

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Lafayette City-Parish Consolidated)	
Government of Lafayette, Louisiana,)	
d/b/a/ Lafayette Utilities System,)	
)	
Complainant,)	File No. _____
)	
v.)	
)	
Communications Corp. of America, Inc.,)	
White Knight Broadcasting, Inc., and)	
Duane Lammers,)	
)	
Defendants.)	

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**COMPLAINT FOR FAILURE TO NEGOTIATE
RETRANSMISSION CONSENT RIGHTS IN GOOD FAITH**

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SUMMARY

Pursuant to Sections 76.7 and 76.65 of the Commission’s rules, the City-Parish Consolidated Government of Lafayette, Louisiana, acting through its utilities department, the Lafayette Utilities System (“LUS”), submits this complaint against Communications Corporation of America (“ComCorp”), White Knight Broadcasting, Inc. (“White Knight”), and Duane Lammers (collectively “Defendants”) for violating the Commission’s rules requiring broadcasters to exercise “good faith” in negotiating retransmission consent agreements.

As shown below, the Defendants have violated both the Commission’s procedural and substantive “good faith” standards by, among other things, putting forth “take-it-or-leave-it” proposals; refusing to consider anything but cash compensation; refusing to make “must have” Fox programming available to LUS unless it also accepts a local low-power station and an out-of-market station that LUS does not need or want; demanding rates for the “must have” Fox

programming that are several times higher than the going rates for similar programming in Lafayette; insisting that LUS pay the same exorbitant rates for the low-power and out-of-market stations as the Defendants are demanding for the “must have” Fox programming; and submitting proposals without even having read them, thereby omitting key information and unreasonably delaying the negotiations. In short, considering the “totality of the circumstances,” it is clear that the Defendants have no “sincere desire to reach an agreement that is acceptable to both parties”¹ but simply want to abuse their market power over LUS to gouge unfair and unreasonable concessions from it.

I. BACKGROUND AND OVERVIEW

1. Lafayette, a city of 120,000 residents, is located in South Louisiana about half way between Baton Rouge and Lake Charles on U.S. Interstate Route 10. In January 2009, Lafayette’s utility department, Lafayette Utilities System (LUS), is going to launch a \$110 million fiber-to-the-home system. The system will consist of more than 870 miles of optical fiber and state-of-the-art equipment and facilities, and it will make advanced communications services and capabilities available to more than 60,000 homes, schools, businesses, and institutions throughout the City. Unique among fiber systems in the United States, the Lafayette system will enable all businesses and residents within the City to communicate with each other at speeds of at least 100 Megabits/second in both directions without extra charge. Affidavit of Steven Glen Creeden (“Creeden Aff.”), at ¶ 3.

¹ *In the Matter of: Implementation of the Satellite Home Viewer Improvement Act of 1999 Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, CS Docket No. 99-363, *First Report and Order*, ¶ 32, 15 FCC Rcd. 5445, 2000 WL 279298 (F.C.C.) (“*Good Faith Order*”), *recon. granted in part*, 16 FCC Rcd 15599 (2001).

2. Lafayette is one of the most conservative cities in America, and its leadership and residents typically look first to the private sector to meet the community's needs for products and services.² That is just what occurred here. Recognizing that a world-class fiber-to-the-home system would set Lafayette apart from other cities in Louisiana and the United States and would serve as a powerful engine of economic development, educational and occupational opportunity, global competitiveness, and quality of life, the City's leaders repeatedly asked the incumbent communications providers to develop such a system in Lafayette. Only after AT&T and Cox emphatically refused several times did the City decide to take matters into its own hands and develop a publicly owned and operated fiber system. Supported by a rare consensus among both the City's Democratic and Republican parties, the City's business community, including all 20 past heads of the local Chamber of Commerce, and numerous community groups, the City put the matter to a referendum and won a landslide vote of 62-38% to proceed with the development of a public fiber system. *Creeden Aff.*, at ¶ 4.

3. Over the last three years, despite refusing to meet the Lafayette community's requirements, the incumbents did everything possible to derail the City from doing so itself. Not only did the incumbents fight the project at the local level, but they also sought to derail it at the Louisiana State Legislature, the Louisiana Bond Commission, the Louisiana Public Service Commission, and the courts. None of these efforts succeeded, and the Louisiana Supreme Court has now definitively and unanimously ruled in the project's favor.³

² Lafayette was ranked the ninth most conservative city in the United States in Bay Area Center for Voting Research, *The Most Conservative and Liberal Cities in the United States*, <http://tinyurl.com/662znu> (last visited October 17, 2008).

³ *Naquin v. Lafayette City-Parish Consolidated Government*, 950 So.2d 657 (La. 2007).

4. Now, on the threshold of launching its fiber system, LUS has encountered a significant new challenge from a different direction. For the Lafayette fiber system to succeed financially, it must be able to offer the “triple play” of competitive voice, broadband, and cable services. To do that, LUS must be able to obtain essential cable television programming – particularly from the four major television networks – at reasonable and non-discriminatory rates, terms and conditions. Knowing that LUS has an urgent need to finalize its cable lineup by January 2009, the Defendants have sought to use their exclusive control over “must-have” Fox programming to obtain grossly excessive rates from LUS, not just for the Fox programming itself, but also for a local low-power station and for an out-of-market channel that LUS does not want. *Creeden Aff.*, at ¶ 5.

