

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

DISH NETWORK L.L.C.,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	MB Docket No. 21-413
TEGNA INC.,	)	
	)	
Defendant.	)	
	)	
	)	

**ANSWER AND CROSS-COMPLAINT**

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**I. PRELIMINARY STATEMENT**

DISH Network LLC (“DISH”) alleges that TEGNA Inc. (“TEGNA”) has violated the FCC’s good faith negotiation rules. The opposite is true. From the outset of the parties’ negotiation, DISH’s conduct manifested a design to delay and obstruct the parties’ negotiation. TEGNA set forth a comprehensive long form proposal; DISH refused to engage. TEGNA scheduled an early call to discuss economics; DISH stated that it was a waste of time. TEGNA introduced an issues list to resolve key areas of difference; DISH abandoned it. TEGNA offered an extension to continue negotiating; DISH refused to make an economic proposal during the entire extension period. DISH’s Verified Retransmission Complaint (“Complaint”) mentions none of this. Indeed, its description of the negotiation jumps from TEGNA’s presentation of a complete proposal to DISH on August 2, 2021, to DISH’s actions more than two months later on October 4, 2021, during the extension period.

DISH’s conduct is not new. Its negotiation tactics have made it a leader in retransmission consent disputes, with more than 200 “blackouts” in the past year alone. DISH’s public statements on its negotiations with TEGNA are plagued by distortions; as one notable example, DISH’s press releases repeatedly claimed TEGNA was seeking “nearly a billion dollars” in retransmission consent fees,<sup>1</sup> a figure vastly inflated by more than [BEGIN CONFIDENTIAL]

[REDACTED] [END CONFIDENTIAL] based on DISH’s subscriber reports to TEGNA.<sup>2</sup>

<sup>1</sup> See “Tegna Removes Local Channels from DISH TV Customers Nationwide,” <https://ir.dish.com/news-releases/news-release-details/teгна-removes-local-channels-dish-tv-customers-nationwide> (Oct. 6, 2021); “DISH Files Bad Faith Complaint Against Tegna,” <https://ir.dish.com/news-releases/news-release-details/dish-files-bad-faith-complaint-against-teгна> (Oct. 18, 2021).

<sup>2</sup> TEGNA’s calculations are based on the rates proposed in TEGNA’s offer of October 17, 2021, and on the assumption that DISH would maintain the satellite video subscriber base it most recently reported to TEGNA throughout the entire term of the proposed agreement — bucking DISH’s ongoing, years-long streak of consistent subscriber losses.

**REDACTED - FOR PUBLIC INSPECTION**

DISH's Complaint is no more forthright. DISH misrepresents TEGNA's actions at multiple stages of the negotiation. The Complaint also fails to cite FCC decisions that stand directly against its arguments. DISH's Complaint reflects a lack of candor and constitutes an abuse of process, intended to take improper advantage of the Commission's processes to stymie negotiations with TEGNA. Since the Complaint was filed, TEGNA has continued its efforts to negotiate with DISH. Unfortunately, DISH's obstructive conduct persists.

TEGNA has never filed a good faith negotiation complaint, against DISH or any other party, as it consistently has sought to resolve carriage issues through marketplace negotiations. But DISH has brought us here, after itself engaging in conduct that flies in the face of the Commission's good faith negotiation standards. Accordingly, together with its Answer, TEGNA hereby files a cross-complaint against DISH for violation of the Commission's good faith negotiation rules.

Unless specifically admitted, TEGNA denies all allegations in DISH's Complaint.<sup>3</sup>

**[BEGIN CONFIDENTIAL]**

**[END CONFIDENTIAL]**

<sup>3</sup> See 47 CFR 76.7(b)(2)(iv). TEGNA agrees that the statements in ¶¶ 2, 5, and 6 of DISH's Complaint are correct; provided, for clarity and completeness, that (1) TEGNA owns 64 full-power television stations in 51 markets, which are listed in DISH's Exhibit 1 (with the exception of KNAZ, Flagstaff, Arizona, which operates as a satellite of KPNX, Mesa, Arizona) along with certain low-power television stations whose signals DISH was retransmitting under the recently-expired retransmission consent agreement between the parties, and (2) TEGNA's proposals also would grant retransmission consent for WALV-CD, Indianapolis, Indiana, and KUIL-LD, Beaumont, Texas, which are not included in DISH's Exhibit 1.

## II. BACKGROUND

TEGNA opened this negotiation on August 2, 2021, by sending DISH a comprehensive long form retransmission consent proposal. TEGNA's draft agreement was specifically tailored for DISH, with due account to the parties' pre-existing relationship. TEGNA crafted its proposal based on the parties' then-existing agreement, under which the parties had been operating for years, and which had been last amended in 2018 to reflect technological and marketplace developments as of that date.<sup>4</sup> TEGNA's proposal was structured identically to the parties' pre-existing agreement and preserved the majority of the language in that agreement, including existing, hard-fought compromises on issues of particular importance to the parties – some of which were negotiated (and all of which were agreed to) just three years ago. It differed from the prior agreement in that it proposed modifications to certain terms, including updates to reflect changes in the marketplace and technology since the last negotiation. Thus, TEGNA's draft was in no way a "TEGNA form";<sup>5</sup> it was a proposal specifically prepared for DISH that took into account the historic relationship of the parties. TEGNA sent this proposal to DISH two months ahead of the then-existing agreement's expiration on [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED] [END CONFIDENTIAL] to give the parties ample time to reach an agreement.

DISH's response came two weeks later, on August 17, 2021. Rather than responding to TEGNA's proposal, DISH simply attached *its own* form agreement. TEGNA then requested that DISH provide edits to TEGNA's party-specific proposal, so that TEGNA could determine where

<sup>4</sup> See Declaration of Chris Gilpatric, Vice President of Distribution, TEGNA, Inc. ("Gilpatric Declaration") at ¶ 3, attached hereto as Exhibit A.

<sup>5</sup> TEGNA's August 2 proposal to DISH (which was based on an agreement originally negotiated from a prior DISH form) and its updated proposals since that time do not resemble TEGNA's agreements with other operators.

the parties disagreed. DISH replied that it “did not provide a redline because we didn’t feel it would be helpful.”<sup>6</sup> When TEGNA again asked DISH to engage substantively with TEGNA’s proposal rather than simply ignoring it and substituting its own form, DISH responded: “Every single agreement DISH has is based on the DISH form. **DISH has no intentions of engaging substantially with the form you sent.**”<sup>7</sup>

The negotiation continued in a similar tone for the next two months. Every time TEGNA sought to engage DISH on substantive issues, DISH engaged in obstructive negotiation tactics. For example, TEGNA proposed a call between the parties to discuss economics, which took place on September 3, 2021.<sup>8</sup> During that conversation, TEGNA sought to provide DISH with a realistic view of TEGNA’s market rates, in contrast to DISH’s unrealistic and uncompetitively low proposal.<sup>9</sup> Yet DISH’s negotiator later dismissed the call as “a complete waste of 23 minutes of my day.”<sup>10</sup> Nonetheless, TEGNA continued to update its proposals to address substantive points that were raised by DISH in its correspondence. When it became clear that DISH was repeatedly ignoring TEGNA’s updated proposals and simply re-sending its proposed form agreement with only minor changes, TEGNA pivoted and created a substantive issues list designed to help the parties work through some of the thorniest issues.<sup>11</sup> Specifically, TEGNA

<sup>6</sup> Email from Melisa Ordonez to Chris Gilpatric, Aug. 18, 2021. (TEGNA refers to DISH’s negotiator as “M. Ordonez” throughout this Answer, as that is the name that appears in the emails appended hereto. Ms. Ordonez is referred to as Melisa Boddie in the Complaint.)

