

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

In the Matter of:)	
)	
Mediacom Communications Corporation)	
)	CSR-7058-C
v.)	
)	
Sinclair Broadcast Group, Inc.)	
)	
Emergency Retransmission Consent Complaint)	
and Complaint for Enforcement for Failure to)	
Negotiate Retransmission Consent Rights in Good)	
Faith)	

MEMORANDUM OPINION AND ORDER

Adopted: January 4, 2007

Released: January 4, 2007

By the Chief, Media Bureau:

I. INTRODUCTION

1. On October 31, 2006, Mediacom Communications Corporation (“Mediacom”) filed an Emergency Retransmission Consent Complaint and Complaint for Enforcement for Failure to Negotiate Retransmission Consent Rights in Good Faith (“Complaint”) against Sinclair Broadcast Group, Inc. (“Sinclair”), pursuant to Sections 76.7 and 76.65 of the Commission’s rules.¹ Mediacom alleges that Sinclair violated its duty to negotiate retransmission consent in good faith for carriage of certain Sinclair owned and/or operated local broadcast television stations (the “Stations”).² Mediacom requests that the Commission find Sinclair in violation of its obligation to negotiate in good faith for retransmission consent, direct Sinclair to immediately commence negotiations in good faith, and impose other appropriate relief and sanctions.³ Sinclair filed an Answer and Mediacom filed a Reply.⁴ The parties have also filed additional pleadings, motions and numerous ex parte presentations.⁵

¹ 47 C.F.R. §§ 76.7 and 76.65.

² Mediacom Complaint at 1, 11.

³ *Id.* at 1. Mediacom requested emergency, expedited treatment of this Complaint. Mediacom also filed a Request for Order Permitting Interim Carriage and Request for Expedited Treatment (“Request for Interim Carriage”) which asked that, if the Commission cannot act on an expedited basis, it issue injunctive relief beginning December 1, 2006, lasting for at least three months and having the effect of a temporary restraining order, to preserve the *status quo* cable retransmission of the Sinclair stations pending resolution of Mediacom’s Complaint. Pursuant to written notice from Sinclair, Mediacom’s existing retransmission consent was to have expired on December 1, 2006. In a Public Notice released on November 8, 2006, Media Bureau Action, DA 06-2274, the Commission declined
(continued....)

II. BACKGROUND

2. Section 325(b)(3)(C) of the Communications Act obligates broadcasters and multichannel video programming distributors to negotiate retransmission consent agreements in good faith.⁶ Specifically, Section 325(b)(3)(C)(ii) directs the Commission to establish regulations that:

. . . until January 1, 2010, prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.⁷

3. In its *Good Faith Order*, the Commission adopted rules implementing the good faith negotiation provisions and the complaint procedures for alleged rule violations.⁸ The *Good Faith Order*

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Mediacom's request for expedited review of its Emergency Retransmission Consent Complaint, but sought comment on its Request for Interim Carriage. On November 30, 2006, the parties reached an agreement to extend carriage of Sinclair's signals on Mediacom's cable systems through January 5, 2007 in exchange for compensation and other consideration from Mediacom.

⁴ Pursuant to 47 C.F.R. § 0.459 of the Commission's rules, both Mediacom and Sinclair filed Requests for Confidential Treatment to certain portions of their pleadings and ex parte letters. In light of the sensitive and proprietary nature of certain information provided with these documents, and pursuant to the Freedom of Information Act ("FOIA") and the Commission's implementing rules, we grant these requests and confidential treatment will be accorded to those portions of the pleadings and letters as requested by the parties. See 5 U.S.C. § 552 *et seq.*; 47 C.F.R. §§ 0.457, 0.459. The parties submitted redacted copies of their pleadings and letters for inclusion in the Commission's public file. Confidential information is included in the attached Appendix.

⁵ Mediacom filed a "Motion for Consideration by Full Commission," pursuant to 47 C.F.R. §§ 0.5(c), 0.211, 0.283(c) and 1.41. Mediacom argues that while retransmission consent matters generally fall within the scope of the Bureau's delegated authority, the Bureau's authority extends only to matters that are minor or routine and that do not present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines. Mediacom's motion is denied. We do not believe that Mediacom's Complaint presents new or novel matters. The Bureau previously has addressed good faith retransmission consent complaints. See *EchoStar Satellite Corporation*, 16 FCC Rcd 15070 (2001). Bureau resolution of this matter also will assist in expediting a prompt decision for the parties so that the public interest is served.

