

REDACTED—FOR PUBLIC INSPECTION

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

_____)	
DISH NETWORK L.L.C.)	<u>EXPEDITED CONSIDERATION</u>
)	<u>REQUESTED</u>
Complainant,)	
)	MB Docket No. 12-1
)	File No. _____
v.)	
)	
Tegna, Inc.)	
)	
)	
Defendant.)	
_____)	

VERIFIED RETRANSMISSION COMPLAINT OF DISH NETWORK L.L.C.

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SUMMARY

In disregard of its good faith duties and the Commission’s rules, Tegna, one of the nation’s largest broadcast station owners, stonewalled DISH at a critical point in retransmission consent negotiations, forcing a blackout of 65 Tegna stations in 53 markets nationwide, adversely affecting nearly 3 million DISH subscribers. Tegna did so by:

- appearing to demand that DISH pay Tegna for all DISH subscribers in a local market (a Designated Market Area or “DMA”)—whether they purchase local programming from DISH or not;
- appearing to demand that DISH pay Tegna for viewers who are no longer subscribers of DISH;
- refusing to grant DISH retransmission consent for any of its Big-4-affiliated broadcast stations until and unless DISH also agreed to retransmit its CW, MyNetworkTV (“MNTV”) and independent stations and pay higher rates for these unwanted stations;
- demanding that DISH agree to launch *future* Tegna stations, whether or not DISH has the bandwidth to do so;
- demanding a massive rate increase on the order of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] for Big-4 affiliated stations notwithstanding the material decrease in such stations’ viewership among DISH subscribers;
- refusing to put forth a complete agreement setting forth its proposals;
- refusing to answer basic questions from DISH; and
- refusing to resolve fundamental inconsistencies between various elements of its own proposal.

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In fact, this is an unusual case because of the internal contradictions within Tegna’s own proposals. These inconsistencies make it hard or impossible for DISH to ascertain *what* it is that Tegna demands, taking this case even farther away from any concept of good faith than if the improper demands were clear as day. Take the fundamental issue of the number of DISH subscribers on whom Tegna demands payment. DISH has stated that Tegna *appears* to demand payment on all subscribers in each local market exactly because of these contradictions. Tegna’s proposal starts, uncontroversially, with this language: [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL] So far so good. But then Tegna’s proposal, including the version Tegna sent DISH on October 11, 2021, *adds* a provision that states the very opposite:

[BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [END CONFIDENTIAL]

(emphasis added). Remarkably, while DISH has raised this question repeatedly, this language has remained entirely unchanged in the latest version of Tegna’s proposal, sent on October 17, 2021. And an issue list that Tegna sent on September 21, 2021 also states that DISH must ensure that *every single* DISH subscriber in a DMA receives the Tegna stations, whether they want to or not: [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL] And so, it appears that Tegna wants something unprecedented—for DISH to pay Tegna for *all* local market subscribers, whether or not they actually pay for, and receive, local stations.

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DISH also has pointed to literally dozens of voids, omissions, errors, and inconsistencies in Tegna's proposals; Tegna has still failed to address many of them. Tegna's continuous failure to resolve these questions, and its refusal to engage with DISH on DISH's proposed agreement, affect the existence of any understanding between the parties.

The result of Tegna's actions is that DISH's subscribers have lost access to the critical local news, sports, and entertainment programming of Tegna's Big-4 affiliated stations. Tegna's misconduct violates both the letter and the intent of the Commission's good faith rules and has generated, and continues to generate, significant consumer harm.¹

***Per se* violations.** Tegna's behavior fits in several categories of actions or practices that the Commission rules treat as "per se" violations of a broadcast television station's good faith duty. It qualifies as unilateral, take-it-or-leave-it bargaining, since Tegna refuses to either engage with or negotiate from DISH's proposed agreement or to correct its own, and will not yield on its demands that DISH retransmit—and pay for—non-Big-4 affiliated stations. It is also a repeated failure on the part of Tegna to respond to DISH's requests for explanation and clarification. And it qualifies as a failure to execute a written agreement that sets forth the full understanding of the parties, a recipe for "subsequent misunderstandings between the parties related to their respective obligations."²

This good faith violation is particularly applicable here. The apparent demand for compensation on phantom viewers, who do not pay for, or receive, local stations, is not only an

¹ See 47 C.F.R. § 76.65(b)(1)(i), (v) (requiring broadcasters to negotiate and respond to proposals).

² Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues, *First Report and Order*, 15 FCC Rcd. 5445, 5464 ¶ 46 (2000) ("*Good Faith Order*").

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astoundingly improper “something-for-nothing” in itself; the uncertainty is another debilitating result of the bad faith conduct.

Totality of the circumstances. Tegna’s conduct is not only a *per se* violation of its good faith duties, but is also inconsistent with competitive marketplace conditions, thus failing the totality of the circumstances test. 47 C.F.R. § 76.65(b)(4). Tegna is attempting to bundle its unpopular stations (including future Tegna stations) with its network affiliates. This “tying” behavior is prohibited under the antitrust laws—Section 1 of the Sherman Act. The Commission has made clear that “tying is not consistent with competitive marketplace conditions if it would violate the antitrust laws.”³ The impropriety is exacerbated by the demand for a rate increase even for the non-Big-4 stations, which DISH does not want to retransmit at all; by the apparent demand that DISH pay Tegna for subscribers who do not buy local stations (and thus do not watch Tegna’s programming through DISH), as well as for former subscribers who have left DISH; and by an increase in the range of **[BEGIN CONFIDENTIAL]** [REDACTED] **[END CONFIDENTIAL]** in the price of retransmission for Big-4 affiliated stations,⁴ which is an increase in the wrong direction in light of the precipitous decline in viewership that has been suffered by these stations. It is compounded even further by the voids, errors and internal contradictions in Tegna’s offer, which preclude an understanding of the parties on such key issues as fees and how they are calculated, subscribers on which fees are collected, sub-distribution, technical format, signal quality, succession, and many others. Even if these gaps

³ Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, *Report and Order*, 20 FCC Rcd. 10339, 10343 ¶ 10 (2005) (“*2005 Good Faith Order*”).

⁴ These percentages are calculated based on the rates demanded by Tegna in the first and last year of the three-year renewal agreement under negotiation, compared to the 2021 rate in the expired agreement.

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were not *per se* violations of the good faith rule, they are not consistent with competitive marketplace considerations.

The facts are simple: the viewership of Tegna’s Big-4 stations among DISH subscribers has declined by more than [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] over the last 3 years; Tegna nevertheless is demanding an *increase* of the rates DISH pays, in the range of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] While not clear, some language suggests Tegna then wants these increased rates to be multiplied by all DISH subscribers in each Tegna DMA, including those who do not receive the Tegna stations from DISH, as well as by previous DISH subscribers. The viewership of Tegna’s non-Big-4 stations among DISH subscribers has declined by [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] over the same period, and Tegna is not only demanding that DISH retransmit them, but also demanding a rate increase in the range of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

The totality of the circumstances test necessarily looks at all the circumstances. This look compels an indictment of Tegna’s demands as out of step with competitive marketplace conditions, and of Tegna’s conduct as a good faith violation.

DISH subscribers are bearing the brunt of Tegna’s actions. Tegna’s broadcast stations are an important source of local news and information, which has become even more crucial during the ongoing pandemic. The current blackouts are a direct result of Tegna’s unlawful tactics.

The Commission has recognized that any interruption in consumers’ receipt of local broadcast programming is “highly undesirable,” *Good Faith Order*, 15 FCC Rcd. at 5450 ¶ 12, and expressed its “concern regarding the service disruptions and consumer outrage that will

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inevitably result should MVPDs that are entitled to retransmit local signals subsequently lose such authorization,” *id.* at 5472 ¶ 61. When the Commission promulgated the *Good Faith Order*, it remarked that it expected such loss of retransmission rights, even on an interim basis, to be “the exception rather than the norm.” *Id.* The Commission further “encourage[d] broadcasters and MVPDs that are engaged in protracted retransmission consent negotiations [to] agree to short-term retransmission consent extensions so that consumers’ access to broadcast stations will not be interrupted while the parties continue their negotiations.” *Id.*

DISH urges the Commission to act expeditiously to address Tegna’s bad faith by issuing an order that (i) concludes Tegna has failed to negotiate in good faith under the Communications Act of 1934 and the Commission’s rules; (ii) immediately requires Tegna to negotiate in good faith with DISH for the retransmission of its stations’ signals; (iii) imposes forfeitures under Section 1.80 of the Commission’s rules; and (iv) awards DISH such relief that the Commission deems just and appropriate. Given the ongoing service disruptions, DISH seeks expedited treatment of this Complaint.