5. Specifically, the Defendants have threatened to withhold KADN-TV/DT, the Fox affiliate for Lafayette, until LUS (1) agrees to pay rates for KADN that far above the going rates for similar programming in Lafayette, (2) agrees to carry KLAF, a limited-audience local low-power station, and WVLA, a Baton Rouge station, and (3) agrees to pay for KLAF and WVLA the same exorbitant rates that the Defendants demand for KADN.

6. As shown in greater detail below, the Defendants’ negotiating tactics violate both the Commission’s procedural and substantive “good faith” negotiation standards. LUS therefore urges the Commission to review this matter on an expedited basis; find that the Defendants are not negotiating in “good faith;” order the Defendants to provide KADN-TV/DT programming by not later than January 1, 2009; establish reasonable rates for that programming, commensurate with market conditions in Lafayette; enjoin the Defendants from demanding that LUS accept programming from KLAF and WVLA as a condition to receiving programming from KADN;

impose sanctions and/or forfeitures on the Defendants; award LUS its reasonable costs, including attorneys fees; and provide LUS such additional relief as the Commission deems appropriate.

II. JURISDICTION

7. The Commission possesses jurisdiction over this matter pursuant to Section 325(b)(3)(C) of the Communications Act, 47 U.S.C. § 325(b)(3)(C).

III. THE COMPLAINANT

8. The Lafayette City-Parish Consolidated Government is a political subdivision of the State of Louisiana. It is acting in this matter through its utility department, Lafayette Utilities System. Lafayette Utilities System will provide video programming service in Lafayette as of January 2009.

IV. THE DEFENDANTS

9. Communication Corporation of America (“ComCorp”) owns and operates the local Fox affiliate serving the City of Lafayette, KADN-TV, a full-power station licensed in the Designated Marketing Area (DMA) for Lafayette, and its digital counterpart KADN-DT. ComCorp also owns or controls a low-power station, KLAF-LP, which is also licensed in the Lafayette DMA. The Louisiana Secretary of State lists ComCorp’s mailing address and principal office as 700 St. John St., STE. 300, Lafayette, LA 70501. On information and belief, ComCorp’s principal owner is a venture fund based in Greenwich, CT, known as Silver Point Capital.⁴

10. White Knight Broadcasting, Inc. (“White Knight”) owns and operates WVLA-TV, a full-power NBC affiliate licensed in the DMA for Baton Rouge, LA. The Louisiana

⁴ “ComCorp Ready for its Next Chapter,” *TVNewsday* (November 6, 2007), <http://tinyurl.com/6bqxbv>.

Secretary of State lists White Knight's mailing address and principal office as 700 St. John St, STE 301, Lafayette, LA 70501. On information and belief, White Knight Broadcasting, Inc. is a subsidiary of White Knight Holdings, Inc.⁵

11. Communications Corp. of America and White Knight Holdings, Inc. entered jointly administered Chapter 11 bankruptcy in June 2006, and emerged from bankruptcy in October 2007.⁶

12. Duane Lammers is an individual whose business address is 1001 Boardwalk Springs Place, Suite 111, O'Fallon, MO 63368. Defendant Lammers has been the negotiating agent for Defendants ComCorp and White Knight with respect to retransmission consent agreements at issue in this Complaint.

13. LUS brings this Complaint against the multiple named Defendants pursuant to Section 1.735(a) of the Commission's rules. Defendants ComCorp, White Knight, and Lammers appear to have acted in concert and are jointly liable to Complainant. The Complaint concerns common questions of law or fact applicable to both Defendants.

V. STATEMENT OF FACTS

14. On March 13, 2008, Terry Huval, Utility Manager of LUS, wrote letters to various broadcasters, including ComCorp, notifying them that LUS was going to enter into the cable business in Lafayette and wanted permission to retransmit their signals pursuant to 47 C.F.R. § 76.64. Creeden Aff., at ¶ 7; Attachment A.

⁵ Joint Disclosure Statement For Joint Chapter 11 Plan of Reorganization For Communications Corporation of America, Inc., White Holdings, Inc. and Filed Subsidiaries as of March 14, 2007 (Bankr. W.D. La.), <http://tinyurl.com/5stg34>.

⁶ "White Knight Holdings, Inc.," *Business Week Online* (October 1, 2007), <http://tinyurl.com/6ehgq6>.

15. On April 8, 2008, Gary Boulanger of ComCorp responded to Mr. Huval with letters on behalf of KADN and WGMB. The letters stated that KADN and WGMB elected retransmission consent pursuant to 47 C.F.R. § 76.64(f) and would forward their standard retransmission consent agreements under separate cover. Creeden Aff., at ¶ 8; Attachments B and C.

16. Also on April 8, 2008, in language nearly identical to Mr. Boulanger's letters, except for the name and location of the station, Sheldon Galloway of White Knight responded to Mr. Huval stating that WVLA elected retransmission consent pursuant to 47 C.F.R. § 76.64(f) and would forward its standard retransmission consent agreement under separate cover. Creeden Aff., at ¶ 9; Attachment D.

