED [[C]] Stations, consequently went dark for DIRECTV and U-verse subscribers.

17. 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.<sup>87</sup> On [[C]] REDACTED<sup>88</sup> REDACTED [[C]] [[HC]] REDACTED [[HC]]<sup>89</sup> On June 3, 2019, Mr. Lammers provided AT&T for the first time with proposals that by their terms applied to the Defendant Stations. [[HC]] REDACTED [[HC]]<sup>90</sup> Each proposal consisted solely of [[HC]] REDACTED [[HC]]<sup>91</sup> 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).<sup>92</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> ATT000604-626.

<sup>74</sup> ATT000605-625.

<sup>75</sup> ATT000604.

<sup>76</sup> *Id.*

<sup>77</sup> ATT000604.

<sup>78</sup> *Id.*

<sup>79</sup> ATT000649-677.

<sup>80</sup> *See, e.g.*, ATT000678; ATT000704.

<sup>81</sup> Complaint at 19, Answer at 13.

<sup>82</sup> ATT000726; *see also* ATT000720, ATT000747, etc.

<sup>83</sup> ATT000720-723, ATT000725-727.

<sup>84</sup> ATT000720.

<sup>85</sup> ATT000728.

<sup>86</sup> Complaint at 20; Answer at 37.

<sup>87</sup> *See* ATT000725 [[HC]] REDACTED [[HC]] and ATT000770-782 (redlined against a [[HC]] REDACTED [[HC]] AT&T draft).

<sup>88</sup> ATT00759-782.

<sup>89</sup> *Id.*

<sup>90</sup> ATT000783-794, 796-810.

<sup>91</sup> *Id.*; *see also* Complaint at 21; Answer at 37.

<sup>92</sup> ATT000783-794, 796-810; ATT000762-763; ATT000607-608.

18. [[C]] REDACTED [[C]] [[HC]] REDACTED [[HC]]<sup>93</sup> [[C]] REDACTED [[C]] [[HC]] REDACTED [[HC]]<sup>94</sup> [[C]] REDACTED [[C]] [[HC]] REDACTED [[HC]]<sup>95</sup>

19. On June 18, 2019, AT&T filed the Complaint alleging that the Defendants 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 with 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 violation of the totality of the circumstances test.<sup>96</sup> Shortly 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 while the Defendant Stations remained dark.<sup>97</sup> The first agreement with respect to the Defendant Stations was apparently not signed until early October, roughly four months after subscribers lost access to the stations.<sup>98</sup>

20. The *Bureau Decision*, adopted on November 6, 2019, granted the Complaint.<sup>99</sup> The Bureau found that the Defendants had violated the *per se* good faith negotiation requirements by refusing to negotiate with AT&T, unreasonably delaying negotiations, and failing to respond to AT&T's proposals. The Bureau noted that any one of those violations on its own would be sufficient to support its finding, and held that negotiating jointly does not excuse any member of that joint negotiation from its individual obligation to comply with the good faith obligations of the statute and the Commission's rules. The Bureau declined to address AT&T's "totality of the circumstances" claim because it was based on contractual questions then pending before a federal court.<sup>100</sup> Finally, the Bureau noted that despite the signing of the [[C]] REDACTED [[C]] agreement months earlier, most of the Defendant Stations were still unavailable to subscribers at the time the *Bureau Decision* was adopted.<sup>101</sup> The Bureau therefore urged the parties to seek an agreement or agreements for carriage expeditiously.<sup>102</sup> It also noted that, as always, the Commission "reserve[d] the right to take enforcement action proposing a forfeiture for the violations of the Act and our rules detailed herein."<sup>103</sup>

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<sup>93</sup> ATT000795, ATT000811.

<sup>94</sup> ATT000841.

<sup>95</sup> ATT000840.

<sup>96</sup> Complaint at 4-6.

<sup>97</sup> Reply in Support of DIRECTV, LLC and AT&T Services, Inc.'s Complaint for Defendants' Failure to Negotiate in Good Faith, MB Docket No. 19-168, at 11 (filed Aug. 23, 2019) (AT&T Complaint-Supporting Reply).

<sup>98</sup> 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).

<sup>99</sup> See generally *Bureau Decision*, 34 FCC Rcd 10367.

<sup>100</sup> *Id.* at 10383, para. 34. AT&T invites the Commission to rule on this still-pending element of their complaint, or remand it to the Bureau for resolution, unless we affirm the Bureau's finding that the Defendants violated the *per se* rules. DIRECTV, LLC and AT&T Services, Inc.'s Opposition to Defendants' Application For Review, MB Docket No. 19-168, at 23-24 (filed Dec. 23, 2019) (Opposition). In light of our decision today, we dismiss this element of the AT&T Complaint. See *infra* section II.B.3.

<sup>101</sup> *Bureau Decision*, 34 FCC Rcd at 10368-69, n.10.

<sup>102</sup> *Id.* at 10383-84, para. 35. According to news reports, shortly after the release of the *Bureau Decision* all of the Defendant Stations had reached carriage agreements with AT&T. Mike Farrell, *Nashville Station Signs Retrans Pact With AT&T* (Nov. 27, 2019), <https://www.multichannel.com/news/nashville-station-signs-retrans-pact-with-at-t>.

<sup>103</sup> *Id.* at 10369, n.11.

### III. MEMORANDUM OPINION & ORDER

#### A. The AFR, Opposition, and Reply

21. Section 1.115 of the Commission's rules permits "[a]ny person aggrieved by any action taken pursuant to delegated authority" to file an application seeking Commission review of the decision.<sup>104</sup> The filing must "concisely and plainly state the questions presented for review," identify the factors that warrant Commission review,<sup>105</sup> and be filed within 30 days of public notice of the action in question.<sup>106</sup> The Commission will consider an application for review only when the petitioner can show that the action taken pursuant to delegated authority: (1) is in conflict with statute, regulation, case precedent, or established Commission policy; (2) involves a question of law or policy that has not previously been resolved by the Commission; (3) involves application of a precedent or policy that should be overturned or revised; (4) involves an erroneous finding as to an important or material question of fact; or (5) involves a prejudicial procedural error.<sup>107</sup>

22. The timely-filed AFR here contends that the *Bureau Decision* rests upon an "erroneous finding as to an important or material question of fact," "conflict[s] with statute, regulation, case precedent, or established Commission policy," and "involves application of a [newly minted] policy which should be overturned or revised."<sup>108</sup> In general, Defendants argue that the Bureau was "misled" by AT&T and "uncritically" accepted the complainant's position in its review of the record.<sup>109</sup> With respect to findings of fact, Defendants contend that the "Joint Parties" drafts provided by Mr. Lammers to AT&T should have been understood by the Bureau to "serve[] dual roles – as a template for the Joint Parties' baseline terms and as a standalone agreement for [[C]] REDACTED [[C]]."<sup>110</sup> Critically, Defendants argue that under this interpretation of the record, none of the *per se* violations identified by the Bureau would stand.<sup>111</sup> Specifically, Defendants claim that "Mr. Lammers used a staggered approach to negotiations, attempting first to negotiate a template agreement for all Joint Parties," with the intent of "then proposing station-specific modifications for each individual Joint Party,"<sup>112</sup> and that "[t]he parties' need to negotiate [[HC]] REDACTED [[HC]] after agreeing on baseline terms for all of them does not change the fact that, in establishing those baseline terms, Mr. Lammers was negotiating for Defendants."<sup>113</sup> They assert that Mr. Lammers "used the same strategy" in 2016, and that the parties' negotiating history "forecloses the Bureau's conclusion that, when Mr. Lammers provided Joint Parties revisions to the [[C]] REDACTED [[C]] agreement, he must have been negotiating only for [[C]] REDACTED [[C]]."<sup>114</sup> Indeed, Defendants maintain that the "Joint Parties Directv Representation List"

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<sup>104</sup> 47 CFR § 1.115(a).

<sup>105</sup> 47 CFR § 1.115(b)(1-2).

<sup>106</sup> 47 CFR § 1.115(d).

<sup>107</sup> 47 CFR § 1.115(b).

<sup>108</sup> AFR at 13, 22.

<sup>109</sup> *Id.* at 13.

<sup>110</sup> *Id.* at 16, 13-17.

<sup>111</sup> *Id.* at 11.

<sup>112</sup> *Id.* at 12.

<sup>113</sup> *Id.* at 17.

<sup>114</sup> *Id.* at 16.

[sic], included by Mr. Lammers alongside some but not all of the “Joint Parties” drafts, could not be “reasonably interpret[ed]” in any way other than as a list of the stations to which the draft would apply.<sup>115</sup>

23. Defendants next argue that the *Bureau Decision* conflicts with Commission precedent by “intrud[ing] in the negotiation of retransmission consent.”<sup>116</sup> They contend that the dispute between the parties was simply a matter of conflicting but equally legitimate “bargaining proposals,”<sup>117</sup> and that “the Bureau [improperly] accepted AT&T’s framing of the relevant issue.”<sup>118</sup> In so doing, they assert, the Bureau compelled Defendants, contrary to Commission guidance and related precedent, to “accept a specific term or condition” – the condition, proposed by AT&T, that Mr. Lammers bargain for station groups singly, rather than jointly.<sup>119</sup> Defendants also contend that the Bureau imposed “an all-or-nothing requirement” with respect to carriage terms, as discussed in more detail immediately below, and that this requirement “conflict[s] with statute, regulation, case precedent, [and] established Commission policy,”<sup>120</sup> asserting that Commission precedent demonstrates that “back-and-forth communications between the parties” are enough to support a finding that the parties both engaged in good faith negotiation.<sup>121</sup>

24. Finally, Defendants contend that rather than simply asking whether there was a “[r]efusal by a Negotiating Entity to negotiate retransmission consent”<sup>122</sup> or a “[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,”<sup>123</sup> the Bureau created and imposed two improper tests which should be overturned or revised.<sup>124</sup> First, Defendants acknowledge 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.”<sup>125</sup> Defendants claim that when the Bureau made this undisputed statement of fact it was, in actuality, creating a new standard against which Mr. Lammers’ actions were improperly judged.<sup>126</sup> This standard, they argue, creates a new “requirement that a Negotiating Entity simultaneously propose all terms necessary for an agreement . . . rather than negotiating certain terms before others.”<sup>127</sup> Defendants also claim that the Bureau adopted a new standard for joint negotiations, essentially requiring that they consist of only a single agreement that would resolve carriage with respect to all of the parties to the

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<sup>115</sup> *Id.* at 15. Defendants further claim that this was a dispositive misinterpretation, and that the Bureau’s decision “turned on whether Mr. Lammers pasted the lists of represented stations into ‘Exhibit A in each proposed agreement,’ [] rather than simply attaching them to his emails.” *Id.*

<sup>116</sup> *Id.* at 14 (citing *Good Faith Order*, 14 FCC Rcd at 5450, para. 14).

<sup>117</sup> *Id.* at 19.