⁶ 47 U.S.C. § 325(b)(3)(C).

⁷ 47 U.S.C. § 325(b)(3)(C)(ii). Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"), the Commission has adopted rules to extend 47 U.S.C. § 325(b)(3)(C) until 2010 and to amend that section to impose a reciprocal good faith retransmission consent bargaining obligation on MVPDs. See *In the Matter of: Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004: Reciprocal Bargaining Obligation*, MB Docket No. 05-89, FCC 05-119, released June 7, 2005 ("*Reciprocal Bargaining Order*").

⁸ *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, 15 FCC Rcd 5445 (2000) ("*Good Faith Order*"), *recon. granted in part*, 16 FCC Rcd 15599 (2001).

adopted a two-part test for good faith.⁹ The first part of the test consists of a brief, objective list of negotiations standards.¹⁰ The second part of the good faith test is based on a totality of the circumstances standard. Under this standard, a multichannel video programming distributor (“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 constitute a failure to negotiate in good faith.¹¹ The *Good Faith Order* provided that MVPDs believing themselves aggrieved under the good faith rules could file a complaint pursuant to Section 76.7 of the Commission’s rules.¹² The burden of proof in good faith complaints is on the MVPD complainant.¹³

4. Of Sinclair’s 58 operated and controlled local television broadcast stations, Mediacom asserts that it is interested in entering into retransmission consent agreements for carriage of either the analog signal or the analog and digital signals of thirteen Sinclair stations (collectively, the “Major Network Stations”) located in twelve DMAs where Mediacom operates cable systems.¹⁴ All of the Major Network Stations are affiliated with Fox, ABC, NBC, or CBS and have the exclusive right to air major network programming in their DMAs. These stations also generally have the right to block Mediacom from importing stations from other DMAs that offer such major network programming.¹⁵ Also at issue in this proceeding are nine other Sinclair stations (collectively, the “Other Network Stations”) located in DMAs where Mediacom provides cable service that Mediacom asserts it has no interest in carrying.¹⁶ These Other Network Stations, previously affiliated either with The WB or the UPN television networks (which subsequently ceased operation), are now either unaffiliated with a network or affiliated with the CW or My Network TV (“MNTV”) networks.¹⁷

⁹ *Good Faith Order*, 15 FCC Rcd at 5457.

¹⁰ *Id.* at 5462-64. First, a broadcaster may not refuse to negotiate with a multichannel video programming distributor (“MVPD”) regarding retransmission consent. Second, a broadcaster must appoint a negotiating representative with authority to bargain on retransmission consent issues. Third, a broadcaster must agree to meet at reasonable times and locations and cannot act in a manner that would unduly delay the course of negotiations. Fourth, a broadcaster may not put forth a single, unilateral proposal. Fifth, a broadcaster, in responding to an offer proposed by an MVPD, must provide considered reasons for rejecting any aspects of the MVPD’s offer. Sixth, a broadcaster is prohibited from entering into an agreement with any party conditioned upon denying retransmission consent to any MVPD. Finally, a broadcaster must agree to execute a written retransmission consent agreement that sets forth the full agreement between the broadcaster and the MVPD. *Id.*; see 47 C.F.R. § 76.65(b)(1)(i)-(vii).

¹¹ *Id.* at 5458.

¹² 47 C.F.R. § 76.7.

¹³ 47 C.F.R. § 76.65(d).

¹⁴ The Major Network Stations are: KBSI (Cape Girardeau, MO), KDNL (St. Louis, MO), KD SM (Des Moines, IA), KGAN (Cedar Rapids, IA), WDKY (Lexington, KY), WEAR (Pensacola, FL), WICD (Champaign, IL), WICS (Springfield, IL), WLOS (Ashville, NC), WMSN (Madison, WI), WYZZ (Bloomington, IL), WZTV (Nashville, TN) and WTWC (Tallahassee, FL). Mediacom Complaint at 11; see also Declaration of Joseph Pascarelli at ¶ 5 (“Pascarelli Declaration”).

¹⁵ Mediacom Complaint at 11; Pascarelli Declaration at ¶ 5.