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VERIFIED RETRANSMISSION COMPLAINT OF DISH NETWORK LLC

1. Under the Commission’s rules, 47 C.F.R. §§ 76.7 and 76.65, and 47 U.S.C. § 325(b)(3), DISH Network L.L.C. (“DISH”) brings this Verified Retransmission Complaint⁵ against Tegna, Inc. (“Tegna”), one of the largest broadcast station owners in the country. DISH brings this complaint because Tegna has breached its obligation to negotiate in good faith the terms for DISH’s retransmission of Tegna’s owned and operated stations, leading to a loss of local programming for nearly 3 million DISH subscribers. *See* 47 C.F.R. § 76.65.

2. The list of affected stations is attached as Exhibit 1.

⁵ This Complaint is accompanied by a request for confidential treatment. DISH is filing a redacted version of the Complaint for the public record.

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3. The facts in this Complaint are based on the personal knowledge of DISH negotiator Melisa Boddie as stated in her Declaration attached as Exhibit 2 (“Boddie Declaration”).

THE COMPLAINANT

4. DISH provides television services to approximately 11 million subscribers with its Direct Broadcast Satellite (“DBS”) DISH TV and streaming Sling TV services. DISH’s DBS service qualifies as a multichannel video programming distributor (“MVPD”) and is therefore within the scope of 47 C.F.R. § 76.65(a). DISH’s address is 9601 S. Meridian Blvd., Englewood, Colorado 80112. Its United States telephone number is (303) 723-1000.

THE DEFENDANT

5. Tegna Inc. is a Delaware Corporation, which owns or operates 65 television stations and two radio stations in 53 U.S. markets.⁶ Most of the stations are affiliates of one of the four major networks—ABC, CBS, FOX, or NBC, while others are independent or affiliated with other groups of stations that share interconnected programming, such as CW or MNTV. Tegna is therefore a “Negotiating Entity” as that term is used in 47 C.F.R. § 76.65, and its stations are “television broadcast stations,” with respect to its retransmission consent negotiations, for purposes of those rules. Tegna’s principal office is 8350 Broad Street, Suite 2000, Tysons, Virginia 22102.

JURISDICTION

6. The Commission has jurisdiction to consider this Complaint under 47 U.S.C. § 325(b)(3)(C)(ii), 47 C.F.R. § 76.65, and 47 C.F.R. § 76.7.

⁶ See generally Tegna Inc., Annual Report (Form 10-K) (Mar. 1, 2021).

LEGAL BACKGROUND

A. *Per Se* Violations

7. In the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”), Congress confirmed satellite carriers’ ability to provide satellite subscribers with local broadcast signals by creating a statutory copyright license. *See* 17 U.S.C. § 122. This license was intended to solve a problem long-recognized by both Congress and the Commission: that the absence of local signals from satellite offerings was one of the chief factors dissuading consumers from switching to satellite services from their cable system, which could offer these signals under the broad cable copyright license of 17 U.S.C. § 111. This had prevented satellite carriers from introducing needed competition to the dominant cable operators and exercising discipline on soaring cable rates.

8. According to the Commission, SHVIA was designed “to place satellite carriers on an equal footing with local cable operators when it comes to the availability of broadcast programming” and, thus, “authorizes satellite carriers to add more local and national broadcast programming to their offerings” for satellite subscribers. *Good Faith Order*, 15 FCC Rcd. at 5445 ¶ 1.

9. In addition to creating the new satellite copyright license, SHVIA also obligated satellite carriers to obtain the consent of the broadcaster for local retransmissions (unless the broadcaster elects mandatory carriage). *See* 47 U.S.C. § 325(b). At the same time, Congress required broadcasters to negotiate in good faith with MVPDs for retransmission consent. SHVIA directed the Commission to prescribe rules “prohibit[ing] a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing

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to negotiate in good faith.”⁷ In 2005, Congress directed the Commission to make the good faith obligation mutual, and the Commission did so through an amendment to its rules. *See* 47 C.F.R. § 76.65(a) (“Television broadcast stations and [MVPDs] shall negotiate in good faith the terms and conditions of retransmission consent agreements.”).

10. In implementing the good faith rules, the Commission recognized that the good faith statutory requirement was not “largely hortatory” and that it imposed a “heightened duty of negotiation” that exceeds what would otherwise be required under common law.⁸ Because of this, the Commission found that Congress intended for retransmission consent negotiations to take place “in an atmosphere of honesty, purpose, and clarity of process.” *Id.* “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.”⁹

11. To implement its mandate from Congress, the Commission adopted a two-part test for assessing a television broadcast station’s “good faith” in negotiating retransmission consent. The first part of the test consists of an objective list of negotiation standards.

12. This list includes a “[r]efusal by a Negotiating Entity to put forth more than a single, unilateral proposal[.]”¹⁰ Under the *per se* rule against unilateral bargaining, approaches such as “[t]ake it, or leave it” bargaining are “not consistent with an affirmative obligation to

⁷ *See* SHVIA § 1009, codified at 47 U.S.C. § 325(b)(3).

⁸ *Good Faith Order* 15 FCC Rcd. at 5455 ¶ 24.

⁹ *DIRECTV, LLC v. Deerfield Media, Inc., Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture*, 35 FCC Rcd. 10695, 10698 ¶ 4 (2020) (“*Good Faith Violations Order*”).

¹⁰ 47 C.F.R. § 76.65(b)(1)(iv).

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negotiate in good faith.”¹¹ The Commission has provided guidance to prevent negotiating parties from gaming its rules by engaging in take-it-or-leave-it bargaining tactics: “[r]efusal by a Negotiating Entity to put forth more than a single, unilateral proposal is a *per se* violation of a broadcast licensee's good faith obligation . . . such requirement is not limited to monetary considerations, but also applies to situations where a broadcaster is unyielding in its insistence upon carriage of a secondary programming service undesired by the cable operator as a condition of granting its retransmission consent[.]”¹² As the Commission explained:

‘Take it, or leave it’ bargaining is not consistent with an affirmative obligation to negotiate in good faith. For example, a broadcaster might initially propose that, in exchange for carriage of its signal, an MVPD carry a cable channel owned by, or affiliated with, the broadcaster. The MVPD might reject such offer on the reasonable grounds that it has no vacant channel capacity and request to compensate the broadcaster in some other way. Good faith negotiation requires that the broadcaster at least consider some form of consideration other than carriage of affiliated programming.¹³

13. Implementing the *Good Faith Order* for the first time, the Commission also found “behaviors each constitute[] a distinct *per se* failure to negotiate in good faith” include a failure “to respond to any . . . proposals for carriage.”¹⁴ This is particularly the case where the “refusal unreasonably delayed the negotiations, and millions of subscribers consequently lost access to the programming carried by the Defendant Stations.”¹⁵ “Negotiating Entities must respond to

¹¹ *Good Faith Order*, 15 FCC Rcd. at 5463 ¶ 43.

¹² Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements, *Report and Order and Notice of Proposed Rulemaking*, 22 FCC Rcd. 17791, 17864 ¶ 123 (2007) (“*Tying Order*”) (cleaned up).

¹³ *Good Faith Order*, 15 FCC Rcd. at 5463 ¶ 43.

¹⁴ *Good Faith Violations Order*, 35 FCC Rcd. at 10709 ¶ 35.

¹⁵ *Id.*

(Continued...)