<sup>118</sup> *Id.* at 18. Defendants further contend that this led the Bureau to address “only a straw man argument,” specifically the question of whether “a broadcaster can avoid negotiating retransmission consent ‘simply because it is using an agent in common with other parties,’” rather than addressing the facts of the case. *Id.* (citing *Bureau Decision*, 34 FCC Rcd at 10377, para. 23).

<sup>119</sup> AFR at 20 (citing *Good Faith Order*, 14 FCC Rcd at 5489, para. 81).

<sup>120</sup> *Id.* at 22 (citing 47 CFR § 1.115(b)(2)(iii)).

<sup>121</sup> *Id.* at 23-24 (citing *HITV License Subsidiary, Inc. v. DIRECTV, LLC*, MB Docket No. 17-292, Memorandum Opinion and Order, 33 FCC Rcd 1137, 1140, n.33 (MB 2018)).

<sup>122</sup> 47 CFR § 76.65(b)(1)(i).

<sup>123</sup> 47 CFR § 76.65(b)(1)(v).

<sup>124</sup> AFR at 12, 22.

<sup>125</sup> *Id.* at 21 (citing *Bureau Decision*, 34 FCC Rcd at 10376-77, para. 22).

<sup>126</sup> *Id.* at 21-22; *see also* AFR at 9 (implying that the Bureau considered the lack of a comprehensive proposal to be a sufficient reason on its own to support finding that Defendants failed to negotiate).

<sup>127</sup> *Id.* at 22.

negotiation, rather than separate agreements.<sup>128</sup> In both cases, Defendants assert that these alleged “new regulatory standard[s]” were improper, and that the “staggered approach to negotiations” taken by Mr. Lammers was permissible under Commission rules and relevant precedent.<sup>129</sup>

25. Based on these contentions, Defendants present the following questions:

1) Whether the Bureau correctly determined that Defendants had refused to negotiate retransmission consent, unreasonably delayed in negotiating, and failed to respond to AT&T’s retransmission-consent proposals even though their common agent had repeatedly provided AT&T with marked-up draft agreements expressly on behalf of the “Joint Parties,” which included Defendants, AT&T acceded to extensions to enable the Joint Parties to [HC] “continue negotiations,” [HC] and the same parties had previously used the exact same approach in negotiating the initial term of the retransmission consent agreements.<sup>130</sup>

2) Whether the Bureau exceeded its delegated authority by departing from the Commission’s rules and precedent in concluding that a negotiating entity cannot satisfy its duty to negotiate in good faith unless any retransmission-consent agreement proposed by the negotiating entity would itself have resulted in carriage if the proposal were accepted without change.<sup>131</sup>

26. In response to these arguments, the Opposition counters that the *Bureau Decision* is based upon a “thorough review of the record,” and that assertions the Bureau was “misled” or “uncritical” in its analysis are “baseless.”<sup>132</sup> It points out that “Defendants cite no contemporaneous evidence” for their claim that the [[C]] REDACTED [[C]] agreement “served dual roles.”<sup>133</sup> Instead, the Opposition contends that the record evidence shows that negotiating towards a [[C]] REDACTED [[C]] deal was never the same as negotiating towards a deal for the Defendant Station Groups, each of which required separate agreements that Mr. Lammers was unwilling to discuss until he could reach agreement on the [[C]] REDACTED [[C]] deal.<sup>134</sup> The Opposition also points out that, for negotiations over the [[C]] REDACTED [[C]] deal to simultaneously serve as negotiations over a template, “the parties would need to know which terms were universal and which were [[HC]] REDACTED [[HC]]”<sup>135</sup> Instead, there is “no evidence showing that Mr. Lammers identified the ‘baseline terms’ he purportedly proposed negotiating and then applying to all parties,” because he was in actuality focused on closing the [[C]] REDACTED [[C]] deal rather than negotiating on behalf of the Defendants.<sup>136</sup> Further, the Opposition argues that prior to the filing of the Complaint, Defendants never responded to any of AT&T’s proposals, and indeed “never proposed a single term concerning carriage of their stations until June 3, after ‘virtually all of them had gone dark.’”<sup>137</sup> “Ultimately,” it contends, regardless of the approach Mr. Lammers took in 2016, the Bureau “simply read the relevant correspondence from both 2016 and 2019 and found nothing to support Defendants’ claim that Mr. Lammers was actually negotiating terms [in 2019] that would apply to anyone other than [[C]] REDACTED [[C]].”<sup>138</sup> The Opposition also argues that it is “demonstrably incorrect” to

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<sup>128</sup> *Id.* at 12; *see also Bureau Decision*, 34 FCC Rcd at 10382-83, para. 33.

<sup>129</sup> AFR at 12, 22-23.

<sup>130</sup> *Id.* at 1.

<sup>131</sup> *Id.*

<sup>132</sup> Opposition at 12.

<sup>133</sup> *Id.* at 14.

<sup>134</sup> *Id.* at 15.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 12 (citing *Bureau Decision*, 34 FCC Rcd at 10379, para. 26).

<sup>138</sup> *Id.* at 18.

suggest, as Defendants do, that the “Joint Parties” list was “intended to identify the stations to which the proposed agreement at issue would apply.”<sup>139</sup> Instead, “[t]he stations actually covered by the agreement at issue were included in Exhibit A to the proposal itself, which listed only [[C]] REDACTED [[C]] stations.”<sup>140</sup>

27. With respect to unreasonable delay specifically, the Opposition maintains that the Bureau correctly read the record to demonstrate that Mr. Lammers took the Defendant Stations off the table until after most of them had gone dark, and that “[t]he conclusion that Defendants unreasonably delayed follows automatically.”<sup>141</sup> It further states that even if the Commission finds that the Defendants did not refuse to negotiate altogether, their conduct still constituted unreasonable delay under the relevant rules.<sup>142</sup> The Opposition contends that even if Defendants had been pursuing a “dual roles” strategy, that approach could not possibly have resulted in reaching carriage agreements prior to the expiration of existing agreements and extensions. Those agreements were instead, the Opposition contends, completely dependent on resolution of the [[C]] REDACTED [[C]] agreement, “a future event that lacked any set deadline and indeed might never have occurred.”<sup>143</sup> The Opposition asserts that the Defendants thus failed to act as though time was of the essence; they acted “as if time was immaterial,” even after agreements expired and blackouts began.<sup>144</sup> This alone, the Opposition contends, constitutes unreasonable delay.

28. The Opposition supports the Bureau’s application of Commission precedent, disputing Defendants’ claim that the *Bureau Decision* compelled them to bargain singly, rather than jointly.<sup>145</sup> The Opposition contends that, in fact, Defendants never actively bargained or intended to bargain jointly with [[C]] REDACTED [[C]], and never had the “intent of reaching agreement,” for the [[C]] REDACTED [[C]] prior to the adoption of a separate [[C]] REDACTED [[C]] deal.<sup>146</sup> The Opposition notes that AT&T incorporated elements of the first [[C]] REDACTED [[C]] draft into their proposals for carriage of the Defendant Stations and provided updated drafts, but argues that Mr. Lammers did not respond to these updated proposals either directly or within a later “Joint Parties” draft.<sup>147</sup> It contends that the “bargaining proposal[]” Defendants sought to advance was, in fact, a proposal under which [[C]] REDACTED [[C]] would be negotiated while the Defendant Stations were off the table indefinitely, and that this constituted a refusal to negotiate in violation of our rules.<sup>148</sup>

29. With respect to the claim that the Bureau created new standards or tests rather than applying the Commission’s rules, the Opposition argues that Defendants “miss the point.”<sup>149</sup> The Opposition states that the Bureau did not fault Defendants for failing to “simultaneously propose all terms necessary for an agreement,” and it did not impose an all-or-nothing requirement;<sup>150</sup> instead, Defendants

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<sup>139</sup> Opposition at 13 (citing AFR at 15).

<sup>140</sup> *Id.* at 13.

<sup>141</sup> *Id.* at 19.

<sup>142</sup> *Id.* at 20.

<sup>143</sup> *Id.* at 21.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 16.

<sup>146</sup> *Id.* (citing *Good Faith Order*, 15 FCC Rcd at 5462, para. 40 (“Broadcasters must participate in retransmission consent negotiations with the intent of reaching agreement.”)).

<sup>147</sup> Opposition at 16.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 20. Similarly, the Opposition contends that the Bureau did not prohibit “template” based bargaining. *Id.*

<sup>150</sup> AFR at 20.

were found to have committed *per se* violations because they failed to respond to or propose “any terms at all until after blackouts began.”<sup>151</sup>

30. Finally, the Opposition reiterates the Complaint’s argument that, even if none of Defendants’ conduct is found to constitute a *per se* violation, it should still be considered a violation of the duty to negotiate in good faith under the totality of the circumstances standard.<sup>152</sup> AT&T contends that “Defendants’ [*sic*] planned to use their common agent [[HC]] REDACTED [[HC]].”<sup>153</sup> AT&T notes that the Commission need not reach this argument if the *Bureau Decision* is upheld, but otherwise asks us either to resolve this claim or to remand it to the Bureau for resolution.<sup>154</sup>

31. In their Reply, Defendants largely recapitulate the arguments raised in the AFR, beginning with the claim that the Opposition contains “precisely the sort of factual mischaracterization that misled the Media Bureau.”<sup>155</sup> They contend that the *Bureau Decision* “rests entirely” on its factual determination that when Mr. Lammers sent the “Joint Parties” drafts he was not negotiating on behalf of the Defendants.<sup>156</sup> They argue that, in fact, when he sent these drafts he intended to negotiate simultaneously a deal that would apply exclusively to [[C]] REDACTED [[C]], as well as a template that would cover all of the Defendant Stations.<sup>157</sup> Specifically, they point to: 1) the fact that the [[C]] REDACTED [[C]] drafts were identified by Mr. Lammers as being sent on behalf of the “Joint Parties”; 2) Mr. Lammers’ statement that he was [[HC]] REDACTED [[HC]] to the [[C]] REDACTED [[C]] deal in the deals for the Defendants; 3) the immediate AT&T response stating [[HC]] REDACTED [[HC]]; 4) a letter sent by AT&T’s outside counsel, in which the attorney describes Mr. Lammers seeking [[HC]] REDACTED [[HC]]; and 5) the allegation by AT&T in its civil suit that Mr. Lammers was planning to [[HC]] REDACTED [[HC]]<sup>158</sup>

32. Defendants contend that AT&T always understood the “Joint Parties” drafts to contain “common terms” applicable to the Defendants as well as [[C]] REDACTED [[C]],<sup>159</sup> relying in part on the AT&T civil suit against Mr. Lammers’ firm in which AT&T observed that Mr. Lammers intended to [[HC]] REDACTED [[HC]] the defendants.<sup>160</sup>

33. Defendants also assert that Mr. Lammers’ 2019 approach was identical to his 2016 approach, and that AT&T concedes Mr. Lammers used “[[[C]] REDACTED [[C]]” in 2016.<sup>161</sup> They contend that even though AT&T preferred Mr. Lammers not take this approach in 2019, he “was entitled to negotiate – and, more importantly, did negotiate – for all of the Joint Parties using the [[C]] REDACTED [[C]] template.”<sup>162</sup> They theorize that the *Bureau Decision*’s finding that Mr. Lammers did

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<sup>151</sup> Opposition at 20.