¹⁶ The Other Network Stations are: KMWB (Minneapolis, MN), WMYA (Anderson, SC), WCGV (Milwaukee, WI), WVTW (Milwaukee, WI), WDBB (Bessemer, AL), WDKA (Paducah, KY), WNAB (Nashville, TN), WYXP (Nashville, TN) and WTVZ (Norfolk, VA). *Id.* at 12; Pascarelli Declaration at ¶ 6.

¹⁷ Mediacom Complaint at 11.

5. Sinclair elected retransmission consent for all of the Major Network and Other Network Stations during the current must carry/retransmission consent election cycle, thereby requiring Mediacom to obtain retransmission consent for each in order to carry them on Mediacom's cable systems.¹⁸ Sinclair issued a termination notice on September 28, 2006, which ended Mediacom's right to carry the stations effective December 1, 2006. Through private agreement, the parties further extended carriage of Sinclair's signals on Mediacom's systems until January 5, 2007.¹⁹

III. DISCUSSION

6. Mediacom's Complaint contains five counts that Mediacom asserts demonstrate that Sinclair has breached its duty to negotiate retransmission consent in good faith. At the outset of our discussion, we note that it appears that this dispute is most significantly over the appropriate valuation of Sinclair's 22 broadcast signals. It is clear from the record that the parties fundamentally disagree on this issue. Absent other factors, however, disagreement over the rates, terms and conditions of retransmission consent – even fundamental disagreement – is not indicative of a lack of good faith. Each of Mediacom's allegations is discussed below.

A. Count One

7. Mediacom alleges that Sinclair's single and non-negotiable demand that Mediacom consent to a global agreement encompassing all 22 of its stations located in DMAs where Mediacom provides cable service is a *per se* violation of the Commission's good faith rules.²⁰ Sinclair argues that at no time during the negotiations did Mediacom ever convincingly assert that it did not want to carry certain of the Sinclair stations. According to Sinclair, Mediacom did not want to carry the stations *only* if it had to pay for them. Sinclair contends that, after learning through an antitrust lawsuit filed by Mediacom that Mediacom did not want to carry certain Sinclair stations, Sinclair put forth a proposal whereby Mediacom could negotiate for each of the stations separately without conditioned carriage of any other station.²¹ According to Sinclair, rather than accepting, or at least offering to negotiate with respect to this offer, Mediacom rejected the offer as a "sham."²²

8. **Discussion.** Mediacom argues that Sinclair's single and non-negotiable demand for a global agreement covering the 22 Sinclair stations located in DMAs where Mediacom provides cable service violates the good faith requirement against offering a single, unilateral proposal while refusing to discuss alternate terms or counter-proposals.²³ We need not reach this issue as any argument on this issue was rendered moot when Sinclair put forth a proposal offering each of its 22 stations to Mediacom at individual rates without conditioning carriage of any station on the carriage of any other station.

¹⁸ *Id.* at 13; Pascarelli Declaration at ¶ 2.

¹⁹ *See supra* n.3.

²⁰ Mediacom Complaint at 18.

²¹ Sinclair Answer at 7; *see* Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc., 4:06-cv-491, (S.D. Iowa) (filed Oct. 11, 2006).

²² Sinclair Answer at 7.

²³ *See* 47 C.F.R. § 76.65(b)(iv); *Good Faith Order*, 15 FCC Rcd at 5463.