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retransmission consent proposals and explain their reasons for rejecting any such proposals.”¹⁶

Under the rules, it is specifically a *per se* violation to fail “to respond to a retransmission consent proposal of the other party, including the reasons for the rejection of any such proposal[.]”¹⁷

14. The Commission has also identified another *per se* violation that is especially relevant here—a “[r]efusal by a Negotiating Entity to execute a written retransmission consent agreement that sets forth the full understanding of the television broadcast station and the multichannel video programming distributor.”¹⁸ In doing so, the Commission was concerned with a negotiating strategy that leads to gaps and failure of the parties to agree on key terms—a recipe for disaster during the term of the defective agreement. In the Commission’s words, “this requirement also minimizes subsequent misunderstandings between the parties related to their respective obligations.”¹⁹

15. Incompleteness and unresponsiveness have also long been considered hallmarks of bad faith under common law. Thus, courts have held that where parties intentionally leave blanks in a given agreement, subject to further negotiation, failure to continue to negotiate is itself a sign of bad faith. *See Bear Stearns Inv. Prod., Inc. v. Hitachi Auto. Prod. (USA), Inc.*, 401 B.R. 598, 625 (S.D.N.Y. 2009); *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 430 (2d Cir. 2011) (defendant had fallen short of its good faith duty where, among other things, it had not provided a single substantive comment with respect to any draft agreement); *Sunnyside*

¹⁶ *Id.* at 10698 ¶ 6.

¹⁷ 47 C.F.R. § 76.65(b)(1)(v).

¹⁸ 47 C.F.R. § 76.65(b)(1)(vii).

¹⁹ *Good Faith Order*, 15 FCC Rcd. at 5464 ¶ 46.

Cogeneration Assocs. v. Cent. Vermont Pub. Serv. Corp., 915 F. Supp. 675, 680 (D. Vt. 1996) (parties had duty to negotiate in good faith after they negotiated important terms, but left other terms open).

B. Totality of the Circumstances

16. The Commission also recognized that its *per se* rules could not capture the entire range of behaviors that may constitute bad faith negotiating, and therefore adopted a totality of the circumstances test to complement them. Under this test, the Commission may find that a television broadcast station breached its duty of good faith “based on the totality of the circumstances of particular retransmission consent negotiation.” 47 C.F.R. § 76.65(b)(4); *see Good Faith Violations Order*, 35 FCC Rcd. at 10699 ¶ 7 (“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.”). The test was informed by the importance the statute attaches to competitive marketplace considerations. The statute specifically states that term disparities in the demands of a broadcaster are not a good faith violation if they are based on competitive marketplace considerations. Consistent with that language, the Commission has made competitive marketplace considerations an important criterion in its totality of the circumstances test.²⁰

17. While the Commission had initially indicated that “[p]roposals 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” should be considered presumptively “consistent with competitive marketplace

²⁰ *Good Faith Order*, 15 FCC Rcd. at 5448 ¶ 8.

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considerations and the good faith negotiation requirement,”²¹ it crucially qualified this presumption by stating: “it is implicit in Section 325(b)(3)(C) that any effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement[.]”²² The Commission also warned that “tying is not consistent with competitive marketplace considerations if it would violate the antitrust laws.”²³

18. A tying arrangement is unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1, and generally prohibited *per se*, without proof of an unreasonable anticompetitive effect.²⁴ The elements of an unlawful tie are well-settled. A tie is unlawful if: “(1) [T]he tying and the tied products are actually two distinct products; (2) there is an agreement or condition, express or implied, that establishes a tie; (3) the entity accused of tying has sufficient economic power in the market for the tying product to distort consumers’ choices with respect to the tied product; and (4) the tie forecloses a substantial amount of commerce in the market for the tied product.”²⁵ As seen in the Statement of Facts below, these elements are met.

STATEMENT OF FACTS

A. The Extraordinary Terms Demanded by Tegna

19. Tegna’s demands are remarkable in their inconsistency with competitive marketplace considerations. Boddie Declaration ¶ 4. They include rate increases in the face of

²¹ *Id.* at 5469 ¶ 56.

²² *Id.* at 5470 ¶ 58.

²³ *2005 Good Faith Order*, 20 FCC Rcd. at 10346 ¶ 15.

²⁴ *See Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984), *abrogated on other grounds by Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

²⁵ *Borschow Hosp. & Medical Supplies, Inc. v. Cesar Castillo Inc.*, 96 F.3d 10, 17 (1st Cir. 1996) (internal quotations omitted); *see also Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 461-62 (1992).

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declining ratings, a refusal to grant partial rebates for the ever-increasing loss of valuable content, coerced retransmission of entirely unwanted stations, rate increases for the unwanted stations, and a possible demand for payment on current and past DISH subscribers that do not receive the Tegna stations from DISH. Specifically:

- Tegna appears to demand that DISH pay Tegna for all DISH subscribers in a DMA—whether they purchase local programming from DISH or not. In particular, on the one hand, the proposed agreements sent to DISH by Tegna, including the version sent on October 11, 2021, contain language that limits retransmission of the Tegna stations to those DISH subscribers who purchase local stations: **[BEGIN CONFIDENTIAL]**

[REDACTED]

[REDACTED] **[END CONFIDENTIAL]**

This is standard language and uncontroversial. On the other hand, Tegna’s October 11, 2021 proposal has added an internally inconsistent provision to this same language stating the very opposite: **[BEGIN CONFIDENTIAL]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **[END**

CONFIDENTIAL] (emphasis added).²⁶ The fact that Tegna added language during the negotiations requiring receipt of its stations by all DISH customers suggests strongly that this was Tegna’s intent. To add weight to that interpretation, Tegna’s table of

²⁶ Remarkably, while DISH has raised this question repeatedly, this language has remained entirely unchanged in the latest version of Tegna’s proposal, sent on October 17, 2021.

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outstanding issues describes Tegna’s position as requiring that all DISH customers receive Tegna’s signals, not just those who subscribe to local channels: **[BEGIN**

CONFIDENTIAL] [REDACTED]

[REDACTED] **[END**

CONFIDENTIAL]

- Tegna is apparently demanding that DISH pay Tegna for viewers who are no longer subscribers of DISH. Specifically, the obligation of DISH to pay without any downward adjustment, 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.
- Tegna is refusing to grant DISH retransmission consent for any of its Big-4-affiliated broadcast stations until and unless DISH also agreed to retransmit its CW, MNTV, and independent affiliated stations and pay higher rates for these unwanted stations.
- Tegna is demanding that DISH launch and retransmit all of its non-Big-4 stations, and wants DISH to also pay a price increase of **[BEGIN CONFIDENTIAL]** [REDACTED] **[END CONFIDENTIAL]** in the face of a viewership decline of **[BEGIN CONFIDENTIAL]** [REDACTED] **[END CONFIDENTIAL]** for these stations.²⁷
- Tegna is demanding that DISH launch future Tegna stations, whether DISH has sufficient spot beam bandwidth or not.
- Tegna is refusing to put forth a complete agreement setting forth its proposals.

²⁷ The percentages fluctuate between CW or MNTV stations, on the one hand, and independent stations, on the other. *See* Boddie Declaration ¶ 4.

- Tegna is refusing to answer basic questions from DISH.
- Tegna is refusing to resolve fundamental inconsistencies between various provisions of its own proposal.
- Tegna is demanding a massive rate increase on the order of **[BEGIN CONFIDENTIAL]** [REDACTED] **[END CONFIDENTIAL]** for Big-4 affiliated stations notwithstanding the material decrease in such stations' viewership among DISH subscribers.
- Tegna is refusing to agree to even a partial rebate if it does not deliver the marquee programming DISH is paying for.

B. Tegna's Refusal to Resolve Dozens of Problems Arising from Tegna's Proposals in the Negotiation

20. DISH and Tegna's retransmission consent agreement expired on October 6, 2021.

Negotiations between the parties started on August 2, 2021, when Tegna sent DISH its proposed agreement. That proposal, and the few subsequent proposals that Tegna has provided since, was rife with voids, omissions, errors, and internal contradictions, raising no fewer than 40 questions, which DISH asked repeatedly during the weeks of negotiations. Most of these questions still remain unaddressed and unanswered by Tegna as of today. Boddie Declaration ¶ 5.

21. Specifically, in an effort to reach agreement, DISH followed two parallel tracks in its response to Tegna's initial salvo. First, on October 4, 2021 and then again on October 7, 2021, DISH provided robust annotations to Tegna's drafts. Second, DISH sent Tegna DISH's own proposed agreement, which did not raise the same questions affecting Tegna's proposed agreement. DISH made every effort to engage Tegna in this negotiation. For example, on

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October 4, DISH wrote to Tegna, providing both DISH’s proposed agreement and annotations to Tegna’s proposed agreement. Boddie Declaration ¶ 6.