<sup>152</sup> Opposition at 22-24.

<sup>153</sup> *Id.* at 22.

<sup>154</sup> *Id.* at 23-24.

<sup>155</sup> Reply at ii.

<sup>156</sup> *Id.* at 1.

<sup>157</sup> *Id.* at ii, 1-2.

<sup>158</sup> *Id.* at 1-2 (citing, respectively, *Bureau Decision*, 34 FCC Rcd at 10372-73, paras. 11-13; *id.* at 10373, para. 13; *id.*; ATT000710; and Civil Complaint, *AT&T Services, Inc. and DIRECTV, LLC v. Max Retrans LLC*, No. 19-01925 (E.D. Mo. July 11, 2019) (Civil Complaint)).

<sup>159</sup> Reply at ii.

<sup>160</sup> *Id.* at iii (citing Civil Complaint at para. 6; emphasis added by Defendants).

<sup>161</sup> Reply at 2 (citing Opposition at 17).

<sup>162</sup> Reply at 2.

not, in fact, negotiate was based on the factual error of “assum[ing] that Mr. Lammers accepted AT&T’s unilateral decision to abandon the template approach.”<sup>163</sup> They argue that the evidence of the 2016 negotiation proves that Mr. Lammers’ 2019 Joint Parties drafts approach could have reflected simultaneous negotiations on behalf of [[C]] REDACTED [[C]] and Defendants.<sup>164</sup> They contend that the basic premise of the AT&T federal suit against Mr. Lammers was that “he improperly *negotiated for Defendants* . . . not that he *failed to negotiate for Defendants*,” and that for all these reasons the Commission should reject the Bureau’s conclusion that the Defendants “categorically refused to negotiate.”<sup>165</sup>

34. Finally, Defendants once again assert that the *Bureau Decision* adopted a “new good faith standard,” creating a requirement that Negotiating Entities make a single comprehensive proposal rather than staggering negotiations.<sup>166</sup> They argue that this “new standard” was the basis for the *Bureau Decision*, and consequently the Commission should not consider AT&T’s arguments about Mr. Lammers’ failure to negotiate at reasonable times.<sup>167</sup> Defendants contend that the real issue in this case is whether parties are permitted to seek agreement on non-rate terms before addressing rates, and that because the parties reached carriage agreements without blackouts in 2016, any blackouts in 2019 cannot be attributed to Mr. Lammers’ negotiating strategy.

## **B. Denial of the Application For Review**

35. After careful consideration of the underlying record, we deny the AFR, affirming both the Bureau’s reasoning and its conclusions. As discussed below, the Bureau’s factual analysis was sound, and its legal analysis conformed to the guidance of Commission rules and precedent, so we reject Defendants’ claim that the Bureau was “misled” or “uncritical[.]”<sup>168</sup> The record shows that Defendants repeatedly refused to negotiate for carriage of the stations’ signals or to respond to any of AT&T’s proposals for carriage. This refusal unreasonably delayed the negotiations, and millions of subscribers consequently lost access to the programming carried by the Defendant Stations. Defendants’ behaviors each constituted a distinct *per se* failure to negotiate in good faith.

### **1. The Defendants Refused to Negotiate Retransmission Consent, Unreasonably Delayed in Negotiating, and Failed to Respond to Retransmission Consent Proposals Because the “Joint Parties” Drafts Applied Only to [[C]] REDACTED [[C]]**

36. The AFR attempts to portray Mr. Lammers as engaged in two simultaneous negotiations: one for carriage of the [[C]] REDACTED [[C]] stations, and another for a template agreement that would cover all of the Defendants and need only station-specific tweaks before being signed. The record shows, however, that Mr. Lammers was in fact engaged in negotiation only for carriage of the [[C]] REDACTED

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<sup>163</sup> *Id.* at 3.

<sup>164</sup> *Id.* at 2.

<sup>165</sup> *Id.* at 3, 4 (emphasis in original).

<sup>166</sup> *Id.* at 4.

<sup>167</sup> *Id.* at 5.

<sup>168</sup> AFR at 14. We also take the opportunity to address Defendants’ allegation that the Bureau “deferred” to AT&T, “the world’s largest multichannel video programming distributor. . . uncritically accept[ing]” their statements and arguments in order to provide them with “assistance in negotiating retransmission consent with a handful of small broadcasters.” AFR at ii. Defendants, each of which are affiliated with “[t]he largest. . . television broadcasting company in the country,” (*see supra* note 36) call into question the ability and willingness of the Commission to act as a neutral arbiter in the resolution of adjudications, a core duty of this agency. Despite the seriousness of these claims, Defendants provide no evidence to support them. They are, apparently, based solely upon Defendant’s disagreement with the outcome of the *Bureau Decision*, an outcome which we affirm today. These allegations are without merit, and we firmly reject them.

[[C]] stations. It demonstrates that he was not willing to negotiate for carriage of the Defendant Stations until the [[C]] REDACTED [[C]] deal was signed, specifically because he hoped to use the completed [[C]] REDACTED [[C]] agreement as the “baseline” – or “starting point”<sup>169</sup> – for negotiation of the Defendant Station Groups’ deals. As the Bureau correctly found, this approach – taking negotiation for carriage of the Defendant Stations off the table and refusing to discuss any terms specifically relating to them until virtually all of them had gone dark – does not meet the requirements of our rules. We therefore affirm the Bureau’s finding that this course of action constituted a violation of all three *per se* standards at issue.

37. As the Bureau observed, Mr. Lammers had the authority to negotiate on behalf of the Defendant Stations and 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]]<sup>170</sup> Each such draft agreement, however, proposed to cover certain [[HC]] REDACTED [[HC]] to include only those listed in Exhibit A of the agreement – a list that never included the Defendant Stations.<sup>171</sup> The Defendants explain that some of Mr. Lammers’ proposed drafts were also accompanied by a list of the stations he was representing.<sup>172</sup> They contend that “there is no other way to reasonably interpret” the presence of these lists than as proof that the [[C]] REDACTED [[C]] draft was also, simultaneously, a template intended to apply to all of the stations.<sup>173</sup>

38. As explained, however, the stations covered by the proposed agreements were identified within the agreements themselves,<sup>174</sup> and Defendants’ characterization of Mr. Lammers’ actions simply does not accord with the facts. If Mr. Lammers had intended to negotiate both [[C]] REDACTED [[C]]-specific terms and “universal” or “common” terms,<sup>175</sup> he would have identified which was which when he sent the “Joint Parties” drafts.<sup>176</sup> He did not. To the contrary, he indicated that his [[HC]] REDACTED [[HC]]<sup>177</sup> He was [[HC]] REDACTED [[HC]]<sup>178</sup> in the [[HC]] REDACTED [[HC]]<sup>179</sup> He emphasized that [[C]] REDACTED [[C]] [[HC]] REDACTED [[HC]] [[C]] REDACTED [[C]] deal was complete.<sup>180</sup> Whenever pressed by AT&T about his silence regarding 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, but he never identified parts of those drafts that were universal as opposed to [[C]] REDACTED [[C]]-specific.<sup>181</sup> Indeed, each time Mr. Lammers sent any of the allegedly “Joint” proposals to AT&T, he sent it only to the negotiator(s) handling [[C]] REDACTED [[C]], despite the fact

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<sup>169</sup> Merriam-Webster, *baseline*, <https://www.merriam-webster.com/dictionary/baseline> (last visited Apr. 24, 2020).

<sup>170</sup> ATT000231-250, ATT000553-574, ATT000605-625.

<sup>171</sup> *See, e.g.*, ATT000235.

<sup>172</sup> *See, e.g.*, ATT000574, 626; *c.f.*, ATT000231-250.

<sup>173</sup> AFR at 15 (insisting that the Bureau’s finding that the station lists “were not intended to identify the stations to which the proposed agreement would apply” was “without supporting evidence”).

<sup>174</sup> *Supra* para. 37; *see also Bureau Decision*, 34 FCC Rcd at 10377-78, para. 24.

<sup>175</sup> Reply at ii.

<sup>176</sup> *See* Opposition at 15 (“[T]o be able to negotiate a set of “baseline terms” applicable to all parties using the [[C]] REDACTED [[C]] draft as a ‘vehicle,’ (Application at 19) the parties would need to know which terms were universal and which were [[HC]] REDACTED [[HC]]” (citing ATT000640)).

<sup>177</sup> ATT000840.

<sup>178</sup> ATT000841.

<sup>179</sup> ATT000604.

<sup>180</sup> ATT000841.

<sup>181</sup> *See, e.g.*, ATT000252, ATT000579-580, ATT000678, ATT000704.

that AT&T had separate negotiators assigned to the Defendant Stations,<sup>182</sup> leaving it up to them to [[HC]] REDACTED [[HC]]<sup>183</sup>

39. Defendants rely heavily on the claim that Mr. Lammers used the same negotiating approach in 2019 that he had used in 2016, to which AT&T ostensibly acquiesced, and criticize the Bureau for “agree[ing] 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]].”<sup>184</sup> The Bureau did not consider whether Defendants’ 2016 conduct would have constituted a violation of the *per se* good faith standards, and we need not do so here. The extent to which Defendants may have violated the retransmission consent rules in the past without those actions resulting in a good faith complaint does not undermine the validity of the 2019 Complaint. Nevertheless, we address Defendants arguments regarding the 2016 negotiations in more detail.

40. Defendants contend that given the history of the 2016 negotiations, “AT&T plainly understood that[, in 2019,] Mr. Lammers was attempting to negotiate terms for all Joint Parties using the [[C]] REDACTED [[C]] agreement as a template.”<sup>185</sup> Defendants identify a number of pieces of evidence which, they contend, bolster the claim that both sides understood Mr. Lammers to be negotiating on behalf of all the Represented Stations.<sup>186</sup> We do not find that this evidence undermines the record evidence demonstrating that Mr. Lammers was engaged in negotiation only for carriage of the [[C]] REDACTED [[C]] stations. Indeed, it further demonstrates that, despite what the parties had done or agreed to do in 2016, in 2019 Mr. Lammers intended to negotiate [[C]] REDACTED [[C]] alone while keeping the Defendant Stations off the table, and AT&T clearly understood that to be his intent. As discussed immediately above, describing the [[C]] REDACTED [[C]] drafts as [[HC]] REDACTED [[HC]] did not change the fact that they applied exclusively to [[C]] REDACTED [[C]] stations. Mr. Lammers merely [[HC]] REDACTED [[HC]] rather than “knew,” that the Defendant Stations’ agreements would include language [[HC]] REDACTED [[HC]] to [[C]] REDACTED [[C]], because he refused to negotiate on behalf of the Defendants before the parties got [[HC]] REDACTED [[HC]].<sup>187</sup> As for the AT&T statements that Defendants identify in support of their position, each reflects AT&T’s contemporaneous recognition of, and opposition to, Mr. Lammers’ plan; a plan that encompassed refusing to negotiate on behalf of the Defendants, negotiating only the [[C]] REDACTED [[C]] agreement, and then trying to use those terms as the starting point for negotiation of the Defendants’ agreements.<sup>188</sup> Thus, regardless of the circumstances surrounding the agreements in 2016, the record shows that in 2019 Mr. Lammers persistently and expressly refused to negotiate for the carriage of the Defendant Stations, while ignoring AT&T’s consistent and unambiguous refusal to acquiesce to this unlawful plan.