B. Counts Two and Five

9. Count Two asserts that Sinclair's behavior is sufficiently outrageous and excessive so as to violate the "totality of the circumstances" good faith standard. Count Five asserts that Sinclair breached its good faith obligation by demanding outrageous terms and conditions that are not based on "competitive marketplace considerations." Because Count Two and Count Five are factually interrelated, we will address them together. Mediacom states that good faith bargaining requires that parties to a negotiation have an "obligation to make a sincere, serious effort to adjust differences and to reach an acceptable ground."²⁴ Mediacom argues that during the course of negotiations Sinclair insisted, for instance, that its prices were firm, that it was not interested in compensation through advertisement spots, and that negotiation be limited to payment on a per-subscriber basis.²⁵ Mediacom claims that it later learned that despite such statements, Sinclair concluded a carriage agreement with a cable operator comparable to Mediacom at rates lower than it was demanding from Mediacom and which included non-cash compensation.²⁶ Mediacom argues that Sinclair continued to assert that its demands reflected market conditions or changed realities and that its demands for cash payment were in line with consideration Sinclair was receiving from other operators.²⁷ Mediacom claims that it asked Sinclair for proof of the accuracy of its statements, but received none.²⁸ Mediacom claims that Sinclair is making an example of Mediacom and it is using its relative competitive advantage against Mediacom to set a standard it can cite in subsequent negotiations with other, less vulnerable, MVPDs.²⁹ Mediacom asserts that, because Mediacom's systems represent less than 3 percent of Sinclair's aggregate audience and approximately 50 percent of Mediacom's systems are located in a DMA served by a Sinclair station, Sinclair is in the position to impose uncompromising and harsh proposals that represent a substantial departure from the retransmission consent terms and conditions that Sinclair has offered other similarly-sized cable operators or that Mediacom has been offered by other broadcasters in these same markets.

10. In response, Sinclair argues that Mediacom has been carrying the signals of its 22 television stations for free pursuant to a retransmission consent agreement which provided either party with the right to terminate on 45 days' written notice.³⁰ Sinclair contends that Mediacom's complaint is really about price, and the relief it seeks, in essence, asks the Commission to artificially cap the price cable operators pay for retransmission consent rights.³¹ Sinclair asserts that it has made a variety of proposals, all of which involved payment of cash for retransmission rights. Sinclair claims that it has offered package deals, offered to negotiate *a la carte*, and made a specific *a la carte* offer.³²

²⁴ Mediacom Complaint at 19, citing *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1187 (D.C. Cir. 1981); *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956).

²⁵ Mediacom Complaint at 23.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 37.

³⁰ Sinclair Answer at 3.

³¹ *Id.* at 5.

³² *Id.* at 6.

11. Sinclair argues that it is not a violation of the good faith negotiating rules for a broadcaster to seek compensation that is different from or greater than that sought by other broadcast stations.³³ Sinclair argues that what it should receive for the right to carry its stations is a function of what cable companies pay for the right to carry all video programming services, regardless of whether such services are over-the-air broadcast stations or not.³⁴ Sinclair contends that it is inappropriate for cable companies to discount the value of retransmission consent on that basis. Sinclair argues that the best measure for the market value of its retransmission rights is the amount that cable companies, such as Mediacom, pay for the right to carry video programming of comparable popularity.³⁵

12. In reply, Mediacom responds that its complaint is about Sinclair's pricing behavior, not its prices.³⁶ Mediacom claims that it is not asking the Commission to set retransmission consent prices.³⁷ On the other hand, however, Mediacom asserts that the Commission is required to constrain the leeway that a broadcaster might otherwise have in proposing particular terms and conditions for retransmission consent by requiring that such terms and conditions be based on competitive marketplace conditions.³⁸

13. Mediacom argues that Sinclair's demands are not based on competitive marketplace considerations.³⁹ Mediacom contends that Sinclair has engaged in an intentional disinformation campaign in an effort to harm Mediacom and thereby coerce its acceptance of Sinclair's demands.⁴⁰ Mediacom complains that Sinclair has run false and misleading advertisements telling customers that they must switch to another pay television provider if they want to continue to receive Sinclair's signals after retransmission consent termination.⁴¹ Mediacom asserts that the \$150 inducement to Mediacom subscribers to switch to another provider is further evidence of Sinclair's continued lack of good faith.⁴² Mediacom claims that Sinclair has engaged in a strategy of making false statements with intent to mislead Mediacom's customers, investors, regulators and lenders.⁴³ Mediacom also states that Sinclair has

³³ *Id.* at 13.

³⁴ *Id.* at 15.

³⁵ *Id.* at 15-16.

³⁶ Mediacom Reply at 4.

³⁷ *Id.* at 4.

³⁸ *Id.* at 6-7; *see also* 47 U.S.C. § 325(b)(3)(c)(ii).

³⁹ Mediacom Reply at 7.

⁴⁰ *Id.* at 9.

⁴¹ *Id.* at 5.

⁴² November 29, 2006 Letter from Seth Davidson, Attorney for Mediacom to Kevin J. Martin, Chairman FCC at 2.

