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SUPREME COURT  
OF THE STATE OF WASHINGTON

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BELO MANAGEMENT SERVICES, INC., a Delaware Corporation;  
KIRO-TV, INC., a Delaware Corporation; TRIBUNE BROADCASTING  
SEATTLE, LLC, a Delaware Limited Liability Company; and CBS  
CORPORATION,

Respondents

v.

CLICK! NETWORK, a Department of Tacoma Public Utilities Division  
of the CITY OF TACOMA; and TACOMA NEWS, INC.,

TACOMA NEWS, INC. as

Appellant.

*CORRECTED*

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BRIEF OF RESPONDENTS BELO MANAGEMENT SERVICES, INC.,  
KIRO-TV, INC. and TRIBUNE BROADCASTING  
SEATTLE, LLC

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COME NOW Belo Management Services, Inc. (hereinafter "Belo Management"), KIRO-TV, Inc. (hereinafter "KIRO") and Tribune Broadcasting Seattle, LLC (hereinafter "Tribune Broadcasting") (hereinafter sometimes cumulatively "Broadcasters"), acting by and through their attorneys, Witherspoon Kelley, and hereby respond to the Opening Brief of Tacoma News, Inc. (hereinafter "TNT"), as follows:

## I. INTRODUCTION

Click! Network (hereinafter "Click!"), a division of the utilities department of the City of Tacoma, operates a cable television system, the only publicly-owned system in Washington State. Each of the Broadcasters has entered into a Retransmission Consent Agreement (hereinafter "RCAs") with Click! pursuant to which it pays a separate and confidential monthly fee to each Broadcaster for the right to retransmit the content of television stations owned by Broadcasters in the Puget Sound area.

The Broadcasters have entered into hundreds of RCAs with multi-channel video distributors (hereafter sometimes "MVPDs")<sup>1</sup> who operate cable companies and satellite systems throughout the United States, all of which RCAs are confidential, their retransmission fees being

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<sup>1</sup> MVPDs include cable operators, telephone companies that distribute video signals (like AT&T (U-verse) and Verizon (FiOS)), and satellite television companies (like DISH and DirecTV).

known only to the Broadcaster and MVPD that are parties to a specific RCA.

The Federal Communications Commission (hereinafter "FCC") has promulgated policies and regulations that govern retransmission consent fees. The FCC has determined that RCAs are "highly confidential" and not to be shared with parties other than the broadcaster and MVPD who are parties to a specific RCA. The purpose of this highly confidential system is to encourage competition among broadcasters and MVPDs so that consumers have a multiplicity of broadcast content from which to choose at competitive prices.

The undisputed facts show that public disclosure of the retransmission fees would cause the Broadcasters to suffer millions of dollars in lost revenue because other MVPDs would have access to Click!'s competitive pricing data from private transactions. It is also unrefuted that Click! does not favor disclosure of the retransmission fees because, in the words of its General Manager, "public disclosure will cause irreparable harm to Click! by damaging its competitive position and long term economic performance." (CP 16) Click's concern is that public disclosure of pricing data would give competing broadcasters access to one another's RCAs, driving up fees paid by Click! and its subscribers.

The trial court acted appropriately in entering a very narrow injunction, prohibiting release only of the specific confidential retransmission fees that each of the Broadcasters and Click! have agreed to. All other terms of the RCAs have been disclosed.

## II. RESTATEMENT OF THE ISSUES

Broadcasters respectfully restate the issues presented to the Court for review as follows:

1. Do the retransmission fees contained in each RCA constitute trade secrets, exempt from public disclosure pursuant to the provisions of RCW Ch. 19.108, where the FCC has declared pricing information in RCAs "highly confidential," the pricing information has been maintained as confidential between each individual Broadcaster and Click!, the pricing information is "novel" in that it is not readily ascertainable from another source, reasonable steps have been taken to maintain the confidentiality of the pricing information, and release of the pricing information would cause substantial harm to the Broadcasters?