41. Fundamentally, Defendants contend that each time Mr. Lammers sent or discussed a “Joint Parties” draft with any AT&T negotiator, he was engaged in good faith negotiation with respect to carriage of the Defendant Stations. They make this claim even though every draft applied by its terms

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<sup>182</sup> ATT000231, ATT000553, ATT000604.

<sup>183</sup> ATT000553.

<sup>184</sup> Reply at 2 (emphasis in original). *See Bureau Decision*, 34 FCC Rcd at 10380, para. 28 (citing AT&T Complaint-Supporting Reply at 28). Defendants also dispute the Bureau’s observation regarding the change in [[HC]] REDACTED [[HC]] between the final “Joint Parties” draft and the June 3 [[HC]] REDACTED [[HC]]. AFR at 17. The evidence was not central to the *Bureau Decision*, but it could equally support either the Bureau reading or a dual roles reading of the record and so does little to counteract the strong weight of evidence on the side of the Bureau reading.

<sup>185</sup> AFR at 16.

<sup>186</sup> *Supra* para. 31 (citing Reply at 1).

<sup>187</sup> *Supra* para. 38.

<sup>188</sup> *Supra* para. 31 (citing Reply at 1).

exclusively to [[C]] REDACTED [[C]] stations, and even though Mr. Lammers repeatedly and expressly refused to discuss carriage of the Defendant Stations.<sup>189</sup> What the record demonstrates instead is that Mr. Lammers intended to negotiate for carriage of the [[C]] REDACTED [[C]] stations and expressed hope that, at some undefined point in the future, he could use that completed agreement as a starting point in his negotiations for carriage of the unrelated Defendant Stations.<sup>190</sup> Simply expressing a hope about future negotiations, however, is not the same thing as actually negotiating or seeking to negotiate Defendants' carriage agreements. For the months at issue in this case, Mr. Lammers refused to respond to AT&T's proposals relating to the Defendant Stations, causing an extended and unreasonable delay.<sup>191</sup> He manifestly failed to demonstrate any intention of seeking, much less reaching, agreement on carriage of Defendant Stations, evincing a refusal to negotiate on behalf of such stations during this period. Absent intervention by the Bureau, taking carriage of the Defendant Stations off the table while negotiating an unrelated carriage deal may well have been an effective negotiating strategy, albeit at the cost of further extending the months-long blackouts affecting millions of American viewers. We find, however, that it was a strategy completely reliant upon willful, repeated, and extended violation of our rules.

## 2. **The Bureau Decision Did Not Depart from the Commission's Rules and Precedent**

42. The AFR contends that the Bureau not only misinterpreted the facts, but also misapplied Commission rules and relevant precedent by allegedly intruding in the negotiations between the parties and imposing new, improper tests for what constitutes a refusal to negotiate or failure to respond. First, the AFR asserts that the Bureau improperly inserted itself into the negotiations, treating a straightforward "bargaining proposal" as an absolute failure to negotiate, and prohibiting Defendants from engaging in a lawful joint negotiation.<sup>192</sup> Based on the record, however, the Defendants were not negotiating at all; they were not using the "[[C]] REDACTED [[C]] agreement [as simply the vehicle]" to negotiate "baseline terms" for their own agreements.<sup>193</sup> As discussed above and as described in great detail in the *Bureau Decision*, Mr. Lammers never proposed to simultaneously negotiate the [[C]] REDACTED [[C]] agreement and a universal template.<sup>194</sup> His "proposal" was that the parties not negotiate for carriage of any of the Defendant Stations for months, even as deadlines, both under the prior carriage agreement and under the carriage extension agreements, approached and expired. Defendants suggest that the Bureau should have considered AT&T "free to accept, reject or counter"<sup>195</sup> the "proposal" that the parties completely refrain from negotiation, but our rules expressly identify that type of proposal as one that inherently cannot be offered in good faith "with the intent of reaching agreement."<sup>196</sup>

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<sup>189</sup> The AFR argues that it is "clear that Defendants could negotiate the terms of their *own* agreements even if the proposal they marked up applied by its terms to a different Joint Party." AFR at 15 (emphasis in original). This dispute, however, is not over what they could have done, but over what they actually did.

<sup>190</sup> See generally *supra* paras. 13-18.

<sup>191</sup> See *supra* paras. 13-16; see also *Good Faith Order*, 15 FCC Rcd at 5463, para. 42 ("The Commission is aware that, in many cases, time will be of the essence in retransmission consent negotiations. . . [w]e advise broadcasters that, in examining violations of this standard, we will consider the proximity of the termination of retransmission consent and the consequent service disruptions to consumers."); *Bureau Decision*, 34 FCC Rcd at 10379, n.130 and accompanying text (addressing and dismissing Defendants' claim that AT&T's [[C]] REDACTED [[C]]).

<sup>192</sup> AFR at 18-21.

<sup>193</sup> AFR at 19.

<sup>194</sup> See *supra* para. 40 (discussing both parties' recognition that Mr. Lammers intended to negotiate the [[C]] REDACTED [[C]] agreement first and then use it as a starting point for negotiating Defendants' agreements).

<sup>195</sup> AFR at 19 (citing *Good Faith Order*, 15 FCC Rcd at 5470, para. 56).

<sup>196</sup> *Good Faith Order*, 15 FCC Rcd at 5462, para. 40.

43. Nor did the Bureau impose an “all-or-nothing” standard that would require Negotiating Entities to “simultaneously propose all terms necessary for an agreement” with all the jointly negotiating parties.<sup>197</sup> The Bureau accurately noted that, during the time at issue, “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.”<sup>198</sup> This observation did not constitute the creation of a new test for whether a particular course of action rises to the level of a “failure to negotiate.” This was not a test at all, but one fact among many demonstrating that Defendants did not actively participate in negotiations with the intent of reaching agreement (the long-standing test of whether a Negotiating Entity has engaged in an unlawful failure to negotiate).<sup>199</sup> Similarly, the Bureau did not impose “a new standard of what constitutes good-faith negotiations for multiple parties negotiating together using a common agent”<sup>200</sup> when it noted that if Mr. Lammers had sent a “single proposed agreement that would have resolved carriage with respect to all of the parties” he might have been in compliance with the requirement to respond to AT&T’s proposals.<sup>201</sup> Instead, the Bureau was merely suggesting one way that, “in theory,” the “Joint Parties” drafts might have actually represented negotiation on behalf of all of the Joint Parties.<sup>202</sup> As the Bureau explained, the test under our rules is whether Negotiating Entities “actively participate in retransmission consent negotiations, with the intent of reaching agreement.”<sup>203</sup> As the Bureau explained in great detail, the record shows that Mr. Lammers did not intend to reach agreement with respect to any of the Defendant Stations, evincing a “complete refusal to discuss terms for Defendant Stations” until most had gone dark.<sup>204</sup> The *Bureau Decision* does not state or imply that a Negotiating Entity is prohibited from “sequencing its negotiation to reach agreement on non-rate terms before addressing rates.”<sup>205</sup> Here, Mr. Lammers was not negotiating one part of Defendants’ agreements before another, and did not engage in “back and forth communications” on behalf of the Defendants other than to repeatedly inform AT&T that he would not be responding to their proposals with respect to the Defendant Stations. What the Bureau found, and we affirm, is that he failed to negotiate Defendants’ agreements at all and failed to respond to AT&T’s proposals with respect to the Defendants for an extended period. Rather than imposing “new standards,” the Bureau simply contrasted this behavior with acceptable examples to demonstrate how far it had strayed from good faith.<sup>206</sup>

### 3. The Missouri Decision and the Totality of the Circumstances Claim

44. For the reasons set forth below, we dismiss AT&T’s totality of the circumstances claim. In addition to its claim that Defendants violated several *per se* good faith standards, AT&T asked the Bureau, and now asks the Commission, to find that Defendants violated their obligation to negotiate in good faith under the “totality of the circumstances” standard if the Commission does not uphold the *Bureau Decision*.<sup>207</sup> Specifically, AT&T’s totality claim is based exclusively on a focused argument that

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<sup>197</sup> *Id.* at 22; *see also id.* at 9; Reply at 4.

<sup>198</sup> *Bureau Decision*, 34 FCC Rcd at 10376-77, para. 22.

<sup>199</sup> *Good Faith Order*, 15 FCC Rcd at 5462, para. 40.

<sup>200</sup> AFR at 12.

<sup>201</sup> *Bureau Decision*, 34 FCC Rcd at 10382-83, para. 33.

<sup>202</sup> *Id.*

<sup>203</sup> *Bureau Decision*, 34 FCC Rcd at 10369, para. 3 (citing *Good Faith Order*, 15 FCC Rcd at 5462, para. 40).

<sup>204</sup> *Bureau Decision*, 34 FCC Rcd at 10377-78, para. 24.

<sup>205</sup> Reply at 5.

<sup>206</sup> *Bureau Decision*, 34 FCC Rcd at 10376-77, para. 22 and 10382-83, para. 33.

<sup>207</sup> Complaint at 4-6.

Defendants [[C]] REDACTED [[C]]<sup>208</sup> AT&T also raised these arguments in a civil complaint against Mr. Lammers' firm before the Eastern District of Missouri.<sup>209</sup> In light of the pendency of that civil complaint, the Bureau “decline[d] to prejudge the court’s decision on the contractual questions,” because it did not need to “reach this issue in order to resolve AT&T’s Complaint.”<sup>210</sup>

45. After the pleadings closed in this proceeding, AT&T’s civil complaint was dismissed.<sup>211</sup> The Magistrate Judge found that [[HC]] REDACTED<sup>212</sup> REDACTED<sup>213</sup> REDACTED<sup>214</sup>[[HC]]

46. Defendants contend that the Missouri Decision “undermines the central premise of the Bureau’s order: that every one of [Duane Lammers’s] [*sic*] proposals in fact was addressed expressly and exclusively to amendment of the existing [[C]] REDACTED [[C]] carriage agreements.”<sup>215</sup> In yet another filing, Defendants assert that the doctrine of issue preclusion bars AT&T’s Complaint, and that “the district court’s decision is binding on the issue of whether Max Retrans jointly negotiated for Defendants and [[C]] REDACTED [[C]], as opposed to (as the Media Bureau believed) exclusively for [[C]] REDACTED [[C]].”<sup>216</sup>

47. AT&T responds that “the court and Bureau plainly decided different issues”<sup>217</sup>:

Although the court concluded that Mr. Lammers was negotiating “jointly on behalf of all ten station groups,” for purposes of interpreting the NDA, that does not mean—and the court did not hold—that Mr. Lammers was actually negotiating the [[HC]] REDACTED [[HC]]<sup>218</sup>

AT&T also notes that “The Bureau’s Order was released on November 8, 2019, months *before* the court’s January 16, 2020 decision,” and that “Defendants cite no authority for their bizarre proposition that a second decision retroactively invalidates and precludes an earlier decision.”<sup>219</sup>

48. As an initial matter, we find that the Missouri Decision is not in tension with the *Bureau Decision*: both conclude that Mr. Lammers was only willing to negotiate for carriage of the [[C]]

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<sup>208</sup> Complaint at 17-18; Answer at 26-27.