17. Shortly afterward, Defendant Lammers sent to LUS two draft retransmission consent agreements. One of these draft agreements, which Lammers submitted as agent for ComCorp, covered both KADN and KLAF. Creeden Aff., at ¶ 10; Attachment E. It set forth the following monthly per-subscriber rates for each: █████ for 2008, █████ for 2009, █████ for 2010, and █████ for 2011. *Id.*

18. The other agreement, which Defendant Lammers submitted as agent for White Knight, covered WVLA and demanded the same rates that ComCorp demanded for KADN and KLAF: █████ for 2008, █████ for 2009, █████ for 2010, and █████ for 2011. Creeden Aff., at ¶ 11; Attachment F.

19. In contrast to the ABC affiliate that serves Lafayette, which has a large local news, weather, and programming staff in Lafayette and provides extensive Lafayette-oriented programming, KADN has no local news or programming staff and merely imports programming from a Fox affiliate in Baton Rouge. That affiliate – and, in turn, KADN – treats Baton Rouge as

the relevant local market and covers affairs in Lafayette only sporadically, when and to the extent they may be of interest to viewers in Baton Rouge. Creeden Aff., ¶ 12.

20. KLAF once had its own transmitter in Lafayette, but ever since ComCorp emerged from its bankruptcy proceeding in 2007, KLAF has reached its limited audience through one of KADN's multicast streams. Thus, KLAF's costs are likely to be considerably lower than other low-power stations. Creeden Aff., ¶ 13.

21. Considering the limitations in the services that KADN and KLAF was proposing and the rates that LUS was simultaneously negotiating with other comparable stations, LUS believed that ComCorp's and White Knight's proposed rates were grossly inflated for the Lafayette market. Creeden Aff., ¶ 14. For example, LUS was negotiating (and has now entered into) a retransmission consent agreement with KATC, a full-power ABC affiliate based in Lafayette, LA, for a flat monthly per-subscriber rate of █████ for 2009, 2010, and 2011. *Id.*; Attachment G. Similarly, LUS was negotiating (and has now entered into) a retransmission consent agreement with KPLC, a full-power NBC affiliate in Lake Charles, LA, for monthly per-subscriber rates of █████ for 2009, █████ for 2010, and █████ for 2011, and WAFB, a full-power CBS affiliate in Baton Rouge, for monthly per-subscriber rates of █████ for 2009 through 2011. *Id.*; Attachment H. LUS was also negotiating (and has now entered into) a retransmission consent agreement with KAJN Lafayette, a low-power Lafayette station, for a monthly per-subscriber rate for █████ for 2009 through 2011. *Id.*; Attachment I. As to low power stations, LUS was negotiating (and has now entered into) retransmission consent agreements with KLWB and KLFT, two low-power stations in Lafayette, for monthly per-subscriber rates of █████ for 2009, █████ for 2010, and █████ for 2011. *Id.*

22. On or about August 5, 2008, LUS sent to Mr. Lammers a counterproposal for KADN and KLAF. Creeden Aff., ¶ 15; Attachment J. Based on its assessment of the market rates prevailing in Lafayette, LUS proposed a package of cash payments and various promotional and advertising concessions that it believed would be beneficial to all concerned. The package included monthly per-subscriber rates for KADN of █████ for 2008, █████ for 2009, █████ for 2010, and █████ for 2011. For KLAF, LUS proposed a uniform rate of █████ for 2008-11. *Id.*

23. LUS did not make a counterproposal for WVLA. Creeden Aff., ¶ 16. WVLA is a Baton Rouge station, and its programming reflects that city's distinct identity and culture,⁷ and White Knight was not offering to provide any local Lafayette programming or news. Furthermore, LUS was negotiating (and has now entered into) a retransmission consent agreement at substantially lower rates with another NBC affiliate, KPLC. *Id.*; Attachment H. KPLC is significantly viewed in Lafayette, so WVLA could not invoke network non-duplication or syndicated programming exclusivity rights to prevent LUS from importing signals from KPLC. LUS therefore had no interest in carrying WVLA. *Id.*

24. On August 14, 2008, the Defendant Lammers responded by email to LUS's counterproposal. Creeden Aff., ¶ 17; Attachment K. In its entirety, the email read as follows, with our emphasis added:

⁷ According to Google Maps, the driving distance between Baton Rouge and Lafayette is 60.1 miles, <http://tinyurl.com/37kw64>.

From: Duane Lammers [mailto:duanelammers@centurytel.net]
Sent: Thursday, August 14, 2008 2:14 PM
To: Steve Creeden
Subject: RE: Retransmission Consent Counter Proposal

Steve:

I am not going to bother working on this until we get closer to an agreement on economics. So your counter is hereby rejected due to the suggested carriage fees. *We are not interested in promos. Cash is king. In addition, WVLA will be part of any deal on the same terms that you carry the other stations.* If you would like to make another offer, let me know.