22. On October 6, 2021, with the parties not having reached a renewal agreement, Tegna pulled its stations from DISH and those DISH subscribers who want local stations from DISH lost access to important local news content, live sports, and primetime programming. In advance of this expiration, DISH had still been attempting to reach an agreement. Boddie Declaration ¶ 7.

23. On October 9, 2021, in a 13th hour effort to reach agreement, DISH catalogued the outstanding questions arising from Tegna’s proposed agreements. All of these issues had specifically been raised by DISH on October 4, 7, and 9th. While Tegna has sent DISH a number of versions of Tegna’s proposal, each with minor revisions to the previous version, and has addressed some of these issues, it has been silent on many. Boddie Declaration ¶ 8.

24. The following is a list of the issues still remaining unaddressed, except with the vague generality that the same language was found in DISH’s preexisting agreements. Boddie Declaration ¶ 9. As DISH has explained to Tegna, these agreements are old—they date as far back as 2012, and the renewal agreement should take into account the significant developments in the marketplace.

- Tegna’s proposed reporting period, distribution system, and subscriber, definitions leave DISH confused as to what its rights and obligations would be. Despite DISH’s many questions in its effort to understand these definitions, Tegna still has not adequately resolved them.

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- Tegna’s proposals are unclear even as to whether DISH has the right to retransmit each station’s signal as opposed to a so-called programming feed. Despite DISH’s questions aimed at understanding DISH’s rights, Tegna has refused to answer or address them.
- Tegna’s proposals are unclear as to whether Tegna is prohibiting DISH from making available the industry standard “pause on live” to its subscribers. Tegna has failed to confirm there is no such prohibition.
- Tegna’s proposals continue to demand that DISH’s grant of retransmission consent rights be conditioned on DISH’s being able to verify what device is connected to the set top box, despite DISH explaining that it has no way of doing so.
- Tegna’s proposals are unclear as to whether Tegna proposes that DISH pay for any “subscriber” of a sub-distributor whether they receive a Tegna station, authorized by DISH or not. Despite DISH’s many questions aimed at understanding Tegna’s proposed sub-distribution rights and obligations, Tegna has refused to answer or address them.
- As explained above, Tegna appears to require DISH to ensure that every subscriber within the spot beam receive Tegna’s local broadcast station programming for DISH, even if they do not subscribe to local-into-local service or do not have the ability to receive locals from DISH. Tegna has refused to clarify this point for DISH.
- Tegna’s proposals continue to give sub-distributors of DISH a grant of consent broader than what they are offering DISH. This makes it unclear what DISH’s rights and obligations are with respect to sub-distributors. Despite DISH’s many questions aimed at understanding Tegna’s proposed sub-distribution rights and obligations, Tegna has refused to answer or address them.

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- Tegna’s proposals continue to demand that DISH ensure each channel is retransmitted in a technical format appropriate for each subscriber’s television set. Even though DISH has told Tegna numerous times it has no way of knowing what television set each subscriber has, Tegna has refused to address the issue.
- Tegna’s proposals continue to confuse DISH’s retransmission obligations throughout its proposed agreement by using different phrases and words for what seems like the same right or same obligation. Tegna has refused to clarify the scope of these rights and obligations.
- Tegna’s proposals continue to demand that DISH launch Tegna stations that become Big-4, CW, or MNTV affiliated.
- Tegna is demanding that DISH launch future Tegna stations, whether or not DISH has sufficient spot beam coverage.
- Tegna’s proposals continue to demand that Tegna be allowed to terminate its grant of retransmission consent to DISH if Tegna agrees to do this with a third-party affiliated network.
- Tegna’s proposals continue to prohibit a “downward adjustment” of retransmission fees. Despite DISH’s repeated questions regarding what a “downward adjustment” means, Tegna has refused to address or answer them.
- Tegna’s proposals continue to be unclear as to whether it is demanding that the agreement would apply to Tegna signals that DISH subscribers receive over the air or through a third-party app (and not from DISH).

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- Despite DISH's repeated questions, Tegna's proposals have failed to clarify the inconsistencies with respect to the timing of DISH's payment obligations, leaving DISH confused as to what its payment obligations would be.
- Tegna's proposals continue to demand a payment method that DISH does not use, despite DISH explaining that it does not use this payment method for any other broadcaster or programmer.
- Tegna's proposals continue to add confusion as to whether Tegna is demanding a double counting for certain subscribers. Even though DISH has asked numerous questions to clarify this issue, Tegna has refused to answer or address them.
- Tegna's proposed transfer and assignment provision leaves DISH confused as to what each party's rights and obligations are under its proposed agreement. Tegna's proposals include a discharge of Tegna's contractual obligations arising under the agreement prior to a transfer.
- Tegna's proposed transfer, successor and assignment provisions leave significant gaps for situations that could lead to cessation of carriage in the event of a change in control. Thus, Tegna's proposed draft does not guarantee continued carriage if Tegna sells a station to someone who does not then-currently have a valid retransmission consent agreement with DISH that will govern the sold Tegna station. DISH cannot enter into an agreement that does not address this specific situation, which occurs frequently in the industry, especially given Tegna's announcements regarding the possible sale of its stations.
- Tegna's proposals continue to demand that DISH agree to allow Tegna to negotiate retransmission consent on behalf of stations it does not own.

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- Tegna’s proposals continue to demand that DISH pay retransmission fees during a force majeure event, for up to 90 days, even if DISH is not receiving the Tegna signals.
- Tegna’s proposals also demand that DISH pay retransmission fees even if Tegna does not deliver the network programming DISH is paying for.
- Even though DISH has explained that all of DISH’s retransmission agreements require acquired stations to be added to the purchaser’s agreement, Tegna continues to demand that it be able to share an agreement with any potential purchaser that has a retransmission agreement with DISH then-currently in place.

25. In response to DISH’s October 9 email summarizing the outstanding issues, Tegna replied (after DISH’s requested deadline) to express its disappointment at the rates offered by DISH and stated that it was **[BEGIN CONFIDENTIAL]** [REDACTED] [REDACTED] **[END CONFIDENTIAL]** In another email, dated October 8, Tegna told DISH that **[BEGIN CONFIDENTIAL]** [REDACTED] [REDACTED] [REDACTED] **[END CONFIDENTIAL]** However, DISH cannot reasonably be asked to clarify Tegna’s own proposal when DISH does not understand and has repeatedly told Tegna that it does not understand most of Tegna’s proposal. Boddie Declaration ¶ 10.

26. On October 11, Ms. Boddie responded to an email from Tegna by thanking Tegna for addressing some of the comments but noting that “there are still several of them that have not been addressed or answered.” She re-emphasized that DISH could not be expected to respond to a proposal that it does not understand, and that DISH would need answers to its outstanding questions to be able to provide a complete response. Boddie Declaration ¶ 11.

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27. A proposal Tegna sent on October 11, 2021, unfortunately, did not resolve many of these issues. In fact, as mentioned above, it perpetuates the contradiction over whether Tegna wants payment on phantom viewers—DISH subscribers in the local market who do not pay for, or receive, the local stations. Subsequent correspondence only confirms Tegna’s failure to address many of the questions that DISH has raised, including some of the most significant contradictions in Tegna’s proposal. Boddie Declaration ¶ 12.

28. On October 15, 2021, DISH sent an email to Tegna attaching DISH’s proposed agreement and offering two significant concessions. **[BEGIN CONFIDENTIAL]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **[END CONFIDENTIAL]** In response, on October 17, 2021, Tegna sent DISH yet another version of its own proposal, which contains insignificant changes and addresses none of the outstanding questions. While Tegna has added **[BEGIN CONFIDENTIAL]** [REDACTED]

[REDACTED] **[END CONFIDENTIAL]** the addition has had no effect on the rates demanded by Tegna. Boddie Declaration ¶ 13.

29. Tegna’s behavior has forced a blackout of 65 Tegna stations in 53 markets nationwide, adversely affecting nearly 3 million DISH subscribers. *See* Exhibit 1.

C. Tegna’s Attempted Improper Tie

30. Tegna’s insistence on DISH’s retransmission of Tegna’s unpopular CW and MNTV stations, and payment of higher rates for these stations to boot, is also an attempt at an improper tie. All the elements of the tying offense prohibited by the antitrust laws are met here.