⁴³ *Id.* at 9. Sinclair filed Comments in response to Mediacom's Reply. Sinclair argues that it is well settled that a Reply pleading cannot contain new allegations and such new material will be stricken. Sinclair claims that the Reply contains substantial amounts of material that goes well beyond Mediacom's Complaint. Sinclair asserts that its failure to address each and every one of Mediacom's allegations contained in the Reply should not be construed as a concession on Sinclair's part. Sinclair states that it would respond if the Commission requested such a response. The Commission did not request such a response. We will contain our analysis of this case to matters raised in the Complaint.

repeatedly made false and misleading statements to Mediacom and the sorts of broken promises and false statements made by Sinclair go beyond the norm of good faith bargaining.⁴⁴

14. Mediacom further argues that Sinclair's pricing demands are based on Sinclair's abuse of its market power.⁴⁵ Mediacom asserts that it repeatedly asked Sinclair to disclose the amounts it has agreed to receive in long-term retransmission consent agreements with other similarly situated or larger cable companies. With the exception of one agreement, Sinclair has refused.⁴⁶ Mediacom states that it therefore had to rely on its own analysis of Sinclair's public statements and disclosures. According to Mediacom, its analysis suggests that, on average, Sinclair is receiving from other comparable MVPDs only a small fraction of the amount initially demanded for the Major Network Stations. According to Mediacom, this demonstrates that Sinclair's demands are inconsistent with competitive marketplace considerations.⁴⁷

15. **Discussion.** We do not find that Mediacom has satisfied its burden of proof with regard to Counts Two and Five. With regard to Mediacom's complaint that Sinclair touts its proposals as consistent with competitive marketplace considerations without factually justifying such proposals, the Commission, in the *Good Faith Order*, stated that:

A broadcaster, in responding to an offer proposed by an MVPD, must provide reasons for rejecting any aspect of the MVPD's offer. Blanket rejection of an offer without explaining the reasons for such rejection does not constitute good faith negotiation. . . . We reiterate that good faith negotiation requires a broadcaster's affirmative participation. However, this standard is not intended as an information sharing or discovery mechanism. Broadcasters are not required to justify their explanations by document or evidence.⁴⁸

The record amply demonstrates that, in over a year of negotiation, there have been numerous proposals put forth by both parties and that there has been significant discourse back-and-forth on these proposals. What Mediacom seems to protest is the price Sinclair seeks for retransmission of its signals on Mediacom's systems and its failure to justify this price to Mediacom. As discussed above, good faith negotiation requires both parties to explain their reasons for putting forth or denying an offer. In this instance, however, Mediacom appears to expand this requirement to the point that Sinclair must empirically prove that its offers are consistent with marketplace considerations or violate the good faith rules. Mediacom and Sinclair are sophisticated, well established media corporations that can determine for themselves whether particular proposals reflect market conditions. Accordingly, we decline to expand the requirement in this manner.

⁴⁴ *Id.* at 11.

⁴⁵ *Id.*

⁴⁶ *Id.* Mediacom refers to a retransmission consent agreement between Sinclair and Suddenlink. Mediacom claims that that deal is anomalous and not properly comparable to the Mediacom/Sinclair negotiation. *See* Mediacom Reply at n.14.

⁴⁷ Mediacom Reply at 13.

⁴⁸ *Good Faith Order*, 15 FCC Rcd at 5464.

16. Sinclair seeks in this negotiation to alter the amount and manner by which it is compensated for retransmission of its signals on Mediacom's systems. For its part, Mediacom believes that Sinclair's valuation is excessive. Either Sinclair is overvaluing its signals or Mediacom is undervaluing these same signals. In this regard, we emphasize that Sinclair's desire to receive appropriate compensation from Mediacom for carriage of its signals is consistent with the framework for retransmission consent established by Congress in Section 325 of the Communications Act and does not appear to be unreasonable.⁴⁹ In its proposal that permitted Mediacom to negotiate for each of its stations separately without conditioned carriage of any other station, Sinclair proposed monthly per subscriber fees ranging from [REDACTED] to [REDACTED] for its stations in various markets. Sinclair notes that in comments filed by the American Cable Association ("ACA") in conjunction with the *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, ACA asserts that "[w]hen dealing with small and medium-sized cable companies, networks and major affiliate groups are demanding new monthly per-subscriber fees ranging from \$.50 to \$1.00 and up for each network station,"⁵⁰ which is more than Sinclair has sought for any of its stations. In addition, Mediacom itself pays between \$.20 and \$3.40 for forty-four of its cable networks and between \$.20 and \$.55 for twenty-seven of its non-sports, cable networks.⁵¹