Duane Lammers

25. On September 8, 2008, the Defendants took two steps to raise the pressure on LUS. One was to assert network non-duplication and syndicated programming exclusivity, through a letter of that date from Steve Pruett, KADN's CEO, to LUS's Terry Huval. Creeden Aff., at ¶ 18; Attachment L. This precluded LUS from obtaining from any other source the Fox and syndicated programming listed in the appendix to the letter. *Id.* The other step was to send the following email to LUS:

From: Duane Lammers [mailto:duanelammers@centurytel.net]
Sent: Monday, September 08, 2008 11:35 AM
To: Steve Creeden
Subject: Signup

Are you signing customers up for service? If so, don't you think you have an obligation to change your website so that you are not representing local station carriage that has not been granted?

Duane Lammers

Creeden Aff., ¶ 18; Attachment M.

26. LUS's representative, Steve Creeden, promptly responded as follows:

From: Steve Creeden
Sent: Monday, September 08, 2008 2:53 PM
To: 'Duane Lammers'
Subject: RE: Signup

I don't understand the purpose of your last e-mail. It does not seem to be related to our negotiations for reaching an agreement for carriage of the stations you represent.

We are not taking orders from prospective customers, and we have not publicly disclosed our channel lineup. Our website is accurate. The FAQ you reference states that our television lineup will contain "local channels" and it will. We do not infer in any way that it will contain any of the channels you represent.

Thanks for your concern and interest,

Steve Creeden

Creeden Aff., ¶ 19; Attachment N.

27. On October 6, 2008, Defendant Lammers emailed two revised agreements to LUS, stating in his cover email that "We have changed our contracts, so I am sending you new copies. I also gave you a break on rates." Creeden Aff., ¶ 20; Attachment O. One of the revised agreements, labeled "Lafayette Utility White Knight Retrans10.06.08.doc," identified KFXK, a Fox affiliate in Longview/Tyler, Texas, as the station covered, and it set forth monthly per-subscriber rates of [REDACTED] for 2009, [REDACTED] for 2010, and [REDACTED] for 2011. *Id.*; Attachment P. The other agreement, labeled "Lafayette Utility CCA Retrans10.06.08.doc," did not identify any station, and set forth the same rates as the ones for KFXK. *Id.*; Attachment Q.

28. On October 10, 2008, Steve Creeden, representing LUS, called Defendant Lammers to obtain clarification of his transmission of October 6. During the call, Defendant Lammers confirmed that he was still representing both ComCorp and White Knight, apologized for not having read the agreements before sending them to LUS, and confirmed that the

Defendants were still requiring that LUS accept all three stations – KADN, KLAF, and WVLA. He also stated that he might consider lower rates for KLAF as the negotiations proceeded. Creeden Aff., ¶ 21.

29. On October 14, 2008, Steve Creeden, joined by Frank Ledoux of LUS, had a follow-up telephone conversation with Defendant Lammers. Mr. Ledoux opened the discussion by stating that he was a manager of the LUS fiber project and that he was prepared and fully authorized to reach a successful conclusion of the negotiations. Turning first to WVLA, Messrs. Creeden and Ledoux stated that LUS had no interest in obtaining that station, and they asked that Defendant Lammers reconsider his position that LUS had to take all three stations – KADN, KLAF, and WVLA. Defendant Lammers responded that he had insisted from the outset that LUS had to take the three stations as a package, that his position had not changed, and that “there was no sense in wasting any of our time proceeding with this call unless LUS agreed to discuss an arrangement that specifically included all three stations.” Defendant Lammers then added, “I have the leverage and will use it. You may or may not know who I am, but there are only two guys in the country that do what we do, and I am one of them. I have pulled stations off for up to 10-12 months in order to get an agreement.” Mr. Ledoux then asked Defendant Lammers to confirm that he would not consider a proposal that did not include WVLA. At first, Defendant Lammers replied “I am not saying I wouldn’t consider it. I know the rules and I am not going to back myself into a corner.” Later in the discussion, however, he repeated that the call would be a “waste of time” unless it included all three stations as a package deal, and he responded “Yes” when Mr. Ledoux asked him to confirm that he would not consider an arrangement that did not include WVLA. Creeden Aff., ¶ 22.

30. With no agreement in sight because of the Defendants' intransigence and failure to negotiate in good faith, LUS has come to the Commission for assistance. The Defendants' demands leave LUS in the untenable position of either accepting an economic deal that amounts to extortion, or foregoing the carriage of programming that is essential to its success. The Commission must take prompt remedial action, as described more fully below.

VI. LEGAL ARGUMENTS

31. The Defendants' conduct violates their duty to negotiate retransmission consent agreements in good faith, as required by 47 U.S.C. § 325 and the Commission's implementing rules, 47 C.F.R. § 76.65. Following the enactment of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"),⁸ the Commission issued an order – commonly referred to as the "*Good Faith Order*" – establishing two tests of "good faith."⁹ The first test consists primarily of procedural requirements intended to ensure a fair negotiating process. The second test allows an operator to present facts that, given "the totality of the circumstances," demonstrate to the Commission that a defendant or defendants are not negotiating in good faith. In this case, the Defendants have run afoul of the both of these tests.