31. Tegna provides two separate products: the stations affiliated with one of the Big-4 networks (ABC, CBS, NBC, and FOX) and groups of stations with little interconnected

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programming. To qualify as a network under both the Copyright Act and the Communications Act, a group of stations must be “owned or operated by, or affiliated with, one or more of the television networks in the United States that offer an interconnected program service on a regular basis for 15 or more hours per week to at least 25 of its affiliated television licensees in 10 or more States.” 17 U.S.C. § 119(d)(2)(A). Neither MNTV nor CW appears to have network status currently; for one thing, each reportedly transmits fewer than 15 hours of interconnected programming a week.²⁸ Tegna is nonetheless attempting to force DISH to retransmit CW and MNTV stations by lumping them with Big-4 local affiliates as part of an alleged “Big-6.” Boddie Declaration ¶ 15.

32. But, the CW and MNTV stations are distinguishable from the Big-4 affiliates. Demand for one is entirely distinct from the other. The DISH viewership for each of Tegna’s non-Big-4 stations has historically been dwarfed by that for the respective Big-4 affiliate in each relevant market. This makes sense, as the Big-4 network affiliates have significantly longer high-quality interconnected prime time programming windows. FOX, which provides the lowest number (15) of weekly prime-time programming hours of the Big-4 networks, provides 50% more prime time programming than either CW or MNTV, each of which provides only 10 hours of prime-time programming a week. Moreover, the Big-4 networks air new programming

²⁸ See Monica Marie Zorrilla, *The CW Unveils Weeklong Fall 2021 Primetime Schedule and Midseason Debuts*, Variety (May 25, 2021), <https://variety.com/2021/tv/news/cw-2021-schedule-primetime-4400-naomi-1234981020> (“The CW dares to defy by expanding our primetime schedule to include Saturday night and becoming a full 14-hour, seven-day-a-week broadcast network for the first time in its history[.]”); Patrick Hipes, *MyNetworkTV 2021-22 Schedule Set with ‘Chicago Fire’ Added to Lineup*, Deadline (July 13, 2021), <https://deadline.com/2021/07/mynetworktv-fall-2021-tv-schedule-1234792308> (listing two hours of programming per weekday night).

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regularly; by contrast, each of CW and MNTV runs a large number of re-runs and syndicated content. And finally, the proof is in the pudding: viewership. Boddie Declaration ¶ 16.

33. Tegna has conditioned its retransmission consent for its Big-4 affiliates on DISH retransmitting all of its non-Big-4 stations and paying [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] more for the privilege of doing so. Throughout the negotiations with DISH, Tegna expressly insisted on this tie, lumping the Big-4 network affiliates in with CW and MNTV stations under the misleading label of “Big-6 Network” especially when some don’t even rank in the top 10. Boddie Declaration ¶ 17.

34. Tegna has sufficient economic power in the market for the tying product—its Big-4 affiliates. It has such power both in each DMA in which it owns a Big-4 affiliate as well as in the national market for purchase of retransmission consent from Big-4 network affiliates—power that it is using to restrain trade in the form of requiring retransmission of its unpopular products, the CW and MNTV networks. Boddie Declaration ¶ 18. In the antitrust context, market power may be presumed “when the seller offers a unique product that competitors are not able to offer” or “[w]hen the seller’s share of the market is high.”²⁹ Additionally, the Supreme Court has indicated that coercive market power exists when “the seller has the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market.”³⁰ Here, each broadcast station in a local DMA offers unique programming, as each affiliate is the only saloon in town for that particular broadcast network. Moreover, the programming offered by the four major broadcast networks is important for MVPDs. If any one of these networks is missing

²⁹ *Jefferson Par. Hosp.*, 466 U.S. at 17.

³⁰ *U.S. Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 620 (1977).

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from the package of programming offered by the MVPD provider, there is no adequate substitute for the missing network in the mind of many subscribers, and these subscribers are much more likely to purchase service from an MVPD provider that can provide all four broadcast networks. Tegna's unlawful conduct is aimed at forcing DISH to retransmit and pay for stations it is otherwise uninterested in retransmitting, potentially raising the monthly bills of DISH's subscribers. Boddie Declaration ¶ 19.

35. At the local level, because of the exclusive nature of network franchise agreements and laws prohibiting importation of out-of-market stations, each local network station is the only outlet in town for that network. Armed with the power of exclusivity, Tegna can exploit a key asymmetry: there are multiple suitors vying for its retransmission consent, including the two satellite distributors, the cable and phone companies, and a number of online video distributors. Tegna can play these distributors off against each other, as the distributor lacking retransmission consent is at a competitive disadvantage, spurned by households that either must have the network in question or must have a complement of all four major networks. Boddie Declaration ¶ 20.

36. At the national level, Tegna's size and geographic reach make its power greater than the sum of its parts. For a national distributor such as DISH, the lack of retransmission consent for the Tegna stations interferes with its ability to hold itself out as providing all local stations in all markets, which is in turn a key ingredient of DISH's brand. On account of this market power, blackouts of Tegna stations are asymmetric in the harm they inflict. For DISH, a blackout means subscribers departing, potential customers not subscribing, and national reputational damage. For Tegna, any harm is much more limited, since consumers can still

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access its stations, either over the air or by switching to another distributor. Boddie Declaration ¶ 21.

37. DISH is resisting Tegna’s bundling attempt based on its experience with Tegna’s non-Big-4 stations. As mentioned, the viewership of these stations among DISH subscribers is dwarfed by the viewership of even the least popular Big-4 affiliate in each market where Tegna has a CW or MNTV station, ratings that keep declining dramatically. Boddie Declaration ¶ 22.

38. Finally, Tegna’s unlawful tie would foreclose a substantial amount of commerce in the market for the tied product. Tegna is demanding more than [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] for retransmission of the non-Big-4 stations, significantly higher than the market value of those stations. This [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] that DISH would save by not retransmitting such non-Big 4 stations could be better used in obtaining networks whose content is more in demand. Boddie Declaration ¶ 23.

COUNT I – PER SE VIOLATIONS

39. DISH incorporates by reference paragraphs 1-38 as though fully stated herein.

40. Under 47 C.F.R. § 76.65(a), Tegna is required to negotiate retransmission consent in good faith with DISH.

41. The Commission’s rules set forth a list of practices that are *per se* violations of the requirement to negotiate in good faith. *See* 47 C.F.R. § 76.65(b)(1). Tegna has violated several of these rules.

Tegna’s Unilateral Bargaining

42. Tegna is insisting on the unilateral requirement that DISH retransmit CW and MNTV affiliates, and pay for that supposed privilege to boot, as a condition of retransmitting

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Tegna’s must-have Big-4 affiliated stations. The *per se* rules prohibit a “[r]efusal by a Negotiating Entity to put forth more than a single, unilateral proposal.” 47 C.F.R.

§ 76.65(b)(1)(iv). As the Commission has explained, a unilateral proposal also “applies to situations where a broadcaster is unyielding in its insistence upon carriage of a secondary programming service undesired by the cable operator as a condition of granting its retransmission consent[.]” *Tying Order*, 22 FCC Rcd. at 17864 ¶ 123.

43. Tegna has not only conditioned any retransmission consent agreement on DISH’s carriage of, and payment of a higher rate for, non-Big-4 stations; it has refused to resolve the dozens of issues that remain outstanding. This is a textbook example of “take-it-or-leave-it” bargaining, which, as the Commission has explained, “is not consistent with an affirmative obligation to negotiate in good faith.” *Good Faith Order*, 15 FCC Rcd. at 5463 ¶ 43.

Tegna’s Failure to Respond to DISH’s Proposals

44. The *per se* rules also prohibit a “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.” 47 C.F.R. § 76.65(b)(1)(v). “Negotiating Entities must respond to retransmission consent proposals and explain their reasons for rejecting any such proposals.” *Good Faith Violations Order*, 35 FCC Rcd. at 10698 ¶ 6.

45. Tegna has also violated this prohibition. DISH has repeatedly asked for clarification on fundamental terms and conditions, but Tegna has refused to respond to the vast majority of these requests. Tegna has also refused to respond to DISH’s proposed agreement entirely by explaining to DISH why it was wholly rejected.