17. The record also indicates that Sinclair seeks compensation at or below levels that Mediacom already pays other less highly rated programmers.⁵² For illustration, Sinclair is the licensee of two stations – KGAN (CBS, Cedar Rapids, Iowa) and KDMS-TV (FOX, Des Moines, Iowa) -- and asking for [REDACTED] per subscriber, per month for carriage of each station. KGAN is assigned to the Cedar Rapids-Waterloo, Iowa DMA. In May 2006, KGAN had a Sunday-Saturday Primetime rating of 8.⁵³ Even assuming that the cable networks for which Mediacom pays the most are those that achieve the highest levels of viewership, none of the twenty-five cable networks for which it pays [REDACTED] or more (i.e., the 25 networks for which it pays the most) achieved more than a rating of 1 for this same period in the Cedar Rapids-Waterloo, Iowa DMA.⁵⁴ Similarly, in May 2006, KDSM, which is assigned to the Des Moines-Ames, Iowa DMA, had a Saturday-Sunday Primetime rating of 4.⁵⁵ Only one of the twenty-five cable networks for which Mediacom pays [REDACTED] or more (i.e., the twenty-five cable

⁴⁹ 47 U.S.C. § 325.

⁵⁰ ACA Comments filed in *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MM Docket No. 05-255, at 7 (filed September 19, 2005).

⁵¹ See November 30, 2006 Letter from Seth Davidson, counsel for Mediacom, to Catherine Bohigian, FCC (Mediacom Redacted Programming Cost Overview).

⁵² See November 2, 2006 Letter from Kathryn R. Schmeltzer, Attorney for Sinclair Broadcast Group, Inc. to Kevin J. Martin, Chairman, FCC, et al. at 5; Sinclair Answer at Exhibit 1.

⁵³ See Reply Comments of Sinclair Broadcast Group, Inc., in MB Docket 06-189 (citing Nielsen Station index, May 2006).

⁵⁴ See November 30, 2006 Letter from Seth Davidson, counsel for Mediacom, to Catherine Bohigian, FCC (Mediacom Redacted Programming Cost Overview); Reply Comments of Sinclair Broadcast Group, Inc., in MB Docket 06-189 (citing Nielsen Station index, May 2006).

⁵⁵ See Reply Comments of Sinclair Broadcast Group, Inc., in MB Docket 06-189 (citing Nielsen Station index, May 2006).

networks for which it pays the most) achieved a rating of 2. The remainder achieved ratings of no more than 1 for this same period.⁵⁶

18. Mediacom argues that the price paid for cable programming that is only available through subscription services is not an appropriate measure of the value of broadcast signals that are available free and over-the-air. Mediacom appears to characterize as inconsistent with competitive marketplace considerations the fact that Sinclair seeks compensation commensurate with other programmers carried by Mediacom that are generally lower rated than the Sinclair stations. We disagree. It seems reasonable that the fair market value of any source of programming would be based in large part on the measured popularity of such programming. Therefore, seeking compensation commensurate with that paid to other programmers of equal, or lower, ratings is not *per se* inconsistent with competitive marketplace considerations.