2. Has clear harm to the public's interest been shown, pursuant to RCW 42.56.540, if the fees were publicly disclosed, where it is unrefuted that Click! and its subscribers would suffer severe financial and other harm, jeopardizing the viability of Click!, because disclosure of

the specific retransmission fees would result in Click! paying higher retransmission fees to broadcasters?

3. Has substantial and irreparable harm to the Broadcasters been demonstrated, pursuant to RCW 42.56.540, if the retransmission fees were publicly disclosed, where it is unrefuted that the Broadcasters would suffer millions of dollars of lost revenue because large MVPDs would have access to a competitor's private transactions, thereby reducing competition?

4. Where the trial court reviewed the RCAs in their entirety, with the exception of the specific retransmission fee paid each month by Click! to each Broadcaster, prior to final entry of the Order for Injunctive Relief, and the Public Records Act ("PRA") does not make *in camera* review mandatory and *in camera* review would not have assisted in determining whether the trade secret exemption was properly claimed, did the trial court err in not undertaking *in camera* review of the unredacted RCAs?

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### III. STATEMENT OF THE CASE

The pertinent facts concerning this appeal are as follows.

A. **TNT's Request Was the First Seeking Disclosure of Retransmission Fees.**

Click! entered into its current RCAs with Belo Management on December 15, 2008, and with KIRO on January 1, 2009, and the term sheet with Tribune Broadcasting on December 23, 2011. (CP 330, 383, 366). The public records request submitted by TNT on February 6, 2013 represented the first time that any member of the public sought disclosure of the retransmission fees charged by any broadcaster. Click! files public reports each year which disclose, in the aggregate, the amount of retransmission fees paid by Click! to broadcasters with whom Click! has entered into RCAs for providing of content. (CP 170-171).

In their negotiations with Click!, Belo Management, Tribune Broadcasting and KIRO have never "gone dark" by refusing to provide content to Click! or reached a negotiating impasse over the retransmission fee to be paid for the content, nor have their RCAs with Click! ever been the subject of extensive discussion before the Tacoma City Council or any other governmental body.

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**B. Federal Statutes and Policy Promote Confidentiality of Retransmission Fees.**

Hundreds of RCAs exist between the three Broadcasters and MVPDs across the country. (CP 35, 888, 895). It is unrefuted that the specific license fees charged pursuant to these hundreds of RCAs are not shared between broadcasters and MVPDs generally, but, rather, are maintained as confidential between the parties to each RCA. (CP 36, 888-890, 895).

RCAs are direct by-products of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") which was designed to protect the health of broadcasters by requiring MVPDs, such as cable and satellite systems, to obtain broadcasters' consent to transmit their signals. Congress' ultimate goal was to "benefit all TV viewers whether they subscribe to cable or not by helping to restore a local television marketplace that functions competitively." 138 Cong. Rec. § 561-02 (Jan 29, 1992) (statement of Sen. Inouye). As a result of this 20-year-old legal framework, hundreds of competing broadcasters nationwide negotiate private RCAs with competing MVPDs in their local markets.

Critical to this process is the expectation that RCA "negotiations are conducted in an atmosphere of honesty, purpose and clarity of

process," for which confidentiality is essential. *See Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, First Report and Order*, 15 F.C.C.R. 5445, 54555, ¶ 24 (2000). As a result, the FCC, as the overseer of the regulatory scheme relating to the RCAs, has routinely designated the fee information contained within RCAs as "highly confidential." *See, e.g., Application of News Corp & the Director Group, Inc. Transferors & Liberty Media Corp.*, 22 F.C.C.R. 12797, 12798 (2001).