<sup>7</sup> Email from M. Ordonez to C. Gilpatric, Aug. 18, 2021 (emphasis added).

<sup>8</sup> Gilpatric Declaration at ¶ 4.

<sup>9</sup> See Email from C. Gilpatric to M. Ordonez, Sept. 10, 2021. At the time of the call, DISH was proposing rates that were below what it was paying under the then-existing agreement throughout the entirety of its proposed [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] year term. See Gilpatric Declaration at ¶ 4.

<sup>10</sup> Email from M. Ordonez to C. Gilpatric, Sept. 7, 2021.

<sup>11</sup> Gilpatric Declaration at ¶ 5.

identified the areas of greatest difference between the then-current version of TEGNA's proposal and DISH's form agreement, created a chart setting forth each party's substantive position, and laid out TEGNA's positions with respect to each point – including a number of compromises. TEGNA introduced this list on September 21, 2021. The parties engaged in several turns of the issues list and appeared to make some progress. TEGNA provided DISH with an updated version of its proposed long form agreement to memorialize concessions that it had made in the issues list on September 24, 2021. TEGNA turned the last draft of the issues list on September 30, 2021, **[BEGIN CONFIDENTIAL]** [REDACTED] **[END CONFIDENTIAL]**. TEGNA then offered DISH an extension to allow the parties additional time to negotiate and avoid a disruption of service, and the parties agreed to an extension until October 6.

Unfortunately, DISH wasted this additional time. DISH abandoned the issues list – it never responded to or engaged with the list again until its bizarre attacks against TEGNA in its Complaint.<sup>12</sup> And it allowed the entire extension period to go by without countering the economic proposal TEGNA put forth on September 30.

On October 4, 2021 — two days before the extension's expiration and two months after TEGNA sent its initial proposal — DISH provided comments on TEGNA's proposed draft agreement (as updated) for the first time.<sup>13</sup> DISH's negotiator described these comments — not

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

<sup>13</sup> True to its declaration early in the negotiation that it would refuse to consider any retransmission proposal unless it was based on DISH's then-current form agreement, DISH to date has stubbornly ignored TEGNA's opening proposal and its subsequent concessions to address various DISH concerns and instead, on eight occasions, has sent TEGNA versions of its own form retransmission consent agreement. DISH made certain edits to its form based on a few of TEGNA's comments. But these edits to DISH's new form failed to address – even indirectly – the vast majority of points included in TEGNA's comprehensive and tailored proposal.

a traditional redline proposing alternative language to address differences in position, but rather a series of exclusively margin notes — as follows:

As promised, I have reviewed your document for inconsistencies, ambiguity, and language/concepts that do not work. Unfortunately, given the time before expiration (and the time it will take me to put together a response to TEGNA's proposal), I wasn't able to get through the entire document, but I was able to get through enough to give you an idea of the magnitude of issues within your proposed document.<sup>14</sup>

On the same day, in a later email, DISH significantly reduced its carriage proposal. DISH stated, for the first time two days prior to expiration, that it was no longer willing to commit to carry any of TEGNA's stations not affiliated with a Big 4 network (i.e., ABC, CBS, FOX, and NBC). On the day it made this pivot, DISH was carrying and delivering to consumers the primary channels of all of TEGNA's full-power stations (as well as certain multicast streams) that were not affiliated with a Big 4 network, and each form agreement DISH had sent to TEGNA before October 4 retained that obligation.<sup>15</sup> On October 6, 2021, TEGNA sent a revised long form proposal taking into account certain of DISH's comments of October 4. TEGNA then sent another communication to DISH indicating that it had room to move on rates.<sup>16</sup> This was the last communication before expiration.<sup>17</sup> DISH did not respond until the next afternoon (let alone suggest a further extension); instead, DISH simply removed TEGNA's signals from its system, in multiple cases before the agreement expired.<sup>18</sup> TEGNA became aware that its signals had

<sup>14</sup> Email from M. Ordonez to C. Gilpatric, Oct. 4, 2021.

<sup>15</sup> Gilpatric Declaration at ¶ 6.

<sup>16</sup> Email from C. Gilpatric to M. Ordonez, Oct. 4, 2021.

<sup>17</sup> Gilpatric Declaration at ¶ 8.

<sup>18</sup> *Id.*; Press Release, DISH Network Corporation, Tegna Removes Local Channels from DISH TV Customers Nationwide (Oct. 6, 2021 8:30 PM ET), <https://www.prnewswire.com/news-releases/tegna-removes-local-channels-from-dish-tv-customers-nationwide-301394712.html>.

been taken down only when viewers reached out to its stations asking why their access had been cut off in the middle of prime time programming.<sup>19</sup>

DISH's first communication with TEGNA after pulling down TEGNA's stations was another set of margin comments on TEGNA's latest draft. That draft took into account DISH's prior round of comments, but for every issue that TEGNA had resolved, DISH came up with another one. Nearly 30 of DISH's 73 comments on this draft purported not to understand contractual language that TEGNA had retained from the parties' just expired agreement, which, in some cases, had been negotiated during the last renewal of the parties' agreement in late 2018.<sup>20</sup> With respect to TEGNA's offer of [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL]

Rather than proposing edits to the draft agreement to advance the negotiation, DISH stated that “[w]ithout clarification and/or answers on each and every single one of these points, DISH will not be able to respond.”<sup>21</sup>

TEGNA responded to this litany of margin notes by inviting DISH to make targeted edits to address its concerns.<sup>22</sup> DISH refused to do so, and in response imposed an arbitrary deadline of Sunday at 4 PM MT for TEGNA to provide responses to its margin notes.<sup>23</sup> TEGNA then

<sup>19</sup> Gilpatric Declaration at ¶ 8.

<sup>20</sup> Gilpatric Declaration at ¶ 9.

<sup>21</sup> Email from M. Ordonez to C. Gilpatric, Oct. 7, 2021 (emphasis added).

<sup>22</sup> Email from C. Gilpatric to M. Ordonez, Oct. 8, 2021.

<sup>23</sup> Email from M. Ordonez to C. Gilpatric, Oct. 9, 2021.

turned yet another updated draft reflecting TEGNA's review of DISH's comments, told DISH that it stood behind the remaining language that DISH had raised concerns about, and asked that DISH propose edits in the form of a markup to any language with which it still disagreed.<sup>24</sup> DISH filed the instant Complaint. At the time of filing, DISH had not made a rate proposal in three weeks.<sup>25</sup>

Since filing the Complaint, DISH's pattern of obstruction has continued. TEGNA has made significant compromises, all in an effort to get a deal signed and programming back on DISH's system. For example, in its revised proposal of October 26, 2021, TEGNA both

[BEGIN CONFIDENTIAL]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[END CONFIDENTIAL]

DISH responded three days later, on October 29, 2021, with an email stating that the parties "will remain at an impasse" until TEGNA either uses DISH's form agreement or responds to each and every one of DISH's margin comments to TEGNA's prior, now-outdated drafts.<sup>26</sup>

<sup>24</sup> Email from C. Gilpatric to M. Ordonez, Oct. 13, 2021.

<sup>25</sup> Gilpatric Declaration at ¶ 10.