<sup>209</sup> See generally Civil Complaint, No. 19-01925.

<sup>210</sup> *Bureau Decision*, 34 FCC Rcd at 10383, para. 34.

<sup>211</sup> See generally *AT&T Services, Inc. and DIRECTV, LLC v. Max Retrans LLC*, Case No. 4:19-CV-01925-NCC, Filed Under Seal (E.D.Mo. Jan. 16, 2020) (Missouri Decision).

<sup>212</sup> *Id.* at 7, 9.

<sup>213</sup> *Id.* at 4.

<sup>214</sup> *Id.* at 5.

<sup>215</sup> Letter from Marc S. Martin, Counsel to the Defendants, Perkins Coie, LLP, to Marlene Dortch, Secretary, Federal Communications Commission at 1-2 (Jan. 21, 2020) (MB Docket No. 19-168) (January 21 Letter); see also Letter from Marc S. Martin, Counsel to the Defendants, Perkins Coie, LLP, to Marlene Dortch, Secretary, Federal Communications Commission at 2 (Feb. 28, 2020) (MB Docket No. 19-168) (February 28 Letter).

<sup>216</sup> February 28 Letter at 4.

<sup>217</sup> Letter from Kevin J. Miller, Counsel to the Complainants, Kellogg, Hansen, Todd, Figel, & Frederick, P.L.L.C., to Marlene Dortch, Secretary, Federal Communications Commission at 3 (Mar. 5, 2020) (MB Docket No. 19-168) (March 5 Letter).

<sup>218</sup> Letter from Kevin J. Miller, Counsel to the Complainants, Kellogg, Hansen, Todd, Figel, & Frederick, P.L.L.C., to Marlene Dortch, Secretary, Federal Communications Commission at 2 (Jan. 24, 2020) (MB Docket No. 19-168) (January 24 Letter).

<sup>219</sup> March 5 Letter at 1-2. AT&T also argues that Defendants’ preclusion argument is procedurally barred because it was available but not raised in the January 21 Letter. *Id.* at n.4. Because we are rejecting Defendants’ preclusion argument on other grounds, we need not address this procedural objection. *Infra* note 224.

REDACTED [[C]] Stations and refused to negotiate separate deals for the Defendant Stations until the [[C]] REDACTED [[C]] deal was closed. In any event, the issue raised by AT&T's court complaint was different from the one within the Commission's exclusive jurisdiction here. As the Bureau repeatedly emphasized, "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" established by the Commission's rules.<sup>220</sup> And indeed, the Missouri Decision notes that [[HC]] REDACTED [[HC]]<sup>221</sup> We affirm this foundational premise of the *Bureau Decision* and reiterate that "[r]egardless of whether [[C]] REDACTED [[C]] and Defendants were 'negotiating jointly,' Mr. Lammers' actions in this case amount to an impermissible refusal to negotiate" by the Defendant stations within the meaning of the Commission's rules.<sup>222</sup>

49. Nonetheless, in light of our decision to uphold the *Bureau Decision*, we need not consider AT&T's narrowly-focused "totality of the circumstances" argument, and we dismiss this still-pending element of the Complaint.<sup>223</sup>

### III. NOTICE OF APPARENT LIABILITY FOR FORFEITURE

#### A. Discussion

50. Based on our review of the evidence in the record, described in section I.B above, we find that Defendants apparently willfully and repeatedly violated section 325 of the Act and section 76.65 of the Commission's rules when they refused to negotiate for retransmission consent, unreasonably delayed such negotiations, and failed to respond to proposals for carriage.<sup>224</sup> Accordingly, and as explained herein, the Commission proposes a forfeiture of \$512,228 (five hundred twelve thousand, two hundred twenty-eight dollars) with respect to each of the 18 stations at issue.

51. As explained in section I.A above, section 325 of the Act "prohibit[s] a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith."<sup>225</sup> Section 76.65 of our rules identifies certain "actions or practices [which] violate a broadcast television station's or multichannel video programming distributor's (the "Negotiating Entity") duty to negotiate retransmission consent agreements in good faith."<sup>226</sup> Three of these "actions or practices" are at issue in this case:

- (i) Refusal by a Negotiating Entity to negotiate retransmission consent;...

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<sup>220</sup> *Bureau Decision*, 34 FCC Rcd at 10376, para. 21; *see also id.* at 10377, para. 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. . . . 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.'"); *id.* at 10383-84, para. 35 ("We hold that negotiating jointly does not excuse any member of that joint negotiation from its individual obligation to comply with the good faith obligations of the statute and our rules.").

<sup>221</sup> Missouri Decision at 9.

<sup>222</sup> *Bureau Decision*, 34 FCC Rcd at 10377, para. 23. Because the Missouri Decision, the *Bureau Decision*, and our decision today are not in tension, we need not address Defendants' issue preclusion argument.

<sup>223</sup> *See supra* para. 44.

<sup>224</sup> Sections I and II of this item, *supra*, are incorporated into and made a part of this Notice of Apparent Liability for Forfeiture.

<sup>225</sup> 47 U.S.C. § 325(b)(3)(C)(ii).

<sup>226</sup> 47 CFR § 76.65(b)(1).

(iii) Refusal by 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; [and]

(v) 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.<sup>227</sup>

52. As these provisions make clear, every broadcast television station involved in retransmission consent negotiations must actively participate with the intent of reaching agreement<sup>228</sup>; it must do so in a timely manner, being mindful of the proximity of service disruptions<sup>229</sup>; and it must actually address proposals from counterparties, rather than reject them out of hand without explanation.<sup>230</sup>

53. The facts applicable to this Notice of Apparent Liability are discussed in more detail both above and in the *Bureau Decision*.<sup>231</sup> Defendants' agent declined to participate in negotiations with respect to the Defendant Stations, taking the terms of their carriage off the table because he did not seek, and was not willing to reach, agreements regarding these stations before closing a deal for the carriage of other stations. During this period, AT&T sent multiple proposals for carriage, all of which Defendants explicitly refused to consider or address. This unwavering and intentional refusal to negotiate or respond extended for months, as multiple carriage deadlines passed and existing agreements and extensions expired. Even after Defendants finally made a partial proposal, a first gesture toward negotiation for carriage of their stations after many of them had gone dark, their agent still expressly refused even to discuss the AT&T proposals.

54. Mr. Lammers clearly served as the joint and simultaneous representative for both Defendants and [[C]] REDACTED [[C]]. But notwithstanding that some of the proposed [[C]] REDACTED [[C]] agreements were labeled [[HC]] REDACTED [[HC]]," we do not give credence to Defendants' contention that they began negotiating as early as [[HC]] REDACTED [[HC]], when Mr. Lammers sent his first response to AT&T's [[C]] REDACTED [[C]] proposals. Mr. Lammers openly refused to negotiate or respond to proposals for carriage of the Defendant Stations. He apparently hoped that first reaching an agreement for carriage of the valuable [[C]] REDACTED [[C]] stations would allow him to use that agreement as a "baseline," or starting point, when he began negotiating for carriage of Defendants' stations, but he did not identify any elements of the [[C]] REDACTED [[C]] agreement that would bind or were intended to apply to Defendant Stations.

55. Every Negotiating Entity, in a joint negotiation or otherwise, has an independent obligation to abide by the good faith rules and to participate actively in negotiations within a reasonable time frame. Defendants, through their agent, failed to meet this requirement. Their willful course of conduct constituted, at any given time, an ongoing refusal to negotiate, unreasonable delay of negotiations, and failure to respond to retransmission consent proposals. Accordingly, we find that

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<sup>227</sup> 47 CFR §§ 76.65(b)(1)(i), (iii), and (v).

<sup>228</sup> *Good Faith Order*, 15 FCC Rcd at 5462, para. 40.

<sup>229</sup> *Good Faith Order*, 15 FCC Rcd at 5463, para. 42.

<sup>230</sup> *Good Faith Order*, 15 FCC Rcd at 5464, para. 44.

<sup>231</sup> The *Bureau Decision* "constitute[d] only a partial resolution of this matter, in order to expeditiously resolve the underlying dispute." It noted that, as always, the Commission "reserve[d] the right to take enforcement action proposing a forfeiture for the violations of the Act and our rules detailed herein." *Bureau Decision*, 34 FCC Rcd at 10369, n.11. AT&T did ask the Bureau to dismiss its complaints against some Defendants. To the extent the requests were received prior to adoption of the *Bureau Decision*, these complaints were dismissed without prejudice to our ability to take later enforcement action. *Id.* at 10368-69, n.10. As the AFR explains, "AT&T's desire to withdraw its own claims against these Defendants was irrelevant" with respect to enforcement. AFR at 13 (emphasis removed).

Defendants failed to negotiate in good faith with AT&T for retransmission of their signals in apparent violation of section 325 of the Act and section 76.65 of the Commission's rules.

### C. Proposed Forfeiture

56. Section 503(b)(1)(B) of the Act authorizes the Commission to impose a forfeiture against any entity that “willfully or repeatedly fail[s] to comply with any of the provisions of [the Act] or of any rule, regulation, or order issued by the Commission.”<sup>232</sup> Section 312(f)(1) of the Act defines “willful” as the “conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.<sup>233</sup> This definition of willful applies to section 503(b) of the Act, as the Commission has previously established.<sup>234</sup>

57. Section 503(b)(2)(A) of the Act authorizes us to assess a forfeiture against Defendants, which are all broadcast licensees, of up to \$51,222 per violation or day of a continuing violation, up to a statutory maximum of \$512,228 for a single act or failure to act.<sup>235</sup> In exercising our forfeiture authority, we consider the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, substantial economic gain, and such other matters as justice may require.<sup>236</sup> As required by the Act, the Commission will apply these statutory factors to determine a forfeiture based on the Commission's evaluation of each individual case on its own merits.<sup>237</sup> We may also adjust the base forfeiture upward or downward, taking into account the particular facts of each individual case.<sup>238</sup> In cases in which the Commission has not established a base

<sup>232</sup> 47 U.S.C. § 503(b)(1)(B).