⁸ In the SHVIA, Congress amended Section 325 to require the Commission to promulgate regulations that would "prohibit a television broadcast station that provides retransmission consent from ... failing to negotiate in good faith." 47 U.S.C. § 325(b)(3)(C)(ii).

⁹ *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999, First Report and Order ("Good Faith Order")*, 15 FCC Rcd 5445, 5450-51, 2000 FCC LEXIS 1336.

A. The Defendants Have Violated the Commission’s Procedural “Good Faith” Standards

32. A broadcaster is not negotiating in “good faith” if it has violated one or more of the Commission’s seven *per se* procedural prohibitions set forth in 47 CFR 76.65(b).¹⁰ The following prohibitions apply in this case:

(b) Good faith negotiation—(1) Standards.

The following actions or practices violate a broadcast television station’s ... (the “Negotiating Entity”) duty to negotiate retransmission consent agreements in good faith:

(i) Refusal by a television broadcast station to negotiate retransmission consent with any multichannel video programming distributor;

...

(iii) Refusal by a television broadcast station to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations;

(iv) Refusal by a Negotiating Entity to put forth more than a single, unilateral proposal;

(v) Failure of a Negotiating Entity to respond to a retransmission consent proposal of the other party, including the reasons for the rejection of any such proposal;

(vi) Execution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programming distributor;

47 C.F.R. § 76.65(b)(1).

1. The Defendants have violated the Commission’s prohibition on single, unilateral proposals

33. Read in isolation, the Commission’s terse ban on single, unilateral proposals could easily be gamed by sophisticated broadcasters such as the Defendants here. All that a

¹⁰ *Good Faith Order*, ¶¶ 40-46.

broadcaster would have to do, as Defendant Lammers has sought to do here, is to take an extreme opening position, offer trivial concessions, and pretend to be open to counteroffers. Recognizing this, the Commission has provided instructive clarifications that leave no room for doubt that the Defendants here have violated the single, unilateral proposal prohibition:

The Commission has held that “[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. *The Commission has also indicated that 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.*

“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 [Multichannel Video Programming Distributor] 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.* This standard does not, in any way, require a broadcaster to reduce the amount of consideration it desires for carriage of its signal. *This standard only requires that the broadcaster be open to discussing more than one form of consideration in seeking compensation for retransmission of its signal by MVPDs.*¹¹

34. As the emphasized passages indicate, broadcasters cannot simply insist that a cable operator take unwanted programming, nor can they reject out of hand any form of consideration other than cash. Here, Defendant Lammers has given LUS no choice but to take unwanted programming – at grossly inflated rates. He has also flatly declared that “Cash is King” and rejected all other forms of compensation. These “take it or leave it” demands plainly violate the Commission’s single, unilateral proposal rule.

¹¹ *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements, Report and Order and Notice of Proposed Rulemaking*, MB Docket No. 07-198, 22 FCC Rcd. 17791, 2007 WL 2846428 (F.C.C.) (“*Program Access Report and Order*”), ¶ 123 (emphasis added) (footnotes omitted).

2. The Defendants have violated the Commission’s requirement that broadcasters provide reasoned explanations for rejecting retransmission consent proposals

35. A broadcaster violates its duty to negotiate in good faith if it fails “to respond to a retransmission consent proposal of a multichannel video programming distributor, including the reasons for the rejection of any such proposal.” 47 C.F.R. § 76.65(b)(v). On numerous occasions, the Defendants have rejected LUS’s counterproposals outright, with little or no explanation of the reasons for the rejection. For example, Defendant Lammers dismissed out of hand LUS’s counterproposal to pay a combination of cash and in-kind compensation for programming from KADN and KLAF, insisting that “Cash is king.” Not only was that explanation *per se* insufficient as a matter of law, as shown in the previous section, but it also revealed that the Defendants were completely uninterested in finding solutions that work for all concerned, as the Commission’s rules require. Similarly, the Defendants have also repeatedly failed to provide any explanation for why LUS should pay far higher rates for KADN programming than the going rates in the Lafayette market for comparable programming, or why LUS should also pay the same inflated rates for KLAF and WVLA as the Defendants are demanding for KADN. The reason for the Defendants’ conspicuous silence on these matters is obvious – any attempt at explanation would reveal the absurdity of the Defendants’ positions.

3. The Defendants have violated the Commission’s prohibition on entering into agreements that preclude a party from entering into a retransmission consent agreement with any other party

36. The Defendants are not negotiating with LUS independently but are working together to achieve benefits that none would have individually. In particular, White Knight, acting alone, would not be able to force LUS to carry WVLA at all, much less at the extortionate rates that the Defendants are demanding. As a result it has apparently entered into a written or

verbal agreement that precludes ComCorp from entering into a retransmission consent agreement to provide KADN to LUS on a stand-alone basis. Such an arrangement violates 47 C.F.R. § 76.65(b)(1)(vi).

4. The Defendants have violated the Commission’s requirements to negotiate an agreement, to meet and negotiate at reasonable times and locations, and to not unreasonably delay negotiations

37. The Defendants have at times flatly refused to work with LUS to craft a mutually acceptable agreement. For example, in his email of August 14, 2008, Defendant Lammers stated that he is “not going to bother working on this...” Similarly, in his telephone conversation with Steve Creeden and Frank Ledoux on October 14, 2008, Defendant Lammers refused to negotiate unless and until LUS agreed to accept WVLA and KLAF along with KADN. Such refusals to negotiate violate 47 C.F.R. § 76.65(b)(i).