<sup>26</sup> Email from M. Ordonez to C. Gilpatric, Oct. 29, 2021.

**III. DISH HAS NOT ESTABLISHED A *PER SE* VIOLATION OF THE COMMISSION’S GOOD FAITH NEGOTIATION REQUIREMENT NOR A VIOLATION UNDER THE TOTALITY OF THE CIRCUMSTANCES TEST.**

DISH bears the burden of proof as to the existence of a good faith violation by TEGNA.<sup>27</sup> It has wholly failed to meet this burden. The Commission has established a two-part test to determine whether a party has negotiated in good faith. To satisfy this test, DISH must establish either that TEGNA engaged in one of nine enumerated actions that constitute *per se* violations<sup>28</sup> or breached its duty to negotiate in good faith “based on the totality of the circumstances of [the] particular retransmission consent negotiation[s].”<sup>29</sup> It has done neither.

**A. TEGNA Acted in Good Faith, and DISH Cannot Establish That TEGNA Violated the Commission’s *Per Se* Objective Standards for Good Faith Retransmission Consent Negotiations.**

The Commission has identified nine specific acts or practices that, when committed by a broadcaster or MVPD, constitute a *per se* violation of the good faith negotiation requirements. DISH invokes three of these violations: “[r]efusal by a Negotiating Entity [*i.e.*, a broadcaster or MVPD] to put forth more than a single, unilateral proposal,”<sup>30</sup> “[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>31</sup> and “[r]efusal by a Negotiating Entity to execute a written retransmission consent agreement that sets forth the full understanding of the television

<sup>27</sup> 47 C.F.R. § 76.65(d).

<sup>28</sup> *Id.* § 76.65(b)(1).

<sup>29</sup> *Id.* § 76.65(b)(4).

<sup>30</sup> *Id.* § 76.65(b)(1)(iv); Complaint at ¶ 12.

<sup>31</sup> *Id.* § 76.65(b)(1)(v); Complaint at ¶ 13.

broadcast station and the multichannel video programming distributor.”<sup>32</sup> TEGNA acted in good faith, and has not violated any of these standards.

Refusal to put forth more than a single, unilateral proposal. The FCC has dismissed allegations that one party put forth a single, unilateral proposal where that party “made multiple counterproposals” that “were not identical.”<sup>33</sup> In another denial of a claim brought under this good faith standard, the Commission has noted that it does not apply when active negotiations are taking place, including “the exchange of emails, telephone calls, and multiple proposals during the course of 25 days.”<sup>34</sup> In finding that such active negotiation did take place, the FCC observed that the relevant party had “made multiple offers that, had [the counterparty] accepted them at the time they were made, would have resulted in carriage of the [s]tations.”<sup>35</sup>

As discussed above, TEGNA has made multiple counterproposals that are not identical. Specifically, TEGNA has revised its proposals over the course of the negotiation to address issues raised by DISH, including but not limited to material compromises on fundamental terms such as HD carriage, tier and penetration of carriage, and proposed rates. Had DISH accepted any one of TEGNA’s nine long form proposals over the course of the negotiation, it would have resulted in carriage of the stations. (As discussed above, far from *accepting* any of these offers, DISH refused to meaningfully engage with any of them.) TEGNA commenced the negotiation by presenting a comprehensive long form proposal, and has amended this proposal multiple

<sup>32</sup> *Id.* § 76.65(b)(1)(vii); Complaint at ¶ 14.

<sup>33</sup> *Holstonconnect, LLC v. Nexstar Media Grp., Inc.*, 34 FCC Rcd. 7833, 7836, para. 7 (2019) (“*Holstonconnect Order*”).

<sup>34</sup> *Gray Television Licensee, LLC v. Citizens Telecom Services Company, LLC*, No. CSR8996-C, 2021 WL 1597350, at \*5, para. 16 (OHMSV Apr. 21, 2021).

<sup>35</sup> *Id.*

times to address issues raised by DISH (despite DISH's refusal to provide an industry-standard markup), and has responded promptly to DISH throughout the course of the negotiation. Accordingly, TEGNA has not violated the prohibition on making a "single, unilateral proposal."<sup>36</sup>

Failure to respond to a retransmission consent proposal. DISH has twisted this requirement, effectively taking the position that TEGNA is obligated to separately respond to each and every one of DISH's laundry list of comments, questions, and rude statements, which DISH scattered unproductively in the margins across two of TEGNA's drafts. DISH cites no Commission precedent supporting this interpretation, and TEGNA is not aware of any.

To be clear, and as TEGNA explained to DISH repeatedly, TEGNA reviewed each of DISH's margin notes, and compromised on both positions and language in response. Despite the fact that DISH in no instance proposed edits to address its purported concerns, TEGNA has revised its proposal on multiple occasions to address many of these comments. The remaining notes largely fall into three categories:

1. Comments regarding language that appeared in the party's now-expired prior agreement, that DISH claims it no longer understands. For example, in a provision that was highly-negotiated in 2018, DISH now claims to not understand what [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] means in the context of a sentence prohibiting DISH or its subdistributors from distributing any of TEGNA's signals [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] TEGNA finds this sentence to be perfectly clear, and is troubled that DISH appears to not understand large chunks of the agreement under which it was previously operating.

<sup>36</sup> DISH alleges that TEGNA's negotiation for carriage of both its Big 4 network-affiliated programming streams and its CW and MyNetwork TV-affiliated programming streams violates both this *per se* factor and the totality of the circumstances test. It does neither; in fact, the Commission has expressly stated that this behavior does not constitute bad faith. TEGNA addresses this argument in its discussion of the totality of the circumstances test in Section III.B below.

2. Bald statements that do not seek an answer. For example, regarding TEGNA's force majeure language, DISH commented that "I wouldn't consider a 'labor dispute' out of a party's reasonable control."
3. Comments regarding language that DISH asserts is contradictory or confusing, but TEGNA disagrees. In many cases, DISH engages in great contortions to read supposed ambiguities into plain language. For example, one of DISH's comments claimed to be confused by a requirement that DISH pay its monthly retransmission fees "without any offsets, asserted credits, deductions, or downward adjustments of any kind." In its Complaint, DISH claims this language "suggests that DISH will not be able to adjust the monthly amount to reflect a reduction in the number of subscribers who pay for, and receive, local stations-a reduction created because a subscriber either dropped the locals or departed from DISH altogether."<sup>37</sup> In fact, this language plainly says nothing of the sort, as is obvious from the immediately preceding portion of the relevant paragraph:

[BEGIN CONFIDENTIAL]



<sup>37</sup> Complaint at ¶ 19.

[END CONFIDENTIAL]

This unremarkable provision means precisely what it says. “Each month,” DISH is responsible for calculating how many Subscribers receive each Programming Feed and for paying the applicable fee for each such Subscriber. Once DISH has made these monthly calculations, it is required to pay TEGNA the full amount of fees calculated, without making unilateral deductions (or “downward adjustments”) in the amount paid, regardless of whether DISH believes it is separately owed any money from TEGNA. Any “reduction in the number of subscribers” receiving a station’s Programming Feeds would be reflected in subsequent months’ calculations. The ambiguity DISH claims to see in this provision is nothing but a phantom conjured by DISH’s willful misinterpretation.