<sup>233</sup> 47 U.S.C. § 312(f)(1).

<sup>234</sup> See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991) (“[C]onsistent with congressional intent, recent Commission interpretations of ‘willful’ do not require licensee intent to engage in a violation.”), *recon. denied*, 7 FCC Rcd 3453 (1992).

<sup>235</sup> 47 U.S.C. § 503(b)(2)(A). These amounts reflect inflation adjustments of the forfeitures specified in section 503(b)(2)(A) of the Act. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 584, 599 (2015 Inflation Adjustment Act) requires agencies, starting in 2017, to adjust annually the civil monetary penalties covered thereunder, and to publish each such annual adjustment by January 15. 47 CFR § 1.80(b)(9). The 2015 Inflation Adjustment Act amended the Federal Civil Penalties Inflation Adjustment Act of 1990, which is codified, as amended, at 28 U.S.C. § 2461 note (4). The Enforcement Bureau of the FCC released the order making the 2020 annual adjustment on December 27, 2019. See *Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Civil Monetary Penalties to Reflect Inflation*, Order, 34 FCC Rcd 12824 (EB 2019) (setting January 15, 2020, as the effective date for the increases). The 2015 Inflation Adjustment Act provides that the new penalty levels shall apply to penalties assessed after the effective date of the increase, “including [penalties] whose associated violation predated such increase.” See 28 U.S.C. § 2461 note, citing Inflation Adjustment Act, as amended § 6.

<sup>236</sup> 47 U.S.C. § 503(b)(2)(E); 47 CFR § 1.80(b)(8), Note § II.

<sup>237</sup> 47 U.S.C. § 503(b).

<sup>238</sup> *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17098-99, para. 22 (1997) (*Forfeiture Policy Statement*) (noting that “[a]lthough [the Commission has] adopted the base forfeiture amounts as guidelines to provide a measure of predictability to the forfeiture process, [the Commission] retain[s] the discretion to depart from the guidelines and issue forfeitures on a case-by-case basis, under [the] general forfeiture authority contained in Section 503 of the Act”), *recons. denied*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999); see also 47 CFR § 1.80, note to (b)(8)(section II):

#### *Upward Adjustment Criteria*

- (1) Egregious misconduct.
- (2) Ability to pay/relative disincentive.
- (3) Intentional violation.
- (4) Substantial harm.

(continued....)

forfeiture amount for an apparent violation, it has looked to forfeitures established or issued in analogous cases for guidance.<sup>239</sup>

58. The Commission has never before issued a forfeiture for a violation of the good faith retransmission consent negotiation rules.<sup>240</sup> The Commission has, however, established a base forfeiture of \$7,500 for “violation of the cable broadcast carriage rules.”<sup>241</sup> Defendants’ violative conduct arose from their negotiator’s ongoing refusal to negotiate on behalf of the Defendants until resolution of the [[C]] REDACTED [[C]] deal, despite repeated urging by AT&T, and “[l]ongstanding Commission precedent holds that licensees are responsible for the actions of their employees and contractors.”<sup>242</sup> We will therefore consider the conduct of Defendants’ agent in this case to have been a “single act or failure to act” that continued over an extended period of time.<sup>243</sup> We nonetheless consider a distinct violation to

(Continued from previous page)

- (5) Prior violations of any FCC requirements.
- (6) Substantial economic gain.
- (7) Repeated or continuous violation.

*Downward Adjustment Criteria*

- (1) Minor violation.
- (2) Good faith or voluntary disclosure.
- (3) History of overall compliance.
- (4) Inability to pay.

<sup>239</sup> See *Cumulus Radio LLC; Radio Licensing Holding CBC, LLC; Cumulus Licensing LLC; and Radio License Holdings LLC*, Notice of Apparent Liability for Forfeiture, 34 FCC Rcd 7289, at 7294-95, para. 14 (2019) (citing *Long Distance Direct, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 3297, 3304, para. 19 (2000)).

<sup>240</sup> *Bauermeister*, 22 FCC Rcd 4933 (directing the parties to engage in good faith negotiations, but declining to impose a forfeiture).

<sup>241</sup> 47 CFR § 1.80(b)(8), Note § I. Although, in this instance, the broadcast carriage rules were violated by the broadcasters themselves, rather than a cable operator or other MVPD, this is the most analogous type of violation. The Commission took a similar approach in setting the base forfeiture for cramming. See *Long Distance Direct, Inc.*, Notice of Apparent Liability for Forfeiture, 14 FCC Rcd 314 (1998); see also *Onelink Communications, Inc., TeleDias Communications, Inc.*, Notice of Apparent Liability for Forfeiture, 31 FCC Rcd 1403, 1419, para. 28 (2016); *Norristown Telephone Company, LLC*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 8844, 8850, paras. 21-22 (2011). The Commission’s rules did not provide guidance for calculating forfeitures for cramming, but the Commission determined that cramming was akin to slamming – which had an established base forfeiture amount – because both involved misleading consumers. *Long Distance Direct, Inc.*, 14 FCC Rcd at 336-37, para. 29.

<sup>242</sup> *Application of Saga Communications of Arkansas, LLC for Renewal of License for Station KEGI(FM) Jonesboro, Arkansas*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 6927, 6931, para. 11 (2008) (citing *Dial-a-Page, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 2767 (1993), *recon. denied*, First Report and Order, 10 FCC Rcd 8825 (1995) (finding that rule violation resulting from employee error was fully attributable to licensee under doctrine of respondeat superior and “willful” within the meaning of Section 503(b)(1) of the Act); *Gaffney Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC 2d 912, 913 (1970) (“[L]icensees are responsible for the selection and presentation of program material over their stations, including . . . acts or omissions of their employees.”)).

<sup>243</sup> See, e.g., *Acerome Jean Charles, Boston, Massachusetts*, Notice of Apparent Liability for Forfeiture, 34 FCC Rcd 12744, 12747, para. 15 (2019) (“[D]uring the 27-day period . . . Jean Charles was apparently committing a single, continuing violation of section 301 of the Act. We therefore propose a base forfeiture of \$10,000 for each day during this 27-day period, resulting in a proposed base forfeiture of \$270,000.”). We note that in another matter involving violations of the retransmission consent provisions of the Act and our rules, the Commission used a different method for calculating the forfeiture. See *TV Max, Inc. and Broadband Ventures Six, LLC d/b/a Wavevision, Thomas M. Balun, Eric Meltzer, and Richard Gomez, et al.*, MB Docket Nos. 12-113, 12-181, 12-222, and 12-266, Forfeiture Order, 29 FCC Rcd 8648 (2014). TV Max involved a cable operator that was found to have retransmitted the signals of six full-power commercial television broadcast stations for more than a year without the express written consent of the stations. *Id.* In that case, the Commission considered each day that the cable operator carried broadcast programming in violation of the retransmission consent requirements to be a separate repeated

(continued....)

have been committed with respect to each of the stations that were withheld from negotiation. As discussed above, the “Negotiating Entities” subject to the rules are individual stations, rather than licensees, station groups, or third-party negotiators like Mr. Lammers.<sup>244</sup> Just as importantly, the harm to viewers is multiplied with each station that goes dark, regardless of the number of corporate parents involved in a carriage dispute, underscoring the importance of our focus on individual stations. The record does not clearly identify the precise date on which each of the Defendants began engaging in good faith negotiation with AT&T with the intent to reach agreement for carriage, although it was undoubtedly after June 18, 2019, the date of the Complaint.<sup>245</sup> That means these continuing violations extended, at a bare minimum, from [[HC]] REDACTED [[HC]], until June 18, 2019, or [[HC]] REDACTED [[HC]] Because the Act and our rules contemplate a separate \$7,500 forfeiture for each day of these continuing violations,<sup>246</sup> and [[HC]] REDACTED [[HC]] x \$7,500 = [[HC]] REDACTED [[HC]], our base forfeiture reaches the statutory maximum penalty of \$512,228 with respect to each of Defendants’ Stations.<sup>247</sup>

(Continued from previous page) \_\_\_\_\_

violation for which a forfeiture could be imposed. *See id.*, 29 FCC Rcd at 8659 n.75 (“We consider each day that TV Max retransmitted each of the six Stations without consent to be a separate violation”); *id.*, 29 FCC Rcd at 8660 n.77 (explaining that calculation of a “straightforward application of the base forfeiture amount” in that case would be: “\$7,500 base forfeiture amount x 365 violations [within the one year statute of limitations] x 6 unlawfully carried stations = \$16,425,000”). We find the nature of the violations at issue in these cases, however, to be distinguishable from the factual circumstances presented in TV Max. Specifically, we believe the conduct here (unlike TV Max) more closely resembles a situation involving a single dereliction (e.g., here, the refusal to negotiate in good faith) which persists until remedied (e.g., here, until the licensee finally begins to negotiate carriage of the station in good faith). In other words, here there existed a continuing or persistent legal duty that the violator steadily failed to fulfill. *See, e.g., Enserch Corporation*, Forfeiture Order, 15 FCC Rcd 13551, 13554, para. 10 (2000) (treating unauthorized transfer of control as a continuing violation that does not end until the Commission grants a transfer of control application).

<sup>244</sup> *Supra* para. 2. *See also Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Program “Married By America” on April 7, 2003*, Forfeiture Order, 23 FCC Rcd 3222, 3237-38, 3240-41 ¶41, Attach. A (2008) (finding the licensees of stations that broadcast indecent material liable for a forfeiture penalty of the base amount on a per station basis).

<sup>245</sup> *Bureau Decision*, 34 FCC Rcd at 10376-77, para. 22 (filings from both parties indicated that negotiations had still not begun as of August 2019).

<sup>246</sup> *See, e.g., Enserch Corporation*, Forfeiture Order, 15 FCC Rcd 13551, 13554, para. 10 (2000).

<sup>247</sup> Defendants’ course of conduct supports this penalty whether that conduct is considered a violation of one, two, or all three of the *per se* standards at issue here.

59. In applying the applicable statutory factors, we would normally consider whether there is any basis to upwardly adjust the proposed forfeiture, but in this case we are unable to apply any upward adjustments because each penalty has already reached the statutory maximum.<sup>248</sup> We also consider whether there is any basis to downwardly adjust the proposed forfeiture.<sup>249</sup> Here, we find none. Therefore, after applying the *Forfeiture Policy Statement*, section 1.80 of the Commission's rules, and the statutory factors, we propose the following forfeitures against the Defendants, for which they are apparently liable.