Tegna’s Refusal to Provide a Full Understanding of an Agreement

46. Tegna has refused to put forth a complete agreement setting forth its proposals, refusing to answer basic questions from DISH about key terms and conditions. This conduct is a violation of the *per se* rule prohibiting “[r]efusal by a Negotiating Entity to execute a written retransmission consent agreement that sets forth the full understanding of the television broadcast station and the multichannel video programming distributor.” 47 C.F.R. § 76.65(b)(1)(vii). This violation goes to the heart of the Commission’s concern about “subsequent misunderstanding between the parties related to their respective obligations.” *Good Faith Order*, 15 FCC Rcd. at 5464 ¶ 46.

COUNT 2 – TOTALITY OF THE CIRCUMSTANCES

47. DISH incorporates by reference paragraphs 1-46 as though fully stated herein.

48. Even if the Commission concludes the conduct described above does not give rise to a *per se* violation, in the alternative, the Commission should find that Tegna’s misconduct fails the good faith test “based on the totality of the circumstances.” 47 C.F.R. § 76.65(b)(4). Under this standard, “an MVPD may present facts to the Commission which, even though they do not allege a violation of the objective standards, given the totality of the circumstances reflect an absence of a sincere desire to reach an agreement that is acceptable to both parties and thus constitutes a failure to negotiate in good faith.” *Good Faith Order*, 15 FCC Rcd. at 5458 ¶ 32.

49. Contrary to the requirements of good faith negotiations, Tegna has unlawfully tied its retransmission consent for Big-4 network affiliates to the retransmission of non-Big-4 affiliated stations. This conduct satisfies the elements of a *per se* unlawful tying arrangement as described above. Tegna has also failed to engage productively with DISH, failed to respond to

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the vast majority of DISH’s questions about Tegna’s proposals, failed to consider working with DISH’s proposed agreement, which would obviate the need to resolve DISH’s myriad of questions arising from Tegna’s proposed agreement, and refused to execute an agreement that sets forth the parties’ full understanding. Under the totality of the circumstances test, each of these violations, alone and together, constitutes a failure by Tegna to negotiate in good faith, in violation of the Communications Act and the Commission’s rules.

REQUEST FOR RELIEF

50. For the foregoing reasons, DISH asks the Commission to issue an order granting the following relief:

- i. Declaring that Tegna has failed to negotiate in good faith under the Communications Act and the Commission’s rules;
- ii. Immediately requiring Tegna to negotiate in good faith with DISH for the retransmission of its stations;
- iii. Imposing forfeitures on Tegna pursuant to Section 1.80 of the Commission’s rules as the Commission deems appropriate; and
- iv. Awarding DISH such other relief that the Commission deems just and appropriate.

REQUEST FOR EXPEDITED TREATMENT

DISH’s retransmission consent agreement with Tegna has already expired. To minimize the harm to DISH’s subscribers caused by Tegna’s conduct, DISH requests that the Commission act on this Complaint on an expedited basis.

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Jeffrey H. Blum, EVP, External and
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Counsel for DISH Network L.L.C.

October 18, 2021

VERIFICATION OF JEFFREY BLUM

I, Jeffrey Blum, have read the Verified Complaint of DISH Network L.L.C. in this matter, and pursuant to 47 C.F.R. § 76.6(a)(4), state that, to the best of my knowledge, information, and belief formed after reasonable inquiry, the statements made in this Complaint (other than those of which official notice can be taken) are well grounded in fact and warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. The Complaint is not interposed for any improper purpose.

Date: October 18, 2021

/s

Jeffrey H. Blum
EVP, External and Legislative Affairs
DISH NETWORK L.L.C.
1110 Vermont Avenue, N.W., Suite 450
Washington, D.C. 20005
202-463-3703

CERTIFICATE OF SERVICE

I, Alicia Loh, hereby certify that, on October 18, 2021, I caused a copy of the foregoing Confidential Verified Retransmission Complaint, as well as a copy of the redacted version thereof electronically filed with the Federal Communications Commission on this day, to be served upon the party listed below by overnight delivery.

Chris Gilpatric
Vice President, Distribution
Tegna, Inc.
8350 Broad Street, Suite 2000
Tysons, VA 22102

_____/s_____
Alicia Loh

EXHIBIT 1

Exhibit 1: List of Affected Tegna Stations

Call Letters	Affiliation	DMA
WZZM	ABC	Grand Rapids, MI
KBMT	ABC	Beaumont, TX
KIII	ABC	Corpus Christi, TX
KVUE	ABC	Austin, TX
KXTV	ABC	Sacramento, CA
WATN	ABC	Memphis, TN
WFAA	ABC	Dallas-Ft. Worth, TX
WHAS	ABC	Louisville, KY
WJXX	ABC	Jacksonville, FL
WNEP	ABC	Wilkes Barre-Scranton, PA
WOI	ABC	Des Moines, IA
WQAD	ABC	Davenport, IA
WVEC	ABC	Norfolk, VA
WLTX	CBS	Columbia, SC
WBNS	CBS	Columbus, OH
KFSM	CBS	Ft. Smith, AR
WFMY	CBS	Greensboro, NC
KHOU	CBS	Houston, TX
KTHV	CBS	Little Rock, AR
WMAZ	CBS	Macon, GA
WWL	CBS	New Orleans, LA
KENS	CBS	San Antonio, TX
KFMB	CBS	San Diego, CA
KREM	CBS	Spokane, WA
WTSP	CBS	Tampa, FL
WTOL	CBS	Toledo, OH
KYTX	CBS	Tyler, TX
WUSA	CBS	Washington, DC
KCWI	CW	Des Moines, IA
KSKN	CW	Spokane, WA
WCCT	CW	Hartford, CT
WLMT	CW	Memphis, TN
KMPX	EST	Dallas-Ft. Worth, TX
KIDY	FOX	San Angelo, TX
KMSB	FOX	Tucson, AZ
KXVA	FOX	Abilene, TX
WPMT	FOX	Harrisburg, PA
WTIC	FOX	Hartford, CT

WZDX	FOX	Huntsville, AL
KONG	IND	Seattle, WA
KTBU	IND	Houston, TX
KTTU	MNT	Tucson, AZ
KTVD	MNT	Denver, CO
WATL	MNT	Atlanta, GA
WUPL	MNT	New Orleans, LA
KARE	NBC	Minneapolis, MN
KGW	NBC	Portland, OR
KING	NBC	Seattle, WA
KPNX	NBC	Phoenix, AZ
KSDK	NBC	St. Louis, MO
KTFT	NBC	Twin Falls, ID
KTVB	NBC	Boise, ID
KUSA	NBC	Denver, CO
KWES	NBC	Odessa-Midland, TX
WBIR	NBC	Knoxville, TN
WCNC	NBC	Charlotte, NC
WCSH	NBC	Portland-Auburn, ME
WGRZ	NBC	Buffalo, NY
WKYC	NBC	Cleveland, OH
WLBZ	NBC	Bangor, ME
WTHR	NBC	Indianapolis, IN
WTLV	NBC	Jacksonville, FL
WXIA	NBC	Atlanta, GA
KAGS	NBC	Waco, TX
KCEN	NBC	Waco, TX

EXHIBIT 2

EXHIBIT 2

DECLARATION OF MELISA BODDIE

I, Melisa Boddie, being over 18 years of age, swear and affirm as follows:

1. I make this declaration using facts of which I have personal knowledge of, or based on information provided to me, in connection with the retransmission consent negotiations between Tegna Inc. and DISH Network L.L.C (“DISH”).

2. I am currently the Vice President of Programming Acquisition for DISH. In that capacity, I am responsible for the negotiation of retransmission consent contracts on behalf of DISH with every local broadcast group and local broadcast station in the United States. I have been the lead negotiator in DISH’s effort to renew its retransmission consent agreements with numerous broadcasters, including with Tegna.

3. I have negotiated more than a thousand retransmission consent agreements in the last decade.

Factual Background

4. Tegna’s demands include coerced retransmission of entirely unwanted stations, rate increases for the unwanted stations, commitments to carry future stations regardless of whether we have sufficient capacity to do so; rate increases for the Big-4 affiliated stations in the face of declining ratings; a refusal to grant partial rebates for the ever-increasing loss of valuable content; and a possible demand for payment on past DISH subscribers that do not receive the Tegna stations from DISH, as well as a demand for payment on subscribers who have left DISH.