C. **Broadcasters and Click! Closely Guard Retransmission Fees as Confidential.**

The unrefuted evidence in this case demonstrates that this essential element of confidentiality has been pursued and implemented by the Broadcasters and Click!. (CP 36, 301, 889-890, 895). The content of the RCAs at issue are known only to Click! and a few select individuals employed by each Broadcaster. (CP 36, 167, 890, 895). Both the KIRO and Belo Management RCAs with Click! contain provisions that the terms of the agreements are to remain confidential. (CP 327, 374). Tribune Broadcasting does not have a formal RCA with Click!, but rather a term sheet (CP 383-384) that contains specific retransmission fees. It is the intention of Tribune Broadcasting to execute a long form RCA with Click!

containing a detailed confidentiality clause, which is the standard operating procedure of Tribune Broadcasting after short term sheets containing key economic terms are executed (CP 895); the Click! General Manager understands Tribune Broadcasting expected the fees stated in its term sheet to be confidential and Click! agreed, consistent with industry practice, to treat the fee information as such. (CP 236).

The affidavit of the General Manager highlights Click!'s practice to keep retransmission fees confidential.

[T]hat it is Click! Network's ('Click!') longstanding practice to keep the terms and conditions of our retransmission consent agreements strictly confidential. We are particularly diligent in maintaining the confidentiality of the proprietary pricing and rate information in these contracts. This information is commercially sensitive to Click! in its business operations. Our efforts include limiting access to these agreements on a need to know basis. These agreements are presented for approval only to, as required by city code, the attorneys within the city attorney's office assigned to Click!, and the finance director, and the superintendent of Tacoma Power, who has been authorized by the Tacoma Utility Board to review and approve such agreements. The agreements are maintained and accessed by only those administrative staff members who are directly responsible for contract management of these agreements. (CP 167).

**D. Retransmission Fees Are Novel Because of Their Origin from Private Negotiations.**

The retransmission fee information contained in the RCAs is unique and novel because it is a product of private negotiations in a

competitive market. (CP 889). The retransmission fee information in the RCAs is of economic value to Broadcasters because it is known only to each Broadcaster and Click!, and not to any other entities in the industry including competing broadcasters and other MVPDs who could use this proprietary information to Broadcasters' detriment. (CP 36-37, 889, 896).

E. **Broadcasters Would Suffer Severe Economic Harm from Public Disclosure of Retransmission Fees.**

There is economic value to Broadcasters in the specific retransmission fee, derived in part from the fact that, since the fees are not made public, Broadcasters are not deprived of the opportunity to bargain for the highest fees with other MVPDs in an environment of confidentiality that is important to delicate negotiations involving significant amounts of revenue to Broadcasters. Public disclosure of the retransmission fees would result in the loss of millions of dollars of revenue to Broadcasters on an annual basis because, if the fees were publicly disclosed, other MVPDs, particularly large cable systems and satellite television providers with which the three Broadcasters conduct business, would seek to renegotiate fees using the fees negotiated with Click! as a baseline. (CP 37, 889-890, 896).

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F. **Click!'s and the Public's Interests Face Significant Harm if Retransmission Fees are Disclosed.**

In addition to the significant harm that would be suffered by Broadcasters if the retransmission fees were disclosed, Click! would suffer extreme financial harm if the retransmission consent fees were publicly disclosed because, knowing what the highest fee charged by any broadcaster was, all broadcasters could seek to negotiate the highest fee with Click!, thereby driving up Click!'s costs. This is the same result that would obtain if the Broadcasters, as a group, colluded or negotiated collectively with Click! rather than separately and in confidence, as they have always done.

Click! has significant concern about harm to its subscribers from disclosure because of the threat to the continued viability of Click's operation as a cable system. (CP 168-171). Because Click!'s retransmission fees would increase, these costs would necessarily be passed on to subscribers to Click! in the Tacoma area. Such higher subscriber fees could result in subscriber loss for Click!, further compounding the harm. (CP 168). The subscriber fee currently charged by Click! to its subscribers is only 60% of the amount the other local cable system charges its subscribers (RP 56), and because of this lower rate, Comcast, the only cable competition to Click! in the Tacoma market

"charges lower rates than in other markets where it is the only operator." (CP 169). To the extent higher subscriber fees would result if the retransmission consent fees in the RCAs were publicly disclosed, Click!'s ability to charge lower subscriber fees to its customers would decrease, all to the detriment of the citizens of the Tacoma area. (CP 169).