38. Similarly, Defendant Lammers’s negligent submission of draft agreements to LUS without even reading them first, resulting in the omission of essential information, has unreasonably delayed the negotiations in violation of 47 C.F.R. § 76.65(b)(i).

39. The Defendants have also acted in a manner that unreasonably delays retransmission consent negotiations. For example, on October 6, 2008, Defendant Lammers submitted revised proposals to LUS without even having read them first, resulting in the inclusion of erroneous information and the omission of critical information. These actions violate 47 C.F.R. § 76.65(b)(iii).

B. The Defendants Have Violated the Commission’s Substantive “Good Faith” Standard

40. In addition to violating the Commission’s procedural “good faith” standards, the Defendants have also violated the Commission’s substantive “good faith” standard. As the FCC observed in its *Good Faith Order*, a broadcaster violates the latter standard where “the totality of

the circumstances reflect an absence of a sincere desire to reach an agreement that is acceptable to both parties and thus constitute a failure to negotiate in good faith.”¹² That is the case here.

41. Furthermore, the Commission has also observed that,

[W]e will entertain complaints under the totality of the circumstances test alleging that specific retransmission consent proposals are sufficiently outrageous, or evidence that differences among [cable operator] agreements are not based on competitive marketplace considerations.

Good Faith Order, ¶ 32.

42. As described thus far, and in further detail in the following sections, the Defendants’ manifestly unreasonable proposal – by which it is attempting to hold essential programming for ransom, at the expense of a new competitor – is sufficiently outrageous as to amount to a breach of its duty to negotiate in good faith.

1. The rates that the Defendants are demanding for KADN are outrageous

43. In its *Good Faith Order*, the Commission indicated that a proposal by a television broadcaster can be so outrageous as to violate the Commission’s good faith negotiation requirements. That is, if a broadcaster proposes a rate structure that is manifestly out of proportion to the commercial value of the station or makes other outrageous demands on the cable operator, the Commission may reasonably conclude that the broadcaster has no good faith intention of reaching a fair deal with the cable operator in question but instead seeks to abuse its market power.

44. That is the plainly the situation here. The rates that the Defendants are demanding for KADN are far higher than the rates for ABC, CBS, and NBC programming in Lafayette. Furthermore, unlike the ABC affiliate serving Lafayette, KADN does not have any

¹² *Good Faith Order*, ¶ 32.

local news or programming staff in Lafayette and will not provide extensive local Lafayette news, weather or programming. Rather, KADN will merely import programming from a Fox affiliate in Baton Rouge that treats Lafayette as a step-child and covers local affairs in Lafayette only sporadically, when they may be of interest to viewers in Baton Rouge. Not only does this make KADN's offering less desirable to residents of Lafayette, but it also precludes the Defendants from arguing that its high rates for KADN are in part necessary to recover costs of providing local news or programming. Thus, fair and reasonable rates for KADN should be far below the rates that LUS has obtained from KATC and somewhere within the range of the rates that LUS has obtained from KPLC and WAFB.

45. The Commission has stated that proposals may be "presumptively legitimate" even if they (1) seek compensation above that agreed to with other MVPDs in the same market, (2) are different from compensation offered by other broadcasters in the same market, or (3) are conditioned on carriage of other programming (e.g., tying agreements).¹³ The facts in this case overcome these presumptions. In this case, the rates that Defendants demand are not merely somewhat higher than market rates in Lafayette, but they are vastly higher. Furthermore, the Defendants are not simply tying KADN, KLAF and WVLA together as a means of *lowering* the cash rates that LUS would have to pay for KADN alone. Rather, the Defendants are tying these three stations together to obtain grossly inflated rates for *all* of them.

2. The Defendants' demand that LUS carry both KLAF and WVLA at the same exorbitant rate as KADN amounts to an abusive tying arrangement

46. To date, the Commission has been unwilling to issue a blanket prohibition of tying arrangements. The Commission has recognized, however, that such arrangements can be

¹³ See *Good Faith Order*, ¶ 56.

harmful to cable operators and the public, and it has said that it will take appropriate action in cases in which such harm is shown. Specifically, the Commission has stated:

[W]e will not adopt rules specifically prohibiting tying arrangements at this time. *In coming to this conclusion, we recognize that substantial evidence must be presented to support a claim that a tying arrangement exists and that the operator suffers harm as a result. Without proof to support the case, it is difficult for the Commission to formulate an appropriate remedy. . . .* While such arrangements are now permitted, we will continue to monitor the situation with respect to potential anticompetitive conduct by broadcasters in this context. *If, in the future, cable operators can demonstrate harm to themselves or their subscribers due to tying arrangements, we will be in a better position to consider appropriate courses of action.*¹⁴