With regard to these remaining margin notes, TEGNA has made clear to DISH that it has reviewed DISH’s comments and stands behind its language, and has repeatedly invited DISH to provide a markup with proposed edits for TEGNA’s consideration if it finds something confusing, or prefers different phrasing. DISH has refused and refused and refused to do so.<sup>38</sup> On November 1, 2021, in yet another effort to move past this particular DISH tactic, TEGNA provided an itemized list summarizing its responses to each and every one of DISH’s nearly 150 margin notes.<sup>39</sup> To be clear, TEGNA was not required to do so to satisfy this *per se* requirement. Rather, TEGNA is committed to getting a deal done, and agreed to respond to DISH’s unreasonable demands in order to do so. But even this was not sufficient to cause DISH to substantively respond to TEGNA’s proposal. Rather, DISH paradoxically (and falsely) now claims that it “has never taken the position that it cannot meaningfully respond to TEGNA’s retransmission consent proposals unless TEGNA drafts a separate, itemized response to each margin note DISH added to TEGNA’s September 24 and October 6 drafts,” but then

<sup>38</sup> Gilpatric Declaration at ¶ 10.

<sup>39</sup> Email from C. Gilpatric to M. Ordonez, Nov. 1, 2021.

“reiterate[s], so long as TEGNA’s proposals remain incomplete, we will remain at an impasse.”<sup>40</sup>

DISH’s excuse for once again refusing to respond to TEGNA’s proposal is the need for TEGNA

to “resolve DISH’s outstanding questions and concerns,” along with DISH’s demand that

TEGNA [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL] before DISH will meaningfully respond to any aspect of TEGNA’s proposal.<sup>41</sup>

Throughout this process, TEGNA has sought to productively advance this negotiation and has updated its proposal multiple times to respond to DISH’s positions – whether referenced in DISH’s emails, set forth in its form agreement or included in its litany of margin notes – even though DISH has made it difficult to do so. It is DISH, not TEGNA, that has failed to meaningfully respond.

Failure to execute a written retransmission consent agreement that sets forth the full understanding of the parties. This argument perplexes TEGNA, as it is the very fact that parties have not agreed to terms and “execut[ed] a written retransmission consent agreement” that has led to an impasse.<sup>42</sup> But to be clear, TEGNA has not refused to execute a written agreement that sets forth the full understanding of the parties. It has put forward full proposals that, if accepted, would have resulted in an executed, written retransmission consent agreement. TEGNA hopes that DISH will come back to the table and negotiate an agreement so that the parties can execute

<sup>40</sup> Email from M. Ordonez to C. Gilpatric, Nov. 2, 2021.

<sup>41</sup> *Id.*

<sup>42</sup> 47 C.F.R. § 76.65(b)(1)(vii).

an agreement setting forth the full understanding of TEGNA and DISH, in order to restore carriage of TEGNA's stations on DISH's system.

**B. TEGNA Acted in Good Faith, and DISH Cannot Demonstrate That TEGNA Violated the Commission's Good Faith Retransmission Consent Regulations Under the Totality of the Circumstances Test.**

The Commission also considers the totality of the circumstances in determining whether a party has breached its obligation to negotiate in good faith. In adopting this standard, the Commissions explained that it "will entertain complaints under the totality of the circumstances test alleging that specific retransmission consent proposals are sufficiently outrageous, or evidence that differences among MVPD agreements are not based on competitive marketplace considerations, as to breach a broadcaster's good faith negotiation obligation."<sup>43</sup> DISH raises two claims in its arguments that TEGNA has violated the totality of the circumstances test: first, that TEGNA's negotiation for carriage of its programming streams affiliated with Big 4 networks and the CW Network and MyNetwork TV constitutes improper "tying," and second, that TEGNA's rate proposals are higher than DISH would like. The FCC has conclusively stated that neither of these positions violates its good faith negotiation rules. TEGNA's conduct complies with the Commission's rules under the totality of the circumstances test.<sup>44</sup>

Carriage of multiple programming streams. The Commission has conclusively stated that "[p]roposals for carriage conditioned on carriage of any other programming, such as a

<sup>43</sup> *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, First Report and Order, 15 FCC Rcd 5445, 5458, para. 32 (2000) ("Good Faith Order").

<sup>44</sup> DISH complains that TEGNA has "demanded" certain terms set forth in the comprehensive proposals that TEGNA presented to DISH, all of which are consistent with terms agreed to by other MVPDs. DISH cannot on the one hand refuse to negotiate and on the other hand claim TEGNA is "demanding" certain terms.

broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market" "presumptively are consistent with competitive marketplace considerations and the good faith negotiation requirement."<sup>45</sup> It has further stated "[w]e do not find anything to suggest that, for example, requesting an MVPD to carry an affiliated channel, another broadcast signal in the same or another market, or digital broadcast signals is impermissible or other than a competitive marketplace consideration."<sup>46</sup> In applying these clear statements as recently as 2019, the FCC rejected an MVPD's argument that a broadcaster's "demand[]" that the MVPD "carry additional stations not desired by [the MVPD] or its customers" constituted an "abusive tying arrangement."<sup>47</sup> The FCC found the MVPD had not satisfied its burden of proving that the broadcaster's proposals were inconsistent with marketplace conditions, nothing that the parties had "gone back and forth with negotiations over pricing, channels involved, and length of contract."<sup>48</sup>

DISH cites none of the authority above in its Complaint. Instead, it cites a generic 2005 FCC statement that "tying is not consistent with competitive marketplace conditions if it would violate the antitrust laws" — a "clarification" DISH affiliate EchoStar asked the Commission to make — and then proceeds to cite only antitrust cases outside of the communications sphere entirely.<sup>49</sup> This clarification does not overturn the FCC's clear determination that a "proposal

<sup>45</sup> *Good Faith Order*, 15 FCC Rcd at 5469, para. 56.

<sup>46</sup> *Id.*

<sup>47</sup> *Holstonconnect Order*, 34 FCC Rcd. at 7838, para. 12.

<sup>48</sup> *Id.*

<sup>49</sup> *Implementation of Section 207 of the Satellite Home Viewer Extension & Reauthorization Act of 2004 Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd. 10339, 10343-46, paras. 10-15 (2005) ("EchoStar argues that the Commission should clarify that tying is not consistent with competitive marketplace considerations if it would violate the antitrust laws. . . .

for carriage conditioned on carriage of *any other programming*” is presumptively consistent with competitive marketplace conditions, which the FCC cited as recently as 2019 in dismissing a tying claim in the *Holstonconnect Order*.<sup>50</sup> Notably, DISH did not take the position that it did not want the obligation to carry TEGNA’s non-Big 4 network-affiliated programming streams until October 4 – more than two months after TEGNA opened this negotiation and just two days before the extension expired and TEGNA’s stations were removed from DISH’s system. Each of DISH’s previous proposals provided for carriage of many of these streams, including the primary channels of all of TEGNA’s full power stations. In hindsight, it appears that this sudden about-face on fundamental carriage terms was designed solely to set up the tying argument in DISH’s Complaint.

Rate proposals. The Commission repeatedly has said that economic proposals do not create “good faith” claims. It is the Commission’s “longstanding precedent that absent other factors, disagreement over the rates, terms, and conditions of retransmission consent — even fundamental disagreement — is not indicative of lack of good faith.”<sup>51</sup> Allegations that rates offered by a broadcaster are “vastly higher” than rates offered by other broadcasters in the same markets “do not support a finding that [Broadcaster’s] proposed retransmission consent rates are grounds for a finding of bad faith under the totality of the circumstances test.”<sup>52</sup> Rather, “a

[W]e clarify that tying is not consistent with competitive marketplace considerations if it would violate the antitrust laws.”)