19. Mediacom offers other examples of Sinclair's "outrageous" conduct. With regard to Sinclair's misleading advertisements and the \$150 inducement to Mediacom subscribers, we do not perceive as inconsistent with good faith negotiation the use of advertisements by Sinclair to inform Mediacom subscribers of their viewing options. When faced with the prospect of its signals going black on the Mediacom systems, we cannot find that the good faith rules preclude otherwise legitimate business incentives, including what Mediacom describes as a cash offer by Sinclair to subscribers who switch to a certain provider that makes Sinclair's signals available. Also, Mediacom states that Sinclair offered to share the terms of a retransmission consent agreement between Sinclair and a similarly situated cable operator if Mediacom could obtain the cable operator's consent.⁵⁷ Mediacom asserts that Sinclair refused after Mediacom obtained the affected cable operator's permission to review the agreement.⁵⁸ The record with regard to this issue is far from clear and seems to indicate that, in any event, Mediacom became aware of some or all of the terms of the agreement in question.⁵⁹ Moreover, Sinclair was under no good faith obligation to share the terms of any agreement with Mediacom. In addition, Mediacom states that Sinclair on many occasions threatened to terminate the month-to-month retransmission consent agreement with Mediacom.⁶⁰ Under the terms of the agreement, Sinclair or Mediacom were entitled to terminate the agreement at any time upon 45 days prior written notice. Sinclair was entitled to terminate the agreement at any time. Moreover, any threatened termination that was not acted upon was to Mediacom's benefit, given the fact that it was retransmitting Sinclair's stations for free under the terms of the month-to-month agreement. Mediacom also complains that the price of Sinclair's proposals escalated over the course of negotiations. Like all markets, the market for video programming is not static and will change as events warrant. Given the length of the negotiations between the parties, we do not find it a violation of good faith negotiation that Sinclair's asking price increased over time. Finally, Mediacom complains that Sinclair sought retransmission consent from Mediacom's very small systems where election of must carry is usually the norm.⁶¹ Without belaboring the point, Sinclair was fully within its rights under the

⁵⁶ See November 30, 2006 Letter from Seth Davidson, counsel for Mediacom, to Catherine Bohigian, FCC (Mediacom Redacted Programming Cost Overview); Reply Comments of Sinclair Broadcast Group, Inc., in MB Docket 06-189 (citing Nielsen Station index, May 2006).

⁵⁷ Mediacom Complaint at 24.

⁵⁸ *Id.*

⁵⁹ See *supra* n.46.

⁶⁰ Mediacom Complaint at 25-28.

⁶¹ *Id.* at 38-39.

retransmission consent framework established by Congress to elect retransmission consent for these systems. Without more, we cannot find that any of the preceding conduct is inconsistent with good faith negotiation, or, taken as a whole, violative of the totality of the circumstances standard.

C. Counts Three and Four

20. In these factually interrelated claims, Mediacom argues that Sinclair has unlawfully granted an exclusive retransmission consent and violated the good faith bargaining requirement by entering into a per-inquiry agreement with a competing MVPD.⁶² Mediacom argues that the Communications Act expressly prohibits exclusive retransmission consent agreements between a television broadcast station and an MVPD.⁶³ Mediacom argues that Sinclair's per-inquiry agreement falls squarely within the realm of such *de facto* exclusivity agreement and is a *per se* violation of the good faith bargaining requirement.⁶⁴ Mediacom argues further that the per-inquiry agreement distorts "ordinary marketplace considerations" by undermining the proper functioning of the retransmission consent/must-carry scheme.⁶⁵ In this regard, Mediacom argues that, by defraying the cost of the loss of Mediacom's carriage of Sinclair's signals, the per-inquiry agreement distorts Sinclair's incentive to negotiate retransmission consent in good faith.

21. Sinclair asserts that agreement with the "unnamed DBS company" referred to by Mediacom is simply an ordinary per-inquiry arrangement with DIRECTV that was not even negotiated by Sinclair.⁶⁶ Sinclair asserts that at the time Mediacom filed its complaint, Sinclair had already identified DIRECTV and described the agreement in connection with Mediacom's antitrust litigation. Sinclair argues that Mediacom knew the basic terms of the per-inquiry deal and knew that the federal court previously rejected its bounty payment argument.⁶⁷

22. Mediacom argues that nowhere in its Answer does Sinclair specifically deny Mediacom's assertion that it also receives (1) reimbursement from DIRECTV for any advertising losses it suffers as a result of the interruption or termination of its relationships with Mediacom, and (2) additional monetary and/or other consideration from DIRECTV for each Mediacom subscriber that switches to the services of DIRECTV during an interruption or termination of Sinclair's relationships with Mediacom.⁶⁸ Mediacom argues that the elements of the per-inquiry agreement distort and undermine the proper functioning of the retransmission consent scheme.⁶⁹

23. **Discussion.** The record fails to establish a good faith violation. As explained by Sinclair, the agreement in question is actually a commonplace "per-inquiry" arrangement with DIRECTV.⁷⁰ Sinclair

⁶² *Id.* at 30. Mediacom refers to the arrangement as a "Bounty Payment Agreement."