47. Furthermore, the Commission stated in the *Program Access Rulemaking*:¹⁵

When programming is available for purchase only through programmer-controlled packages that include both desired and undesired programming, MVPDs face two choices. First, the MVPD can refuse the tying arrangement, thereby potentially depriving itself of desired, *and often economically vital*, programming that subscribers demand and which may be essential to attracting and retaining subscribers. Second, the MVPD can agree to the tying arrangement, thereby incurring costs for programming that its subscribers do not demand and may not want, with such costs being passed on to subscribers in the form of higher rates, and also forcing the MVPD to allocate channel capacity for the unwanted programming in place of programming that its subscribers prefer. In either case, the MVPD and its subscribers are harmed by the refusal of the programmer to offer each of its programming services on a stand-alone basis. . . . Moreover, *we note that small cable operators and MVPDs are particularly vulnerable to such tying arrangements because they do not have leverage in negotiations for programming due to their smaller subscriber bases.*¹⁶

¹⁴ *First DTV Carriage Order*, ¶¶ 35-36.

¹⁵ While we certainly encourage the Commission to take appropriate action in its *Program Access Rulemaking* to protect the competitive viability of smaller cable operators, the importance to LUS (and to cable competition in the Lafayette area) of prompt, specific, remedial action cannot be understated. From a broader perspective, this Complaint provides the Commission an opportunity to demonstrate that violations of the Commission's retransmission consent negotiation rules can be effectively addressed on a case-by-case basis. Doing so in this case should not preclude the Commission from adopting reasonable reforms on this subject as part of its *Program Access* docket.

¹⁶ *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, Report and Order and Notice of Proposed Rulemaking*, MB Docket No. 07-198, 22 FCC Rcd. 17791, 2007 WL 2846428 (F.C.C.) ("*Program Access Report and Order*"), ¶ 123 (emphasis added).

48. The facts in this case bear out the Commission’s concerns. If left unchecked, Defendants’ conduct in this case will have a strong anticompetitive effect that dampens competition in Lafayette, injures LUS, and harms the residents of the City.

49. As the Commission has also recognized, in today’s communications market, cable television services are often “inextricably linked” with voice and broadband services.

We have stated that broadband deployment and entry into the MVPD business are “inextricably linked.” One basis for this observation is the recent emergence of LECs, cable operators, and some other providers offering consumers a “triple play” of voice, MVPD, and broadband Internet access services. The offering of, and competition in, the triple play brings to consumers not just advanced telecommunications capability, but also a simplicity and efficiency that is proving to be highly attractive in the marketplace.¹⁷

50. That is certainly true of LUS’s fiber system. By preventing the Defendants from impairing LUS’s ability to deploy its state-of-the-world broadband system in January 2009, the Commission would therefore not only serve the purposes of 47 U.S.C. § 325, but it would also serve the purposes of Section 706 of the Telecommunications Act of 1996, which requires the Commission to ensure that advanced telecommunications services and capabilities are deployed to all Americans as rapidly as possible:

As several commenters point out, the 1992 Cable Act sought to promote competition and consumer choice in cable communications. In addition, the purpose of the Communications Act of 1934, as amended, is “to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges.” Moreover, Section 706 of the Telecommunications Act of 1996 directs the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans. . . .” Removing barriers to allow access to a broad

¹⁷ *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MD Docket No. 07-51, *Report and Order and Further Notice of Proposed Rulemaking*, ¶ 20, 22 FCC Rcd. 20235, 2007 WL 3353544 (F.C.C.) (*MDU Order*) (citations omitted).

segment of consumers in the multichannel video programming distribution market by prohibiting exclusivity clauses for the provision of video services will further these statutory purposes.¹⁸

51. Although the passages quoted immediately above involved the Commission's ban on exclusive service agreements at multiple dwelling units, the same considerations apply here.

3. The Defendants' demands are the products of an improper exercise of market power, the effect of which is to impair competition in Lafayette

52. The Commission has stated that a proposal reflecting an abuse of market power, including terms so onerous and unrealistic effectively foreclose options for competitive cable providers, is "presumptively inconsistent" with broadcasters' obligation to negotiate carriage agreements in good faith. According to the Commission, the following would be improper, and presumably worthy of Commission action:

Proposals involving compensation or carriage terms that result from an exercise of market power by a broadcast station or that result from an exercise of market power by other participants in the market (*e.g.*, other MVPDs) the effect of which is to hinder significantly or foreclose MVPD competition.¹⁹

53. The Defendants are using their position of market power to impose outrageous carriage agreements upon LUS. The effect of the Defendants' improper actions will be to hinder significantly or foreclose competition that would otherwise emerge from the launch of LUS's new cable system. In short, the Defendants are attempting to gouge a new competitive entrant

¹⁸ *MDU Order*, ¶¶ 46-47.

¹⁹ *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999, First Report and Order (SHVIA Order)*, 15 FCC Rcd 5445. 5450-51, 2000 FCC LEXIS 1336, ¶ 58.

and obtain a ransom for programming that may be vital to LUS's survival – and they quite likely are exercising market power with full knowledge of that fact.

54. The Commission can and should act against Defendants' improper conduct. Defendants have violated the Commission's good faith negotiation requirements based on the totality of the circumstances, as set forth in section 76.65(b)(2), causing competitive harm to LUS. As the Commission has stated, such conduct is presumptively inconsistent with "competitive marketplace considerations."