<sup>50</sup> *Holstonconnect Order*, 34 FCC Rcd. at 7838, para. 12.

<sup>51</sup> *Id.* at 7835, para. 6 (citing *Coastal Television Broad. Co. LLC v. MTA Commun., LLC*, Memorandum Opinion and Order, 33 FCC Rcd 11025, 11027, para. 7 (2018); *HITV License Subsidiary, Inc. v. DIRECTV, LLC*, Memorandum Opinion and Order, 33 FCC Rcd 1137, 1140, para. 7 (2018); *Mediacom Commun. Corp. v. Sinclair Broad. Grp., Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 47, 50, para. 6 (2007) (“*Mediacom Order*”).

<sup>52</sup> *Id.* at 7837-38, para. 11.

disagreement over price[] . . . is the type of commonplace business disagreement that the Commission does not deem a violation of its rules.”<sup>53</sup> The FCC concluded its denial of another good faith complaint by stating: “[Broadcaster] and [MVPD] disagree on the market price for [Broadcaster’s] signals. As the Commission has stated in the past, absent more, such a disagreement leading to the inability to conclude a retransmission consent agreement does not amount to bad faith.”<sup>54</sup>

Again, DISH cites none of the authority above in its Complaint. DISH has alleged nothing more than a disagreement between DISH and TEGNA as to the value of TEGNA’s signals. This does not amount to bad faith.

#### **IV. CROSS-COMPLAINT FOR DISH’S VIOLATION OF THE GOOD FAITH NEGOTIATION RULES**

DISH’s conduct has violated the Commission’s good faith negotiation rules under both the *per se* standards and the totality of the circumstances test. DISH has violated the Commission’s *per se* standards by refusing to negotiate retransmission consent (which the FCC has interpreted as requiring parties to “participate in retransmission consent negotiations with the intent of reaching agreement”<sup>55</sup>) and by acting in a manner that unreasonably delays

<sup>53</sup> *Id.*.

<sup>54</sup> *Northwest Broadcasting L.P., et. al. v. DIRECTV*, Memorandum Opinion and Order, 30 FCC Rcd. 12449, 12453, para. 11 (2015) (citing *Mediacom*, 22 FCC Rcd at 45, para. 24; *ACC Licensee, Inc. v. Shentel Telecommunications Company*, Emergency Petition for Finding of Bad Faith Retransmission Consent Negotiations and for Enforcement of Customer Notice Rules, Memorandum Opinion and Order, 27 FCC Rcd 7584, 7587, 7590, para. 15 (2012)) (“*Northwest Broadcasting Order*”).

<sup>55</sup> *Good Faith Order*, 15 FCC Rcd at 5462 at para. 40. While the *Good Faith Order* attributes this responsibility only to broadcasters, it has since been extended to apply to both broadcasters and MVPDs. See, e.g., *Implementation of Section 207 of the Satellite Home Viewer Extension & Reauthorization Act of 2004 Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd. 10339, 10339, para. 1 (“We conclude that the reciprocal bargaining obligation applies to retransmission consent negotiations between all broadcasters and MVPDs. . . .”).

retransmission consent negotiations. DISH's behavior violates the totality of the circumstances test because it reflects an "absence of a sincere desire to reach an agreement that is acceptable to both parties."<sup>56</sup>

**A. DISH Violated the Commission's *Per Se* Objective Standards for Good Faith Retransmission Consent Negotiations.**

As described above, the Commission has identified a number of actions or practices that demonstrate that a party has *per se* violated its obligation to negotiate retransmission consent in good faith. DISH has committed at least two of these violations.

Refusal to Negotiate. Negotiating entities may not refuse to negotiate retransmission consent.<sup>57</sup> Going back to the *Good Faith Order*, the FCC has explained that "this requirement goes to the very heart of Congress' purpose in enacting the good faith negotiation requirement."<sup>58</sup> The "long-standing test of whether a Negotiating Entity has engaged in an unlawful failure to negotiate" is whether the party has "actively participated in negotiations with the intent of reaching agreement."<sup>59</sup> The party "must do so in a timely manner, being mindful of service disruptions."<sup>60</sup> DISH has failed to meet this most basic requirement.

DISH's purported recitation of the parties' negotiation skips from August 2, 2021, when TEGNA provided DISH with an initial comprehensive long form proposal, to October 4, 2021

<sup>56</sup> *Implementation of Section 103 of the STELA Reauthorization Act of 2014*, Notice of Proposed Rulemaking, Notice of Proposed Rulemaking, 30 FCC Rcd. 10327, 10329, para. 2 (2015) (quoting *Good Faith Order* at 5458, para. 32) ("*2015 Good Faith NPRM*").

<sup>57</sup> 47 C.F.R. § 76.65(b)(1)(i).

<sup>58</sup> *Good Faith Order*, 15 FCC Rcd at 5462, para. 40.

<sup>59</sup> *DIRECTV, LLC, et. al. v. Deerfield Media, Inc., et al.*, No. ACCOUNTMB-2020414300, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 2020 WL 5560945, at \*16, para. 43 (OHMSV Sept. 15, 2020) (citing *Good Faith Order*, 15 FCC Rcd at 5462, para. 40) ("*DIRECTV Order*").

<sup>60</sup> *Id.* at \*19, para. 52.

— two days before the expiration of the extension period. During the entire period omitted from DISH’s account, DISH refused to engage with TEGNA’s proposal. On August 18, DISH stated: “DISH has no intentions of engaging substantially with the form you sent.”<sup>61</sup> On September 17, DISH reiterated: “I already told you that DISH is not going to engage on Tegna’s new form.”<sup>62</sup> As discussed above, TEGNA’s proposal was in no way a “TEGNA form”; it was a proposal specifically prepared for DISH based on the existing relationship between the parties and current marketplace conditions. DISH, in contrast, apparently insists that “[e]very single agreement DISH has [be] based on the DISH form.”<sup>63</sup>

It was not until October 4 that DISH engaged in any fashion with TEGNA’s comprehensive proposal, which by then had been updated several times to address various issues raised by DISH in its emails and to incorporate compromises TEGNA agreed to during the brief period in which DISH engaged with the issues list TEGNA prepared based on the TEGNA proposal and DISH form. As discussed above, DISH added more than 70 margin notes objecting to language in TEGNA’s September 24 draft proposal without making a single proposed edit or substantive counterproposal — an approach that was both unproductive and entirely inconsistent with the typical redline format that virtually all parties adopt to negotiate contracts. In the email accompanying these notes, DISH’s negotiator stated that she “wasn’t able to get through the entire document.”<sup>64</sup> When TEGNA expressed its disappointment at this revelation, DISH seemed to realize its mistake, responding less than two-and-a-half hours later that it had

<sup>61</sup> Email from M. Ordonez to C. Gilpatric, Aug. 18, 2021.

<sup>62</sup> Email from M. Ordonez to C. Gilpatric, Sept. 15, 2021; email from M. Ordonez to C. Gilpatric, Sept. 17, 2021.

<sup>63</sup> Email from M. Ordonez to C. Gilpatric, Aug. 18, 2021.