⁶³ *Id.*; see also 47 U.S.C. § 325(b)(3)(C); 47 C.F.R. § 76.64(l).

⁶⁴ Mediacom Complaint at 31.

⁶⁵ *Id.*

⁶⁶ Sinclair Answer at 18.

⁶⁷ *Id.*

⁶⁸ Mediacom Reply at 17.

⁶⁹ *Id.* at 17-18.

⁷⁰ In a "per inquiry" arrangement, a broadcaster, or other programmer, is compensated for running an advertisement solely based on sales generated by such advertisement.

asserts that the arrangement was negotiated between DIRECTV and the Fox Affiliate Board and is available to Fox affiliates nationwide. Mediacom concedes that the per-inquiry agreement is not an arrangement between Sinclair and DIRECTV arising out of its dispute with Mediacom, and that such arrangements are not uncommon in the industry.⁷¹ Moreover, the agreement was not negotiated by Sinclair, is not specific to any retransmission consent agreement negotiation and predates the instant retransmission consent dispute.⁷² Nor can we conclude that the arrangement between DIRECTV and Sinclair rises to the level of a *de facto* exclusive retransmission consent agreement between Sinclair and DIRECTV. Nothing in the record leads us to conclude that the compensation flowing to Sinclair from the per-inquiry arrangement eliminates Sinclair's incentive to reach a retransmission consent agreement with Mediacom given the financial consequences of a failure to do so.

IV. CONCLUSION

24. This dispute, at bottom, arises from a fundamental disagreement between the parties over the appropriate valuation of Sinclair's signals. Such disagreements, without more, however, are not indicative of a lack of good faith. Even with good faith, impasse is possible. As the Commission stated in the *Reciprocal Bargaining Order*:

MVPDs and broadcasters alike will not be required to engage in an unending procession of extended negotiations. . . . [P]rovided that a party to a [good faith] negotiation complies with the requirements of the Commission's rules, failure to reach agreement would not violate either Section 325(b)(3)(C) or Section 76.65 of the Commission's rules.⁷³

In light of our finding that Sinclair did not breach its obligation to negotiate retransmission consent in good faith, our formal involvement in this dispute is ended. Nevertheless, we strongly encourage the parties to engage in hard bargaining to achieve an agreement.

25. Moreover, we recognize the cost to consumers if Mediacom and Sinclair do not reach an agreement by January 5th. The Commission does not have the authority to require the parties to submit to binding arbitration. However, we strongly encourage them to submit to binding arbitration. Both parties could agree to final binding arbitration by the Media Bureau. We note that, if both parties agree to final binding arbitration by the Media Bureau, we would require Sinclair to authorize Mediacom's continued carriage of its stations' signals during the pendency of arbitration pursuant to the terms of the November 30, 2006 agreement between the parties. In the alternative, this arbitration could be conducted through the American Arbitration Association. Although we would not have authority to order continued carriage in this case, we would encourage the parties to do so.

⁷¹ Mediacom Reply at 18.

⁷² Our finding here relates solely to the facts of the instant dispute and is not intended to prejudge the issue of "so-called" bounty arrangements negotiated to impact specific retransmission consent transactions.

⁷³ *Reciprocal Bargaining Order*, 20 FCC Rcd at 10339 ¶ 14.

V. ORDERING CLAUSES

26. Accordingly, **IT IS ORDERED** that Mediacom Communications Corporation's Emergency Retransmission Consent Complaint and Complaint for Enforcement for Failure to Negotiate Retransmission Consent Rights in Good Faith against Sinclair Broadcast Group, Inc., filed pursuant to Sections 76.7 and 76.65 of the Commission's rules **IS DENIED**.⁷⁴

27. This action is taken pursuant to delegated authority under Section 0.283 of the Commission's rules.⁷⁵

FEDERAL COMMUNICATIONS COMMISSION

Donna C. Gregg
Chief, Media Bureau

⁷⁴ 47 C.F.R. § 76.7, 47 C.F.R. § 76.65.

⁷⁵ 47 C.F.R. § 0.283.

APPENDIX

CONFIDENTIAL MATERIAL

This Appendix discusses information which the parties have asserted is proprietary and confidential pursuant to 47 C.F.R. § 0.459. This information has been redacted from the published item.

Paragraphs 16 and 17 as set forth in full read:

[REDACTED]