Licensee	Number of Stations Implicated	Total Apparent Liability	NAL Account Number
Deerfield Media (Port Arthur) Licensee, LLC	One	\$512,228	MB-202041430002
Deerfield Media (Cincinnati) Licensee, LLC	One	\$512,228	MB-202041430003
Deerfield Media (Mobile) Licensee, LLC	Two	\$1,024,456	MB-202041430004
Deerfield Media (Rochester) Licensee, LLC	One	\$512,228	MB-202041430005
Deerfield Media (San Antonio) Licensee, LLC	One	\$512,228	MB-202041430006
GoCom Media of Illinois, LLC	Three	\$1,536,684	MB-202041430007
Mercury Broadcasting Company, Inc.	One	\$512,228	MB-202041430008
MPS Media of Tennessee Licensee, LLC	One	\$512,228	MB-202041430009
MPS Media of Gainesville Licensee, LLC	One	\$512,228	MB-202041430010
MPS Media of Tallahassee Licensee, LLC	One	\$512,228	MB-202041430011
MPS Media of Scranton Licensee	One	\$512,228	MB-202041430012
Nashville License Holdings, LLC	One	\$512,228	MB-202041430013
KMTR Television, LLC	One	\$512,228	MB-202041430014
Second Generation of Iowa, LTD	One	\$512,228	MB-202041430015
Waitt Broadcasting, Inc.	One	\$512,228	MB-202041430016

#### IV. CONCLUSION

60. For the reasons discussed above, we affirm the *Bureau Decision* in full. Section 325 of the Act directs us to prohibit parties from failing to negotiate in good faith, and section 76.65 of our rules establishes that certain actions or practices always represent a failure to negotiate in good faith. The Bureau made factual findings that Defendants failed to negotiate carriage, unreasonably delayed negotiations, and refused to respond to proposals. Upon review of the record, we affirm these findings. Accordingly, we hold that each of the Defendants has willfully, repeatedly, and continuously violated section 325(b) of the Act and sections 76.65(b)(1)(i), (iii), and (v) of the Commission's rules. Given these violations, we also find that Defendants are apparently liable for forfeitures ranging from \$512,228 to \$1,536,684.

<sup>248</sup> See *supra* note 240.

<sup>249</sup> See *supra* note 240.

## V. ORDERING CLAUSES

61. Accordingly, **IT IS ORDERED** that, pursuant to sections 1, 4(i), and 325 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 325, and sections 76.7 and 76.65 of the Commission's rules, 47 CFR §§ 76.7 and 76.65, the Application for Review filed by Deerfield Media, Inc.; Deerfield Media (Port Arthur) Licensee, LLC; Deerfield Media (Cincinnati) Licensee, LLC; Deerfield Media (Mobile) Licensee, LLC; Deerfield Media (Rochester) Licensee, LLC; Deerfield Media (San Antonio) Licensee, LLC; GoCom Media of Illinois, 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; and Waitt Broadcasting, Inc. on December 9, 2019, is **DENIED**, as discussed herein.

62. **IT IS FURTHER ORDERED** that DIRECTV, LLC and AT&T Services, Inc.'s June 18, 2019 Complaint, 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** with respect to its "totality of the circumstance" claims.

63. **IT IS FURTHER ORDERED** that, pursuant to section 503(b) of the Act<sup>250</sup> and sections 1.80 of the Commission's rules,<sup>251</sup> Deerfield Media (Port Arthur) Licensee, LLC is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR FORFEITURE** in the amount of five hundred twelve thousand, two hundred twenty eight dollars (\$512,228) for willful and repeated violations of section 325 of the Act<sup>252</sup> and section 76.65 of the Commission's rules.<sup>253</sup>

64. **IT IS FURTHER ORDERED** that, pursuant to section 503(b) of the Act<sup>254</sup> and sections 1.80 of the Commission's rules,<sup>255</sup> Deerfield Media (Cincinnati) Licensee, LLC is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR FORFEITURE** in the amount of five hundred twelve thousand, two hundred twenty eight dollars (\$512,228) for willful and repeated violations of section 325 of the Act<sup>256</sup> and section 76.65 of the Commission's rules.<sup>257</sup>

65. **IT IS FURTHER ORDERED** that, pursuant to section 503(b) of the Act<sup>258</sup> and sections 1.80 of the Commission's rules,<sup>259</sup> Deerfield Media (Mobile) Licensee, LLC is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR FORFEITURE** in the amount of one million, twenty-four thousand, four hundred fifty-six dollars (\$1,024,456) for willful and repeated violations of section 325 of the Act<sup>260</sup> and section 76.65 of the Commission's rules.<sup>261</sup>

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<sup>250</sup> 47 U.S.C. § 503(b).

<sup>251</sup> 47 CFR § 1.80.

<sup>252</sup> 47 U.S.C. § 325.

<sup>253</sup> 47 CFR § 76.65.

<sup>254</sup> 47 U.S.C. § 503(b).

<sup>255</sup> 47 CFR § 1.80.

<sup>256</sup> 47 U.S.C. § 325.

<sup>257</sup> 47 CFR § 76.65.

<sup>258</sup> 47 U.S.C. § 503(b).

<sup>259</sup> 47 CFR § 1.80.

<sup>260</sup> 47 U.S.C. § 325.

<sup>261</sup> 47 CFR § 76.65.

66. **IT IS FURTHER ORDERED** that, pursuant to section 503(b) of the Act<sup>262</sup> and sections 1.80 of the Commission's rules,<sup>263</sup> Deerfield Media (Rochester) Licensee, LLC is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR FORFEITURE** in the amount of five hundred twelve thousand, two hundred twenty eight dollars (\$512,228) for willful and repeated violations of section 325 of the Act<sup>264</sup> and section 76.65 of the Commission's rules.<sup>265</sup>

67. **IT IS FURTHER ORDERED** that, pursuant to section 503(b) of the Act<sup>266</sup> and sections 1.80 of the Commission's rules,<sup>267</sup> Deerfield Media (San Antonio) Licensee, LLC is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR FORFEITURE** in the amount of five hundred twelve thousand, two hundred twenty eight dollars (\$512,228) for willful and repeated violations of section 325 of the Act<sup>268</sup> and section 76.65 of the Commission's rules.<sup>269</sup>

68. **IT IS FURTHER ORDERED** that, pursuant to section 503(b) of the Act<sup>270</sup> and sections 1.80 of the Commission's rules,<sup>271</sup> GoCom Media of Illinois, LLC is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR FORFEITURE** in the amount of one million, five hundred thirty-six thousand, six hundred eighty-four dollars (\$1,536,684) for willful and repeated violations of section 325 of the Act<sup>272</sup> and section 76.65 of the Commission's rules.<sup>273</sup>

69. **IT IS FURTHER ORDERED** that, pursuant to section 503(b) of the Act<sup>274</sup> and sections 1.80 of the Commission's rules,<sup>275</sup> Mercury Broadcasting Company, Inc. is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR FORFEITURE** in the amount of five hundred twelve thousand, two hundred twenty eight dollars (\$512,228) for willful and repeated violations of section 325 of the Act<sup>276</sup> and section 76.65 of the Commission's rules.<sup>277</sup>

70. **IT IS FURTHER ORDERED** that, pursuant to section 503(b) of the Act<sup>278</sup> and sections 1.80 of the Commission's rules,<sup>279</sup> MPS Media of Tennessee Licensee, LLC is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR FORFEITURE** in the amount of five hundred twelve thousand, two

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<sup>262</sup> 47 U.S.C. § 503(b).

<sup>263</sup> 47 CFR § 1.80.

<sup>264</sup> 47 U.S.C. § 325.

<sup>265</sup> 47 CFR § 76.65.

<sup>266</sup> 47 U.S.C. § 503(b).

<sup>267</sup> 47 CFR § 1.80.

<sup>268</sup> 47 U.S.C. § 325.

<sup>269</sup> 47 CFR § 76.65.

<sup>270</sup> 47 U.S.C. § 503(b).

<sup>271</sup> 47 CFR § 1.80.

<sup>272</sup> 47 U.S.C. § 325.

<sup>273</sup> 47 CFR § 76.65.

<sup>274</sup> 47 U.S.C. § 503(b).

<sup>275</sup> 47 CFR § 1.80.

<sup>276</sup> 47 U.S.C. § 325.

<sup>277</sup> 47 CFR § 76.65.

<sup>278</sup> 47 U.S.C. § 503(b).

<sup>279</sup> 47 CFR § 1.80.

hundred twenty eight dollars (\$512,228) for willful and repeated violations of section 325 of the Act<sup>280</sup> and section 76.65 of the Commission's rules.<sup>281</sup>

71. **IT IS FURTHER ORDERED** that, pursuant to section 503(b) of the Act<sup>282</sup> and sections 1.80 of the Commission's rules,<sup>283</sup> MPS Media of Gainesville Licensee, LLC is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR FORFEITURE** in the amount of five hundred twelve thousand, two hundred twenty eight dollars (\$512,228) for willful and repeated violations of section 325 of the Act<sup>284</sup> and section 76.65 of the Commission's rules.<sup>285</sup>

72. **IT IS FURTHER ORDERED** that, pursuant to section 503(b) of the Act<sup>286</sup> and sections 1.80 of the Commission's rules,<sup>287</sup> MPS Media of Tallahassee Licensee, LLC is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR FORFEITURE** in the amount of five hundred twelve thousand, two hundred twenty eight dollars (\$512,228) for willful and repeated violations of section 325 of the Act<sup>288</sup> and section 76.65 of the Commission's rules.<sup>289</sup>

73. **IT IS FURTHER ORDERED** that, pursuant to section 503(b) of the Act<sup>290</sup> and sections 1.80 of the Commission's rules,<sup>291</sup> MPS Media of Scranton Licensee is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR FORFEITURE** in the amount of five hundred twelve thousand, two hundred twenty eight dollars (\$512,228) for willful and repeated violations of section 325 of the Act<sup>292</sup> and section 76.65 of the Commission's rules.<sup>293</sup>

74. **IT IS FURTHER ORDERED** that, pursuant to section 503(b) of the Act<sup>294</sup> and sections 1.80 of the Commission's rules,<sup>295</sup> Nashville License Holdings, LLC is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR FORFEITURE** in the amount of five hundred twelve thousand, two hundred twenty eight dollars (\$512,228) for willful and repeated violations of section 325 of the Act<sup>296</sup> and section 76.65 of the Commission's rules.<sup>297</sup>

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<sup>280</sup> 47 U.S.C. § 325.

<sup>281</sup> 47 CFR § 76.65.

<sup>282</sup> 47 U.S.C. § 503(b).

<sup>283</sup> 47 CFR § 1.80.

<sup>284</sup> 47 U.S.C. § 325.

<sup>285</sup> 47 CFR § 76.65.

<sup>286</sup> 47 U.S.C. § 503(b).

<sup>287</sup> 47 CFR § 1.80.

<sup>288</sup> 47 U.S.C. § 325.

<sup>289</sup> 47 CFR § 76.65.

<sup>290</sup> 47 U.S.C. § 503(b).

<sup>291</sup> 47 CFR § 1.80.

<sup>292</sup> 47 U.S.C. § 325.

<sup>293</sup> 47 CFR § 76.65.

<sup>294</sup> 47 U.S.C. § 503(b).