<sup>64</sup> Email from M. Ordonez to C. Gilpatric, Oct. 4, 2021.

reviewed TEGNA's proposal earlier, but that October 4 was the first time DISH reviewed it "with the intention of marking it up with specific notes on inconsistencies, ambiguity, and language/concepts that do not work for DISH, for TEGNA to review, outside of the issues list [the parties] had been working on."<sup>65</sup> (DISH's invocation of the issues list leaves out the fact that it was TEGNA that introduced the list when DISH failed to engage with its proposal, and DISH that had abandoned it.) TEGNA quickly responded to DISH, stating that it had "room to move on the rates."<sup>66</sup> This was the last communication before the parties' agreement expired. DISH never sought an additional extension and did not respond to TEGNA's email until after TEGNA's stations had been removed from the DISH system (as noted above, in some cases prior to the actual expiration of the extension). The fact that DISH did not engage with TEGNA's draft until the four days into the six day extension period, and that even at that point DISH was not able "to get through the entire document," shows DISH's utter lack of intent in reaching an agreement, and complete disregard for the upcoming service disruption. Moreover, DISH's own Complaint makes plain DISH's refusal to negotiate at all for retransmission of TEGNA's stations not affiliated with a Big 4 network, which itself constitutes a *per se* violation of DISH's duty to negotiate in good faith.<sup>67</sup>

Unreasonable Delay. Negotiating Entities may not "act[] in a manner that unreasonably delays retransmission consent negotiations."<sup>68</sup> In considering a possible violation of this

<sup>65</sup> Email from C. Gilpatric to M. Ordonez, 10/6/21 1:02 PM; Email from M. Ordonez to C. Gilpatric, 10/6/21 3:24 PM.

<sup>66</sup> Email from C. Gilpatric to M. Ordonez, 10/6/21 5:40 PM.

<sup>67</sup> See, e.g., Complaint at ¶ 34 (describing stations not affiliated with a Big 4 network as "stations [DISH] is otherwise uninterested in retransmitting").

<sup>68</sup> 47 C.F.R. § 76.65(b)(1)(iii).

standard, the Commission is “conscious that time is frequently of the essence in retransmission consent negotiations in order to avoid service disruption.”<sup>69</sup> Accordingly, “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>70</sup> In “the most egregious example of delay that we have encountered since the good faith rules were adopted,”<sup>71</sup> the FCC has found a negotiating entity violated the *per se* good faith standard prohibiting undue or unreasonable delay when “the service disruption had already begun before [the entity] made any effort to engage in negotiations with respect to Defendant Stations.”<sup>72</sup> In that case, the defendants had sent a proposal before the expiration of the agreements and then refused to engage until most stations went dark. The FCC described it as “crucial” to its finding that the delay was an intentional refusal to negotiate that served as a central element of the defendant’s negotiation strategy.

It was a remarkably similar element of DISH’s strategy. Not only did DISH fail to engage with TEGNA’s proposal until the extension period, as discussed above, but DISH ensured delay through several other actions. First, it did not make a single rate proposal in the three weeks leading up to expiration. (Despite the lack of a complete proposal from DISH, TEGNA continued to negotiate and offer compromises.) Second, DISH insisted that it could not “meaningfully respond”<sup>73</sup> to TEGNA’s proposal unless it resolved to DISH’s satisfaction “each

<sup>69</sup> *DIRECTV Order* at \*3, para. 5.

<sup>70</sup> *Northwest Broadcasting Order*, 30 FCC Rcd. at 12452, para. 9.

<sup>71</sup> *DIRECTV, LLC, et. al. v. Deerfield Media, Inc., et al.*, Memorandum Opinion and Order, 34 FCC Rcd. 10367, 10381, para. 31 (2019).

<sup>72</sup> *Id.* at 10381, para 30.

<sup>73</sup> Email from M. Ordonez to C. Gilpatric, Oct. 15, 2021.

and every”<sup>74</sup> one of DISH’s almost 150 margin notes across two separate TEGNA drafts, and regardless of how many times and ways TEGNA responded, DISH unreasonably persisted in its refusal to respond. Third, DISH suddenly introduced a material change to its position on carriage on October 4, 2021 — two days before expiration of the extension. Prior to that date, each of DISH’s proposals had included the requirement to continue carrying the primary channels and other Big 6 network-affiliated streams that it was then carrying pursuant to the parties’ then-existing agreement. DISH’s new position, conveyed in the text of an email, was that it should be free to drop from the DISH system multiple TEGNA stations that it previously agreed to carry. To completely upend the parties’ baseline understanding on carriage, one of the most fundamental elements of a retransmission consent negotiation, two days before expiration virtually ensured that the parties would not be able to reach an agreement prior to that date. If DISH did not intend this pivot as a delay tactic two days before a service disruption, it would have sought a further extension. It did not.

**B. DISH Violated the Commission’s Good Faith Retransmission Consent Regulations Under the Totality of the Circumstances Test.**

Under the totality of the circumstances test, a party may present facts that, given the totality of the circumstances, reflect “an absence of sincere desire to reach an agreement that is acceptable to both parties,” even if the party does not allege a violation of the *per se* standards.<sup>75</sup> In this analysis, the Commission will dismiss “commonplace disagreements” but may consider the substance of the proposed terms and conditions or the terms of actual retransmission agreements that are “sufficiently outrageous.”<sup>76</sup>

<sup>74</sup> Email from M. Ordonez to C. Gilpatric, Oct. 7, 2021.

<sup>75</sup> 2015 *Good Faith NPRM*, 30 FCC Rcd. at 10329, para. 2 (quoting *Good Faith Order*, 15 FCC Rcd at 5458, para. 32).

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

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For all of the reasons discussed above, DISH's behavior evidences an "absence of a sincere desire to reach an agreement." When TEGNA scheduled an early call to engage with DISH on economic terms, DISH's negotiator described it as "a complete waste of 23 minutes of my day" and cast the entire negotiation as "a complete waste of everyone's time."<sup>77</sup> This is characteristic of DISH's hostile attitude toward the negotiation. DISH did not engage with TEGNA's proposal until the extension period, two days before expiration. And even then, its form of engagement was to scatter margin notes across two of TEGNA's drafts, in some cases, as discussed above, claiming not to understand language that was part of the parties' then-existing agreement. Throughout the negotiation, TEGNA made compromises to address various issues raised by DISH in its form agreement, in its emails, as a part of the issues list, and in its litany of margin notes. DISH's conduct from the outset appeared designed to avoid substantive engagement with TEGNA's proposals. From its early declaration that it would "not substantially engage" with TEGNA's proposal, to its combative emails raising problems without offering solutions, to its last minute pivot on carriage terms two days before expiration, DISH has unreasonably obstructed this negotiation. TEGNA now suspects this course of conduct was designed to lead to an impasse. Indeed, TEGNA believes that DISH's last minute change of carriage position was designed to set up its Complaint rather than advance negotiations to help the parties reach a deal.

DISH's conduct throughout this process has reflected a transparent strategy to avoid engaging in any meaningful negotiations towards a new agreement. DISH's interactions with TEGNA have been pure theater – going through the motions to set up a good faith negotiation complaint, with no intention of reaching an agreement that would preserve service to the public.

<sup>77</sup> Email from M. Ordonez to C. Gilpatric (Sept. 7, 2021).

It is difficult for TEGNA to understand what motivates this conduct, but perhaps it relates to DISH's broader, longstanding policy goals to hobble the broadcast industry in carriage negotiations.

**V. DISH'S COMPLAINT CONSTITUTES AN ABUSE OF PROCESS.**

Not only did DISH violate the Commission's good faith negotiation rules, but its very filing of the Complaint constitutes an abuse of the Commission's processes. DISH's repeated misrepresentations of TEGNA's behavior and conspicuous failure to cite Commission precedent directly contrary to its arguments also demonstrates a lack of candor.