Thus, the unrefuted facts in this case establish that:

(1) The confidentiality of retransmission fees in RCAs is, in part, the result of Congressional intent to level the playing field between broadcasters and MVPDs, the result being that the FCC has determined that retransmission fee information is "highly confidential;"

(2) The three Broadcasters and Click! have taken all measures possible to maintain the strict confidentiality of the retransmission fees set out in each of the individual RCAs so that the fees are known only to Click! and a few select individuals at each of the individual Broadcasters;

(3) The retransmission fee in each RCA is unique and novel because it is not known to any parties other than Click! and a specific Broadcaster and is the product of closely-guarded, private negotiations, and the fee in each RCA has independent economic value to the specific Broadcaster because it is known only to that Broadcaster and Click! and not to any other entities in the industry, and thus, other MVPDs cannot use that proprietary information to the detriment of the Broadcasters; and

(4) The level playing field would be disrupted if the retransmission fees were publicly disclosed because other MVPDs would have the unilateral advantage of knowing fees paid by Click! to Broadcasters, providing a potential baseline for fees paid under their RCAs with Broadcasters, resulting in the loss of millions of dollars of revenue to the three Broadcasters on an annual basis;

(5) Click! would suffer significant financial harm if the retransmission fee information in the RCAs was publicly disclosed because all broadcasters with which Click! does business would seek to negotiate with Click! the highest fee paid to a broadcaster, thereby driving up Click!'s costs, to the detriment of Click!' subscribers, and threatening the continued viability of Click!.

#### **IV. SUMMARY OF ARGUMENT**

Public records that qualify as trade secrets are exempt from disclosure pursuant to the "other" statute provision of RCW 42.56.070(1), which incorporates the Uniform Trade Secrets Act ("UTSA"), RCW Ch. 19.108, as an exemption under the PRA.

Under Washington law interpreting the UTSA, pricing information that is not generally known or readily ascertainable by competitors, to whom the information would be valuable, is a trade secret as a matter of law. In addition, as a uniform act, the UTSA, as codified under

RCW Ch. 19.108, has been construed by other jurisdictions to protect pricing information as trade secrets.

The FCC, as the federal agency overseeing negotiation and implementation of RCAs, has determined that the retransmission fee information contained in RCAs is "highly confidential," 25 F.C.C.R. 8016, 8107 (June 22, 2010, letter of William T. Lake, Chief, FCC Media Bureau), and public disclosure of the same would place broadcasters "at a competitive disadvantage." Case law and regulations adopted by the FCC are persuasive authority that the pricing information is protected as a trade secret under Washington law.

The retransmission fees set out in the RCAs constitute trade secrets because the fees are "novel" in the sense that the information is not readily ascertainable from another source, the fees have independent economic value because public disclosure of the same would provide other MVPDs with an unfair advantage in their monetary negotiations with Broadcasters, and the Broadcasters and Click! have taken all reasonable steps to ensure the confidentiality of the fee information.

Because the retransmission fees constitute trade secrets, the trial court acted appropriately, pursuant to RCW 42.56.540, in enjoining release of those portions of the RCAs detailing the fee information.

The record in this case is unrefuted that disclosure is not in the public interest, as the trial court held, because significant harm would accrue to Click! if the fee information were made public because broadcasters with whom Click! does business would seek to have Click! pay the highest fee paid to any of the broadcasters, all to the significant financial detriment of Click! and its subscribers. Click! has determined that operation of a cable system is beneficial to the citizens of the Tacoma area by offering competition to private cable companies and subscriber fees approximately 60% of the fees charged by private systems, such competition and lower fees being threatened by disclosure.