VII. COUNT 1 – PER SE VIOLATION OF DUTY TO NEGOTIATE IN GOOD FAITH

55. LUS incorporates by reference the foregoing paragraphs as though fully stated herein.

56. The Defendants have failed to negotiate in good faith an agreement for retransmission of KADN-TV and KADN-DT, by offering only a unilateral, "take it or leave it" proposal, a *per se* violation of the Commission's good faith negotiation rules, 47 C.F.R. § 76.65(b)(1)(iv).

57. The Defendants have refused, and continue to refuse, to negotiate in good faith toward an agreement for retransmission of KADN by LUS, in violation of 47 CFR §§ 76.65(b)(i) and (iii) of the Commission's rules.

58. The Defendants have failed to provide a meaningful response to a retransmission consent proposal for carriage of KADN by LUS, in violation of 47 CFR §76.65(b)(v) of the Commission's rules.

59. The Defendants have entered into an agreement that prevents a party from negotiating a retransmission consent agreement with another party, in violation of 47 CFR §76.65(b)(vi) of the Commission's rules.

VIII. COUNT 2 – VIOLATION OF DUTY TO NEGOTIATE IN GOOD FAITH UNDER THE “TOTALITY OF THE CIRCUMSTANCES”

60. LUS incorporates by reference the foregoing paragraphs as though fully stated herein.

61. The Defendants have demanded that LUS pay rates for carriage of KADN that are outrageous and cannot be justified by competitive market considerations.

62. The Defendants have sought to subject LUS to an “abusive tying arrangement” by demanding that LUS carry two additional stations not desired by LUS -- KLAJ and WVLA -- under the same rates and terms as demanded for carriage of KADN, effectively tripling the cost to LUS of acquiring carriage rights for KADN.

63. LUS is a small cable operator, and a new competitive entrant serving the Lafayette, Louisiana market.

64. The Fox programming sought by LUS through its local affiliate in Lafayette -- KADN -- is economically vital to LUS.

65. The Defendants’ outrageous demands are the product of an improper exercise of market power by, and collusion among, broadcast stations, the effect of which is to hinder significantly or foreclose cable operator competition.

66. Under the totality of the circumstances, Defendants’ demands violate the Commission’s good faith negotiation rules, 47 C.F.R. § 76.65(b)(2).

IX. REQUEST FOR RELIEF

A. Expedited Treatment

67. In light of the short time remaining under the Commission’s rules to negotiate carriage agreements, and LUS’s intention to launch its competitive cable service in early 2009, it is imperative that this matter be resolved promptly. Any delay in granting LUS reasonable

access to vital programming will cause significant harm to consumers and to LUS, and will undermine Congress's objective of promoting competition and diversity in the delivery of video programming services. Accordingly, LUS requests that this matter be resolved on an expedited basis.

B. Declaration that the Defendants are Not Negotiating in Good Faith

68. LUS requests that the Commission declare that the Defendants are not negotiating in good faith, as required by Section 325 of the Communications Act, 47 U.S.C. 325, and Section 76.65 of the Commission's rules.

C. Carriage Order

69. LUS requests the Commission order the Defendants to make KADN available to LUS not later than January 1, 2009, at fair and reasonable rates commensurate with market conditions in Lafayette, Louisiana.

D. Injunction Against Tying Arrangements

70. LUS requests the Commission enjoin the Defendants from demanding that LUS carry KALF or WVLA as a condition to carrying KADN.

E. Other Relief

71. LUS requests that the Commission impose sanctions and/or forfeitures upon the Defendants pursuant to 47 U.S.C. § 503(b) and 47 C.F.R. § 1.80(b); award LUS its reasonable costs, including attorneys fees; and grant LUS any other relief that the Commission deems appropriate.

Respectfully Submitted,



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Counsel for Complainant

October 24, 2008

Before the

**FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Lafayette City-Parish Consolidated)	
Government of Lafayette, Louisiana,)	
d/b/a/ Lafayette Utilities System,)	
)	
Complainant,)	File No. _____
)	
v.)	
)	
Communications Corp. of America, Inc.,)	
White Knight Broadcasting, Inc., and)	
Duane Lammers,)	
)	
Defendants.)	
)	

COMPLAINANT’S VERIFICATION

I, on behalf of the Complainant, have read the Complaint for Failure to Negotiate Retransmission Consent Rights in Good Faith 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 Complaint is well grounded in fact and is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law. The Complaint is not intended for any improper purpose.

/s/

Terry Huval, Director of Utilities
Lafayette Utility System

October 24, 2008

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2008, I caused Public Disclosure copies of the foregoing Complaint to be served by Federal Express, postage prepaid, upon the following:

Defendant ComCorp
General Manager
KADN-TV/DT
1500 Eraste Landry
Lafayette, LA 70506

Defendant White Knight
President
White Knight Broadcasting, Inc.
700 St. John St. Suite 301
Lafayette, LA 70501

Defendant Lammers
Duane Lammers
1001 Boardwalk Springs Place
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O'Fallon, MO 63368



Jim Baller

October 24, 2008