An abuse of FCC process is "any action designed or intended to manipulate or take improper advantage of a Commission process, procedure or rule in order to achieve a result which that process, procedure or rule was not designed or intended to achieve; or to subvert the underlying purpose of that process, procedure or rule."<sup>78</sup> The Commission has explained that this "improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself . . . by the use of the process as a threat or a club."<sup>79</sup> Using the FCC's processes "as a means to cause delay and economic injury" to another party "rather than to air legitimate, substantive objections" constitutes an abuse of process.<sup>80</sup>

As demonstrated above, DISH's Complaint is entirely without merit. It is a frivolous pleading, "based on arguments that have been specifically rejected by the Commission" or otherwise have "no plausible basis for relief."<sup>81</sup> It can serve no other purpose than as tactic for

<sup>78</sup> *Amendment of Sections 1.420 & 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 2 FCC Rcd. 5563, 5563 para 2 (1987).

<sup>79</sup> *Id.* (citing Prosser, *Law of Torts* 877–78 (3d ed. 1964)).

<sup>80</sup> *Application of Nationwide Communications, Inc.*, 13 FCC Rcd. 5654, 5655, para. 5 (1998).

<sup>81</sup> *Id.* (internal quotations removed).

further delay and a “threat or a club” against TEGNA. DISH’s frivolous pleading required TEGNA to either submit to this adversarial proceeding, or completely capitulate to DISH’s positions — both of which cause economic injury to TEGNA. Under the circumstances, TEGNA welcomes the Commission’s review of DISH’s behavior. The Commission should use all options available to censure DISH for its behavior, both in the filing of this Complaint, and for its bad faith in the DISH-TEGNA negotiation.<sup>82</sup>

DISH’s Complaint is based on arguments “that have been specifically rejected by the Commission in other proceedings.”<sup>83</sup> As described above, DISH asserts a number of arguments that TEGNA violated good faith standards that have been conclusively rejected by the Commission, and its Complaint excludes FCC decisions that are directly on point. For example, DISH alleges that TEGNA’s proposals that DISH carry non-Big-4 affiliated stations amounts to a *per se* violation of the Commission’s good faith standards. This position is directly contrary to the *Good Faith Order*, which states: “Proposals for carriage conditioned on carriage of any other programming, such as a broadcaster’s digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market” “presumptively are consistent with competitive marketplace considerations and the good faith negotiation requirement.”<sup>84</sup> The FCC reaffirmed this principle as recently as 2019 in the *Holstonconnect* Order. DISH disregards this entirely. DISH similarly alleges that TEGNA’s rate proposals constitute a violation of the good faith rules. But the FCC’s “longstanding precedent that absent other factors, disagreement

<sup>82</sup> The Commission has previously admonished parties for abusing its good faith negotiation complaint process, including DISH’s affiliate, EchoStar. *See Echostar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd. 15070, 15075-76, para 12 (2001).

<sup>83</sup> *Application of Nationwide Communications, Inc.*, 13 FCC Rcd. 5654, 5655, para. 5 (1998).

<sup>84</sup> Good Faith Order, 15 FCC Rcd at 5469, para. 56.

over the rates, terms, and conditions of retransmission consent — even fundamental disagreement — is not indicative of lack of good faith.”<sup>85</sup> Again, DISH’s Complaint makes no mention of this directly contrary authority.

Parties engaged with the Commission are bound by a duty of candor. For example, the Commission views “misrepresentation and lack of candor in an applicant’s dealings with the Commission as serious breaches of trust.”<sup>86</sup> Section 1.17(a)(1) of the rules states that no person shall, “in any written or oral statement of fact, intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading.”<sup>87</sup> Lack of candor exists when a party breaches its duty “to be fully forthcoming as to all facts and information relevant to a matter before the FCC, whether or not such information is particularly elicited.”<sup>88</sup>

DISH has breached its duty of candor to the Commission primarily in two ways. First, as explained above, DISH fails to cite relevant FCC precedent when making its allegations against TEGNA. While the Commission is well informed of its own decisions, DISH nonetheless has a duty to be forthcoming about the weight of FCC authority that directly contradicts its allegations against TEGNA. The existence of these FCC decisions and their holdings contrary to DISH’s

<sup>85</sup> *Holstonconnect Order*, 34 FCC Rcd. at 7835, para. 6 (citing *Coastal Television Broad. Co. LLC*, 33 FCC Rcd at 11027, para. 7; *HITV License Subsidiary, Inc.*, 33 FCC Rcd at 1140, para. 7; *Mediacom Order*, 22 FCC Rcd at 50, para. 6).

<sup>86</sup> *Swan Creek Communications, Inc. v. F.C.C.*, 39 F.3d 1217, 1221-22 (D.C. Cir. 1994) (quoting *Policy Regarding Character Qualifications in Broadcast Licensing, Report, Order, and Policy Statement*, 102 FCC 2d 1179, 1211, para. 60-61 (1986)).

<sup>87</sup> 47 CFR § 1.17(a)(1).

<sup>88</sup> *Swan Creek Communications, Inc.*, 39 F.3d at 1221-22 (quoting *Silver Star Communications-Albany, Inc.*, 3 FCC Rcd. 6342, 6349, para. 27 (1988)).

legal positions are “facts and information relevant to a matter before the FCC.”<sup>89</sup> Second, DISH misrepresents the course of the parties’ negotiations. Specifically, DISH omits two entire months of the negotiation — from August 2, 2021, to October 4, 2021 — from its narrative. DISH therefore “intentionally omit[s] material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading.”<sup>90</sup> DISH is a sophisticated actor and understands that these factual and legal omissions constitute an attempt to mislead the Commission.

DISH is a serial offender and until the Commission steps in, its obstructive tactics will continue. As of December of last year, DISH was “without at least 236 channels due to eight different carriage battles” and “[t]he blacked-out channels include[d] 212 local network affiliates, and 24 premium or regional sports networks.”<sup>91</sup> Given DISH’s public messaging with respect to these incidents, as well as the instant impasse with TEGNA, DISH appears to use these disruptions as a tool to advance its larger policy objectives. Rather than seeking an agreement that will retain service to DISH subscribers, DISH appears to seek disruptions that can be used to advance its longer term policy goals. History demonstrates that only when faced with real consequences does DISH decide to change course.<sup>92</sup>

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

<sup>90</sup> 47 CFR § 1.17(a)(1).

<sup>91</sup> See Phillip Swann, *Updated: Dish Now Missing 236 Channels Due to Fee Fights*, TV Answer Man (December 5, 2020), <https://tvanswerman.com/2020/12/05/dish-now-missing-236-channels-due-to-fee-fights/>; Phillip Swann, *The Dish Blackouts: The Customers Speak Out!*, TV Answer Man (Aug. 3, 2020), <https://tvanswerman.com/2020/08/03/the-dish-blackouts-the-customers-speak-out/>.

<sup>92</sup> For example, DISH did not cease violating the compulsory copyright license until, following years of litigation, the Eleventh Circuit found its pattern of abuse so egregious that it enjoined DISH from providing distant-into-local transmission of all programming originating on stations affiliated with the Big-4 networks. See *CBS Broadcasting Inc. v. EchoStar Communications Corp.*, 450 F.3d 505 (11th Cir. 2006).