Specifically:

- Tegna appears to demand that DISH pay Tegna for all DISH subscribers in a DMA—whether they purchase local programming from DISH or not. In particular, on the one

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hand, the proposed agreements sent to us by Tegna, including the version sent on October 11, 2021, contain language that limits retransmission of the Tegna stations to those DISH subscribers who purchase local stations: **[BEGIN CONFIDENTIAL]**

[REDACTED]
[REDACTED] **[END CONFIDENTIAL]**

This is standard language and uncontroversial. On the other hand, Tegna’s proposal has added an internally inconsistent provision to this same language stating the very opposite: **[BEGIN CONFIDENTIAL]** [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] **[END CONFIDENTIAL]**

(emphasis added). Remarkably, while DISH has raised this question repeatedly, this language has remained entirely unchanged in the latest version of Tegna’s proposal, sent on October 17, 2021. The fact that Tegna added language during the negotiations requiring receipt of its stations by all DISH customers suggests strongly that this was Tegna’s intent. To add weight to that interpretation, Tegna’s table of outstanding issues describes Tegna’s position as requiring that all DISH customers receive Tegna’s signals, not just those who subscribe to local channels: **[BEGIN CONFIDENTIAL]** [REDACTED]

[REDACTED]
[REDACTED] **[END CONFIDENTIAL]**

- Tegna is apparently demanding that DISH pay Tegna for viewers who are no longer subscribers of DISH. Specifically, the obligation of DISH to pay without any downward

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adjustment, 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.

- Tegna is refusing to grant DISH retransmission consent for any of its Big-4-affiliated broadcast stations until and unless DISH also agreed to retransmit its CW, MyNetworkTV (“MNTV”), and independent affiliated stations *and* pay higher rates for these unwanted stations.
- Tegna is demanding that DISH launch and retransmit all of its non-Big-4 stations, and wants DISH to also pay a price increase of **[BEGIN CONFIDENTIAL]** [REDACTED] **[END CONFIDENTIAL]** in the face of a viewership decline of **[BEGIN CONFIDENTIAL]** [REDACTED] **[END CONFIDENTIAL]** for these stations;¹
- Tegna is demanding that DISH launch future Tegna stations, whether or not DISH has sufficient spot beam coverage.
- Tegna is refusing to put forth a complete agreement setting forth its proposals.
- Tegna is refusing to answer basic questions from DISH.
- Tegna is refusing to resolve fundamental inconsistencies between various elements of its own proposal.
- Tegna is demanding a massive rate increase on the order of **[BEGIN CONFIDENTIAL]** [REDACTED] **[END CONFIDENTIAL]** for Big-4 affiliated stations

¹ The percentages fluctuate between CW or MNTV stations, on the one hand, and independent stations, on the other.

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notwithstanding the material decrease in such stations' viewership among DISH subscribers.

- Tegna is refusing to agree to even a partial rebate if it does not deliver the marquee programming DISH is paying for.

5. DISH and Tegna's retransmission consent agreement expired on October 6, 2021. Negotiations between the parties started on August 2, 2021, when Tegna sent DISH its proposed agreement. That proposal, and the few subsequent proposals that Tegna has provided since, was rife with voids, omissions, errors, and internal contradictions, raising no fewer than 40 questions, which DISH asked repeatedly during the weeks of negotiations. Many of these questions still remain unaddressed and unanswered by Tegna as of today.

6. Specifically, in an effort to reach agreement, DISH followed two parallel tracks in its response to Tegna's initial salvo. First, on October 4, 2021 and then again on October 7, 2021, I provided robust annotations to Tegna's drafts. Second, I sent Tegna DISH's own proposed agreement, which did not raise the same questions affecting Tegna's proposed agreement. I made every effort to engage Tegna in this negotiation. For example, on October 4, I wrote to Tegna, providing both our proposed agreement and annotations to Tegna's proposed agreement.

7. On October 6, 2021, with the parties not having reached a renewal agreement, Tegna pulled its stations from DISH, and those DISH subscribers who want local stations from DISH lost access to important local news content, live sports, and primetime programming. In advance of this expiration, I had still been attempting to reach an agreement.

8. On October 9, 2021, in a 13th hour effort to reach agreement, I catalogued the outstanding questions arising from Tegna's proposed agreements. All of these issues had

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specifically been raised by me on October 4, 7, and 9th. While Tegna has sent DISH a number of versions of Tegna’s proposal, each with minor revisions to the previous version, and has addressed some of these issues, it has been silent on many.

9. The following is a list of the issues still remaining unaddressed, except with the vague generality that the same language was found in our preexisting agreements. As I have explained to Tegna, these agreements are old—they date as far back as 2012, and the renewal agreement should take into account the significant developments in the marketplace.

- Tegna’s proposed reporting period, distribution system, and subscriber, definitions leave DISH confused as to what its rights and obligations would be. Despite my many questions in DISH’s effort to understand these definitions, Tegna still has not adequately resolved them.
- Tegna’s proposals are unclear even as to whether DISH has the right to retransmit each station’s signal as opposed to a programming feed. Despite my questions aimed at understanding DISH’s rights, Tegna has refused to answer or address them.
- Tegna’s proposals are unclear as to whether Tegna is prohibiting DISH from making available the industry standard “pause on live” to its subscribers. Tegna has failed to confirm there is no such prohibition.
- Tegna’s proposals continue to demand that DISH’s grant of retransmission consent rights be conditioned on DISH’s being able to verify what device is connected to the set top box, despite my explanation that it has no way of doing so.
- Tegna’s proposals are unclear as to whether Tegna proposes that DISH pay for any “subscriber” of a sub-distributor whether they receive a Tegna station, authorized by

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DISH or not. Despite my many questions aimed at understanding Tegna's proposed sub-distribution rights and obligations, Tegna has refused to answer or address them.

- As I explained above, Tegna appears to require DISH to ensure that every subscriber within the spot beam receive Tegna's local broadcast station programming for DISH, even if they do not subscribe to local-into-local service or do not have the ability to receive locals from DISH. Tegna has refused to clarify this point for DISH.
- Tegna's proposals continue to give sub-distributors of DISH a grant of consent broader than what they are offering DISH. This makes it unclear what DISH's rights and obligations are with respect to sub-distributors. Despite my many questions aimed at understanding Tegna's proposed sub-distribution rights and obligations, Tegna has refused to answer or address them.
- Tegna's proposals continue to demand that DISH ensure each channel is retransmitted in a technical format appropriate for each subscriber's television set. Even though I have told Tegna numerous times DISH has no way of knowing what television set each subscriber has, Tegna has refused to address the issue.
- Tegna's proposals continue to confuse DISH's retransmission obligations throughout its proposed agreement by using different phrases and words for what seems like the same right or same obligation. Tegna has refused to clarify the scope of these rights and obligations.
- Tegna's proposals continue to demand that DISH launch Tegna stations that become Big-4, CW, or MNTV affiliated.
- Tegna is demanding that DISH launch future Tegna stations, whether or not DISH has sufficient spot beam coverage.

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- Tegna’s proposals continue to demand that Tegna be allowed to terminate its grant of retransmission consent to DISH if Tegna agrees to do this with a third-party affiliated network.
- Tegna’s proposals continue to prohibit a “downward adjustment” of retransmission fees. Despite my repeated questions regarding what a “downward adjustment” means, Tegna has refused to address or answer them.
- Tegna’s proposals continue to be unclear as to whether it is demanding that the agreement would apply to Tegna signals that DISH subscribers receive over the air or through a third-party app (and not from DISH).
- Despite my repeated questions, Tegna’s proposals have failed to clarify the inconsistencies with respect to the timing of DISH’s payment obligations, leaving me confused as to what DISH’s payment obligations would be.
- Tegna’s proposals continue to demand a payment method that DISH does not use, despite my explanation that it does not use this payment method for any other broadcaster or programmer.
- Tegna’s proposals continue to add confusion as to whether Tegna is demanding a double counting for certain subscribers. Even though I have asked numerous questions to clarify this issue, Tegna has refused to answer or address them.
- Tegna’s proposed transfer and assignment provision leaves me confused as to what each party’s rights and obligations are under its proposed agreement. Tegna’s proposals include a discharge of Tegna’s contractual obligations arising under the agreement prior to a transfer.