<sup>295</sup> 47 CFR § 1.80.

<sup>296</sup> 47 U.S.C. § 325.

<sup>297</sup> 47 CFR § 76.65.

75. **IT IS FURTHER ORDERED** that, pursuant to section 503(b) of the Act<sup>298</sup> and sections 1.80 of the Commission's rules,<sup>299</sup> KMTR Television, LLC is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR FORFEITURE** in the amount of five hundred twelve thousand, two hundred twenty eight dollars (\$512,228) for willful and repeated violations of section 325 of the Act<sup>300</sup> and section 76.65 of the Commission's rules.<sup>301</sup>

76. **IT IS FURTHER ORDERED** that, pursuant to section 503(b) of the Act<sup>302</sup> and sections 1.80 of the Commission's rules,<sup>303</sup> Second Generation of Iowa, LTD is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR FORFEITURE** in the amount of five hundred twelve thousand, two hundred twenty eight dollars (\$512,228) for willful and repeated violations of section 325 of the Act<sup>304</sup> and section 76.65 of the Commission's rules.<sup>305</sup>

77. **IT IS FURTHER ORDERED** that, pursuant to section 503(b) of the Act<sup>306</sup> and sections 1.80 of the Commission's rules,<sup>307</sup> Waitt Broadcasting, Inc. is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR FORFEITURE** in the amount of five hundred twelve thousand, two hundred twenty eight dollars (\$512,228) for willful and repeated violations of section 325 of the Act<sup>308</sup> and section 76.65 of the Commission's rules.<sup>309</sup>

78. **IT IS FURTHER ORDERED** that, pursuant to section 1.80 of the Commission's rules,<sup>310</sup> within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture, Deerfield Media (Port Arthur) Licensee, LLC; Deerfield Media (Cincinnati) Licensee, LLC; Deerfield Media (Mobile) Licensee, LLC; Deerfield Media (Rochester) Licensee, LLC; Deerfield Media (San Antonio) Licensee, LLC; GoCom Media of Illinois, 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; and Waitt Broadcasting, Inc. **SHALL PAY** the full amount of the proposed forfeitures or **SHALL FILE**, individually or collectively, a written statement seeking reduction or cancellation of the proposed forfeiture consistent with paragraphs 81-82 below.

79. Each of Deerfield Media (Port Arthur) Licensee, LLC; Deerfield Media (Cincinnati) Licensee, LLC; Deerfield Media (Mobile) Licensee, LLC; Deerfield Media (Rochester) Licensee, LLC; Deerfield Media (San Antonio) Licensee, LLC; GoCom Media of Illinois, 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

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<sup>298</sup> 47 U.S.C. § 503(b).

<sup>299</sup> 47 CFR § 1.80.

<sup>300</sup> 47 U.S.C. § 325.

<sup>301</sup> 47 CFR § 76.65.

<sup>302</sup> 47 U.S.C. § 503(b).

<sup>303</sup> 47 CFR § 1.80.

<sup>304</sup> 47 U.S.C. § 325.

<sup>305</sup> 47 CFR § 76.65.

<sup>306</sup> 47 U.S.C. § 503(b).

<sup>307</sup> 47 CFR § 1.80.

<sup>308</sup> 47 U.S.C. § 325.

<sup>309</sup> 47 CFR § 76.65.

<sup>310</sup> 47 CFR § 1.80.

Holdings, LLC; KMTR Television, LLC; Second Generation of Iowa, LTD; and Waitt Broadcasting, Inc. shall send electronic notification of payment to the Chief, Media Bureau, Policy Division at [Maria.Mullarkey@fcc.gov](mailto:Maria.Mullarkey@fcc.gov) and Lyle Elder at [Lyle.Elder@fcc.gov](mailto:Lyle.Elder@fcc.gov) on the date said payment is made. Payment of the forfeiture must be made by credit card, ACH (Automated Clearing House) debit from a bank account using the Commission's Fee Filer (the Commission's online payment system),<sup>311</sup> or by wire transfer. The Commission no longer accepts forfeiture payments by check or money order. Below are instructions that payors should follow based on the form of payment selected:<sup>312</sup>

- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. A completed Form 159 must be faxed to the Federal Communications Commission at 202-418-2843 or e-mailed to [RROGWireFaxes@fcc.gov](mailto:RROGWireFaxes@fcc.gov) on the same business day the wire transfer is initiated. Failure to provide all required information in Form 159 may result in payment not being recognized as having been received. When completing FCC Form 159, enter the Account Number from paragraph 59, above, in block number 23A (call sign/other ID), enter the letters "FORF" in block number 24A (payment type code), and enter in block number 11 the FRN(s) captioned above (Payor FRN).<sup>313</sup> For additional detail and wire transfer instructions, go to <https://www.fcc.gov/licensing-databases/fees/wire-transfer>.
- Payment by credit card must be made by using the Commission's Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by credit card, log-in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select "Pay bills" on the Fee Filer Menu, and select the bill number associated with the NAL Account from paragraph 59, above – the bill number is the NAL Account number with the first two digits excluded – and then choose the "Pay by Credit Card" option. Please note that there is a \$24,999.99 limit on credit card transactions.
- Payment by ACH must be made by using the Commission's Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. Select "Pay bills" on the Fee Filer Menu and then select the bill number associated to the NAL Account from paragraph 59, above – the bill number is the NAL Account number with the first two digits excluded – and choose the "Pay from Bank Account" option. Please contact the appropriate financial institution to confirm the correct Routing Number and the correct account number from which payment will be made and verify with that financial institution that the designated account has authorization to accept ACH transactions.

80. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer - Financial Operations, Federal Communications Commission, 445 12th Street, SW, Room 1-A625, Washington, DC 20554.<sup>314</sup> Questions regarding payment procedures should be directed to the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, [ARINQUIRIES@fcc.gov](mailto:ARINQUIRIES@fcc.gov).

81. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to sections 1.16 and 1.80(f)(3) of the Commission's rules.<sup>315</sup> The written statement must be mailed to the

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<sup>311</sup> Payments made using the Commission's Fee Filer system do not require the submission of FCC Form 159.

<sup>312</sup> For questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone at 1-877-480-3201 (option #6), or by e-mail at [ARINQUIRIES@fcc.gov](mailto:ARINQUIRIES@fcc.gov).

<sup>313</sup> Instructions for completing the form may be obtained at <https://www.fcc.gov/Forms/Form159/159.pdf>.

<sup>314</sup> 47 CFR § 1.1914.

<sup>315</sup> *Id.* §§ 1.16, 1.80(f)(3).

Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, ATTN: Media Bureau – Policy Division, and must include the relevant NAL/Account Number(s) referenced in the caption. The statement must also be e-mailed to the Chief, Media Bureau, Policy Division at [Maria.Mullarkey@fcc.gov](mailto:Maria.Mullarkey@fcc.gov), and Lyle Elder at [Lyle.Elder@fcc.gov](mailto:Lyle.Elder@fcc.gov).

82. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation.

83. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by certified mail, return receipt requested, to the addresses of record of: Deerfield Media (Port Arthur) Licensee, LLC; Deerfield Media (Cincinnati) Licensee, LLC; Deerfield Media (Mobile) Licensee, LLC; Deerfield Media (Rochester) Licensee, LLC; Deerfield Media (San Antonio) Licensee, LLC; GoCom Media of Illinois, 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; and Waitt Broadcasting, Inc., respectively.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY,  
APPROVING IN PART, CONCURRING IN PART**

Re: *DIRECTV, LLC; AT&T Services, Inc., Complainants, v. Deerfield Media, Inc. et al., Defendants*,  
MB Docket No. 19-168.

For the first time since the retransmission consent good faith negotiation rules were established, the Commission today adopts notices of apparent liability (NALs) for their alleged violation. Even though it is a novel decision, I agree that the record so far contains sufficient evidence of possible violations to proceed with the notices, and therefore I approve of issuing the NALs. However, I cannot fully endorse our analysis on the amount of the proposed forfeitures and, therefore, concur with respect to that section of the item. Even during better days, when our country is not facing the challenges of a global pandemic, imposing the statutory maximum on individual stations by way of a novel, first-time application of the rules could be disproportionately punitive and significantly threaten the operations of these stations. While appropriate sanctions are warranted for regulatory shortcomings, I hope the Commission will conduct a more thorough analysis of whether to adjust the proposals downward if this case proceeds.

**STATEMENT OF  
COMMISSIONER GEOFFREY STARKS**

Re: *DIRECTV, LLC; AT&T Services, Inc., Complainants, v. Deerfield Media, Inc. et al., Defendants*, MB Docket No. 19-168.

The Commission's rules requiring good faith negotiation for retransmission consent are intended to do more than make sure parties play nice with each other. When effective, they also protect consumers from service interruptions when negotiations between broadcasters and multichannel video programming distributors break down. Consumer protection is a core responsibility of this Commission and, as such, we must take action in response to the kind of egregious behavior apparently exhibited here, especially since it resulted in broadcast television service blackouts lasting in some cases roughly four months.

Last year was a banner year for blackouts,<sup>1</sup> and this year, even in the midst of a pandemic that has brought countless other hardships, consumers continue to experience blackouts, losing local broadcast programming at a time when access to local news and information can be critical.<sup>2</sup> Filing a complaint may eventually bring some relief, but often not before the damage is done to consumers who are blindsided when they turn their televisions on and their local channel has gone dark.

The Media Bureau noted in the underlying order that this was the most egregious example of delay we've seen since the good faith negotiation rules were adopted.<sup>3</sup> I therefore fully support proposing the maximum statutory forfeiture for these apparent, *per se*, violations, given the resulting direct harm to consumers. Going forward, Negotiating Entities should be on notice that similar instances of apparent failure to negotiate for retransmission in good faith, especially when resulting in blackouts and other harms to consumers, could result in similar proposed penalties.

My thanks to the staff for their work on this item.

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<sup>1</sup> See Letter from American Television Alliance to the U.S. Senate Committee on Commerce, Science and Transportation (October 22, 2019) (noting that the 276 blackouts to date in 2019 had eclipsed the prior annual record of 213), at <https://www.americantelevisionalliance.org/wp-content/uploads/2019/10/ATVA-Senate-Hearing-Oct-23-FINAL.pdf>.

<sup>2</sup> Axios, "Dozens of local stations blacked out for Dish customers amid pandemic" (July 27, 2020) (noting that Dish's "recent slew of local blackouts is creating an enormous local news draught for many communities during the pandemic"), at <https://www.axios.com/dozens-of-local-stations-blacked-out-for-dish-customers-amid-pandemic-d6da75ba-65c6-4f17-ab7b-96e55d9a0764.html>.

<sup>3</sup> *DIRECTV, LLC; AT&T Services, Inc., Complainants v. Deerfield Media, Inc., et al., Defendants*, MB Docket No. 19-168, Memorandum Opinion and Order, 34 FCC Rcd 10367, 10381 ¶ 31 (MB 2019).