**VI. CONCLUSION AND REQUEST FOR RELIEF**

For the foregoing reasons, TEGNA asks that the FCC take the following actions:

- Dismiss DISH's Complaint,
- Find that DISH has failed to negotiate in good faith in violation Section 76.65 the Commission's rules,
- Find that DISH's Complaint is frivolous and constitutes an abuse of process,
- Find that DISH has breached its duty of candor to the Commission, and
- Take such other actions as may be appropriate in light of such findings, including but not limited to requiring DISH to negotiate in good faith and the imposition of forfeitures, admonishments or other appropriate remedies against DISH.

**WHEREFORE,** TEGNA respectfully requests issuance of an order dismissing DISH's Complaint in its entirety, granting TEGNA's Cross-Complaint set forth herein, and ordering such other and further relief against DISH as the Commission deems just and proper.

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/s/ Jennifer A. Johnson  
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Washington, DC 20001

*Counsel for Defendant TEGNA Inc.*

November 5, 2021

**CERTIFICATE OF SERVICE**

I, Jennifer A. Johnson, hereby certify that on this 5th day of November, 2021, I caused a true and correct copy of the foregoing Answer and Cross-Complaint to be served via overnight delivery upon:

Jeffrey H. Blum  
Hadass Kogan  
DISH NETWORK LLC  
1110 Vermont Avenue, N.W., Suite 450  
Washington, D.C. 20005

Pantelis Michalopoulos  
Christopher Bjornson  
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*Counsel for DISH Network LLC*

/s/ Jennifer A. Johnson  
Jennifer A. Johnson  
Covington & Burling LLP

Dated: November 5, 2021

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**DECLARATION OF CHRIS GILPATRIC**

I, Chris Gilpatric, declare under penalty of perjury, pursuant to 47 C.F.R. § 1.16, that the following is true and correct:

1. I am Vice President of Distribution at TEGNA Inc. (“TEGNA”) and have served in this role since August 2019. My responsibilities include negotiating retransmission consent agreements with MVPDs such as DISH Network L.L.C (“DISH”). I have negotiated hundreds of retransmission consent agreements over the course of my career. I have served as the lead negotiator in TEGNA’s current retransmission consent negotiation with DISH. This Declaration reflects my personal knowledge of that negotiation, and my consultations with negotiators on TEGNA’s prior DISH agreements.

2. I have reviewed TEGNA’s Answer and Cross-Complaint to DISH’s Verified Retransmission Complaint (the “Answer”) and the exhibits thereto. The factual statements therein regarding the negotiation between TEGNA and DISH are true and correct to the best of my knowledge, information, and belief. Confidential Exhibit B contains true and correct copies of my email exchanges with DISH regarding the negotiation, though specific rate proposals have been redacted, along with e-mail headers reflecting privileged communications. Without limiting the foregoing, I specifically certify that the facts that follow are true and correct to the best of my knowledge, information, and belief:

3. On August 2, 2021, with the retransmission consent agreement then in effect between TEGNA and DISH scheduled to expire on **[BEGIN CONFIDENTIAL]**  
**[REDACTED]** **[END CONFIDENTIAL]** I sent DISH a comprehensive long form proposal for a new retransmission consent agreement between the parties. TEGNA’s proposal was based on the parties’ then-existing agreement, which was originally negotiated from a prior

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DISH form, and which had been last amended in 2018 to reflect technological and marketplace developments as of that date. TEGNA's proposal was structured identically to the parties' pre-existing agreement and preserved the majority of the language in that agreement, including highly-negotiated compromises on issues of particular importance to the parties, some of which were negotiated when the agreement was extended in 2018. TEGNA's proposal differed from the prior agreement in that it proposed modifications to certain terms, including updates to reflect changes in the marketplace and technology since the last negotiation. It did not resemble TEGNA's agreements with other MVPDs and was in no way a "TEGNA form."

4. I proposed a call with DISH, which took place on September 3, 2021. The purpose of the call was to discuss the economic terms of TEGNA's and DISH's proposals. At the time of the call, the per-subscriber rates DISH was proposing to pay TEGNA in each of the [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] years within DISH's proposed term were below the rates then in effect under the then-existing agreement.

5. On September 21, 2021, in an effort to advance the negotiations despite DISH's repeated and explicit refusal to engage with TEGNA's proposal, TEGNA prepared and sent to DISH a high-level issues list setting forth key areas of difference between TEGNA's proposal and DISH's form. After several exchanges, I sent DISH the last draft of the issues list to date on September 30, 2021. DISH never responded to this turn of the issues list and did not engage with the list again.

6. On September 30, 2021, TEGNA proposed that the parties extend the then-existing agreement to allow additional time to complete negotiations. The parties ultimately agreed on an extension until 9 p.m. Eastern Time on October 6, 2021. On October 4, 2021, DISH significantly changed its carriage proposal. DISH stated that it would no longer

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commit to carrying any program stream broadcast by TEGNA's stations that was not affiliated with a Big 4 network (*i.e.*, ABC, CBS, FOX, and NBC). At the time it made this statement, DISH was carrying and delivering to its satellite video customers the primary channels of all of TEGNA's full-power stations (as well as certain multicast streams) that were not affiliated with a Big 4 network, and each form agreement DISH had sent to TEGNA before October 4 retained that obligation.

7. Despite the significance of DISH's proposal to substantially reduce its carriage obligations, and its introduction of this new position just two days before the expiration of the then-existing agreement, DISH never requested a further extension beyond October 6, 2021.

8. I sent the last communication between the parties prior to expiration of the extension, at 5:40 p.m. Eastern Time on October 6, 2021. **[BEGIN CONFIDENTIAL]** [REDACTED]

[REDACTED] **[END CONFIDENTIAL]** I did not receive a reply from DISH until the next afternoon. The agreement expired on October 6 at 9 p.m. Eastern Time. The general managers of several of TEGNA's stations informed me that they had received complaints from DISH subscribers stating that their access to TEGNA's channels had been cut off during the 8 p.m. Eastern Time primetime hour, prior to the expiration of the parties' agreement.

9. In two instances, DISH provided margin comments to TEGNA's drafts. On October 4, 2021, DISH provided 73 margin comments to TEGNA's September 24, 2021 draft, and on October 7, 2021 (the day after the extension had expired and TEGNA's stations had been removed from DISH's system), DISH provided a further 73 margin comments to TEGNA's October 6, 2021 draft. Out of its 73 comments to TEGNA's October 6 draft, nearly 30 purported

**REDACTED - FOR PUBLIC INSPECTION**

to not understand contractual language that TEGNA had retained from the parties' just-expired agreement, which, in some cases, had been negotiated during the last renewal of the parties' agreement in late 2018.

10. TEGNA reviewed all of DISH's margin notes to TEGNA's September 24 and October 6 drafts. TEGNA has updated its draft multiple times in response to many of them, and I have made clear to DISH that with respect to the remainder, TEGNA stands behind its language. I have repeatedly invited DISH to provide a markup with proposed edits if it still finds something confusing, or prefers different phrasing. DISH has refused to do so. Additional details regarding DISH's margin notes are as set forth in the Answer.

11. At the time it filed the Complaint on October 18, 2021, DISH had not made a rate proposal to TEGNA since September 28, 2021. TEGNA countered that proposal two days later, on September 30, 2021. On October 19, 2021, DISH made its first rate proposal in three weeks.

\* \* \*

I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on: November 4, 2021

Signature: *Chris Gilpatric*

**REDACTED - FOR PUBLIC INSPECTION**

**EXHIBIT B**

**CONFIDENTIAL**

**REDACTED IN THE ENTIRETY**