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- Tegna’s proposed transfer, successor and assignment provisions leave significant gaps for situations that could lead to cessation of carriage in the event of a change in control. Thus, Tegna’s proposed draft does not guarantee continued carriage if Tegna sells a station to someone who does not then-currently have a valid retransmission consent agreement with DISH that will govern the sold Tegna station. DISH cannot enter into an agreement that does not address this specific situation, which occurs frequently in the industry, especially given Tegna’s announcements regarding the possible sale of its stations.
- Tegna’s proposals continue to demand that DISH agree to allow Tegna to negotiate retransmission consent on behalf of stations it does not own.
- Tegna’s proposals continue to demand that DISH pay retransmission fees during a force majeure event, for up to 90 days, even if DISH is not receiving the Tegna signals.
- Tegna’s proposals also demand that DISH pay retransmission fees even if Tegna does not deliver the network programming DISH is paying for.
- Even though I have explained that all of DISH’s retransmission agreements require acquired stations to be added to the purchaser’s agreement, Tegna continues to demand that it be able to share an agreement with any potential purchaser that has a retransmission agreement with DISH then-currently in place.

10. In response to my October 9 email summarizing the outstanding issues, Tegna replied (after my requested deadline) to express its disappointment at the rates offered by DISH and stated that it was [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED] [END CONFIDENTIAL] In another email, dated October 8, Tegna told me that [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]
[REDACTED] **[END CONFIDENTIAL]** However, I cannot reasonably be asked to clarify Tegna’s own proposal when I do not understand and have repeatedly told Tegna that I does not understand most of Tegna’s proposal.

11. On October 11, I responded to an email from Tegna by thanking Tegna for addressing some of the comments but noting that “there are still several of them that have not been addressed or answered.” I re-emphasized that DISH could not be expected to respond to a proposal that it does not understand, and that DISH would need answers to its outstanding questions to be able to provide a complete response.

12. A proposal Tegna sent on October 11, 2021, unfortunately did not resolve many of these issues. In fact, as mentioned above, it perpetuates the contradiction over whether Tegna wants payment on phantom viewers—DISH subscribers in the local market who do not pay for, or receive, the local stations. Subsequent correspondence only confirms Tegna’s failure to address many of the questions that DISH has raised, including some of the most significant contradictions in Tegna’s proposal.

13. On October 15, 2021, I sent an email to Tegna attaching DISH’s proposed agreement and offering two significant concessions. **[BEGIN CONFIDENTIAL]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **[END CONFIDENTIAL]** In response, on October 17, 2021, Tegna sent DISH yet another version of its own proposal, which contains insignificant changes and addresses none of the outstanding questions. While Tegna has added **[BEGIN CONFIDENTIAL]** [REDACTED]

[REDACTED] [END CONFIDENTIAL] the addition has had no effect on the rates demanded by Tegna.

14. Tegna’s behavior has forced a blackout of 65 Tegna stations in 53 markets nationwide, adversely affecting nearly 3 million DISH subscribers.

Tegna’s Bundling Demand

15. Tegna provides two separate products: the stations affiliated with one of the Big-4 networks (ABC, CBS, NBC, and FOX) and groups of stations with little interconnected programming. Neither MNTV nor CW appears to have network status currently; for one thing, each reportedly transmits fewer than 15 hours of interconnected programming a week.² Tegna is nonetheless attempting to force DISH to retransmit CW and MNTV stations by lumping them with Big-4 local affiliates as part of an alleged “Big-6.”

16. But, the CW and MNTV stations are distinguishable from the Big-4 affiliates. Demand for one is entirely distinct from the other. The DISH viewership for each of Tegna’s non-Big-4 stations has historically been dwarfed by that for the respective Big-4 affiliate in each relevant market. This makes sense, as the Big-4 network affiliates have significantly longer high-quality interconnected prime time programming windows. FOX, which provides the lowest number (15) of weekly prime-time programming hours of the Big-4 networks, provides 50% more prime time programming than either CW or MNTV, each of which provides only 10 hours

² See Monica Marie Zorrilla, *The CW Unveils Weeklong Fall 2021 Primetime Schedule and Midseason Debuts*, Variety (May 25, 2021), <https://variety.com/2021/tv/news/cw-2021-schedule-primetime-4400-naomi-1234981020> (“The CW dares to defy by expanding our primetime schedule to include Saturday night and becoming a full 14-hour, seven-day-a-week broadcast network for the first time in its history[.]”); Patrick Hipes, *MyNetworkTV 2021-22 Schedule Set with ‘Chicago Fire’ Added to Lineup*, Deadline (July 13, 2021), <https://deadline.com/2021/07/mynetworktv-fall-2021-tv-schedule-1234792308> (listing two hours of programming per weekday night).

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of prime-time programming a week. Moreover, the Big-4 networks air new programming regularly; by contrast, each of CW and MNTV runs a large number of re-runs and syndicated content. And finally, the proof is in the pudding: viewership.

17. Tegna has conditioned its retransmission consent for its Big-4 affiliates on DISH retransmitting all of its non-Big-4 stations and paying [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] more for the privilege of doing so. Throughout the negotiations with DISH, Tegna expressly insisted on this tie, lumping the Big-4 network affiliates in with CW and MNTV stations under the misleading label of “Big-6 Network” especially when some don’t even rank in the top 10.

18. Tegna has sufficient economic power in the market for the tying product—its Big-4 affiliates. It has such power both in each DMA in which it owns a Big-4 affiliate as well as in the national market for purchase of retransmission consent from Big-4 network affiliates—power that it is using to restrain trade in the form of requiring retransmission of its unpopular products, the CW and MNTV networks.

19. Here, each broadcast station in a local DMA offers unique programming, as each affiliate is the only saloon in town for that particular broadcast network. Moreover, the programming offered by the four major broadcast networks is important for MVPDs. If any one of these networks is missing from the package of programming offered by the MVPD provider, there is no adequate substitute for the missing network in the mind of many subscribers, and these subscribers are much more likely to purchase service from an MVPD provider that can provide all four broadcast networks. Tegna’s conduct is aimed at forcing DISH to retransmit and pay for stations it is otherwise uninterested in retransmitting, potentially raising the monthly bills of DISH’s subscribers.

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20. At the local level, because of the exclusive nature of network franchise agreements and laws prohibiting importation of out-of-market stations, each local network station is the only outlet in town for that network. Armed with the power of exclusivity, Tegna can exploit a key asymmetry: there are multiple suitors vying for its retransmission consent, including the two satellite distributors, the cable and phone companies, and a number of online video distributors. Tegna can play these distributors off against each other, as the distributor lacking retransmission consent is at a competitive disadvantage, spurned by households that either must have the network in question or must have a complement of all four major networks.

21. At the national level, Tegna's size and geographic reach make its power greater than the sum of its parts. For a national distributor such as DISH, the lack of retransmission consent for the Tegna stations interferes with its ability to hold itself out as providing all local stations in all markets, which is in turn a key ingredient of DISH's brand. On account of this market power, blackouts of Tegna stations are asymmetric in the harm they inflict. For DISH, a blackout means subscribers departing, potential customers not subscribing, and national reputational damage. For Tegna, any harm is much more limited, since consumers can still access its stations, either over the air or by switching to another distributor.

22. DISH is resisting Tegna's bundling attempt based on its experience with Tegna's non-Big-4 stations. As mentioned, the viewership of these stations among DISH subscribers is dwarfed by the viewership of even the least popular Big-4 affiliate in each market where Tegna has a CW or MNTV station, ratings that keep declining dramatically.

23. Finally, Tegna's tie would foreclose a substantial amount of commerce in the market for the tied product. Tegna is demanding more than **[BEGIN CONFIDENTIAL]** [REDACTED] **[END CONFIDENTIAL]** for retransmission of the non-Big-4 stations, significantly

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higher than the market value of those stations. The **[BEGIN CONFIDENTIAL]** [REDACTED]
[END CONFIDENTIAL] that DISH would save by not retransmitting such non-Big 4 stations could be better used in obtaining networks whose content is more in demand.

* * *

The foregoing declaration has been prepared using facts of which I have personal knowledge or based upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best my current information, knowledge, and belief.

Executed on October 18, 2021

Melisa Boddie

Melisa Boddie
Vice President, Programming Acquisition
DISH Network L.L.C.