Moreover, evidence in the record establishes that harm in the amount of millions of dollars would accrue to the Broadcasters because other large MVPDs across the country would seek to use the retransmission fees paid by Click! as the basis for negotiating fees paid by these larger MVPDs. As a result, the record is unrefuted that the Broadcasters would suffer substantial and irreparable damage if the fees were publicly disclosed, satisfying the requirements of RCW 42.56.540.

The trial court did not err in not reviewing the unredacted RCAs *in camera* because unrefuted affidavits establish that the only information deleted from the RCAs by the Broadcasters relates to the retransmission fees. *In camera* review generally is undertaken only if such review is the

exclusive way to determine if an exemption has been properly claimed, and reviewing the specific amount of the fees would not have assisted the court in determining whether the UTSA exemption was properly claimed. Moreover, RCW 42.56.550(3) authorizes the court to make a determination as to whether records are exempt "in a hearing based solely on affidavits."

## V. ARGUMENT

### A. Not All Public Records Are Subject to Disclosure.

Throughout the trial court proceedings and in its briefing TNT has made the conclusory assertion that, because the RCAs constitute public records, they are subject to disclosure without any redaction. The Broadcasters do not dispute that the RCAs are public records. However, it is clear under Washington law that numerous public records and, in particular, those portions of the RCAs that address confidential fee information, are not subject to disclosure.

While courts are instructed to review public records with a view toward disclosure, the mere fact that there are more than 400 exemptions under the PRA and other statutes establishes that not all records must be disclosed to the public. Washington courts have spent a considerable amount of time evaluating some 90 specific exemptions set out under the PRA, in addition to other statutory exemptions and, as a result, have

protected from disclosure a multitude of public records, including those involving trade secrets.

The Washington Supreme Court has stressed that, even though the PRA usually encourages broad disclosure, trade secrets are accorded protection:

The legislature...recognizes that protection of trade secrets, other confidential resource, development or commercial information concerning products or business methods promotes business activity and prevents unfair competition. Therefore, the legislature declares it is a matter of public policy that the confidentiality of such information be protected and its unnecessary disclosure be prevented.

*Progressive Animal Welfare Society v. University of Washington (PAWS II)*, 125 Wn.2d 243, 263, 884 P.2d 592 (1994) (quoting Laws of 1994, Chapter 42, § 1, p. 130).

Thus, the issue in this case is not whether the records are public records; it is conceded that they are. The question is whether there are countervailing interests that dictate that retransmission fees not be publicly disclosed. That countervailing interest is set out in the Legislature's declaration of public policy that the confidentiality of trade secret information be protected to promote business activity and prevent unfair competition, as recognized by the Supreme Court in the *PAWS II* decision, and is reinforced by the federal policy designating RCAs as "highly confidential."

**B. RCW Ch. 19.108 is an "Other" Statute Exempting Trade Secrets from Public Disclosure.**

The PRA protects from public disclosure specific information or records that are exempted or prohibited from disclosure by an "other" statute under Washington law. RCW 42.56.070(1). RCW Chapter 19.108 prohibits disclosure of a trade secret. The UTSA is a statute prohibiting disclosure and, therefore, serves as an "other statute" constituting an exemption under the PRA. *PAWS II*, 125 Wn.2d at 262; *see also* WAC 44-14-06002(7).

**C. Retransmission Fee Information in RCAs Constitutes a Trade Secret.**

Under the UTSA a trade secret is defined very expansively as "(1) information; (2) that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by popular means, by other persons who obtain economic value from its disclosure or use; and (3) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." RCW 19.108.010(4). Determination of whether specific information is a trade secret is a question of fact. *West v. Port of Olympia*, 146 Wn.App. 108, 120, 192 P.3d 926 (2008).

Retransmission fees are trade secrets under Washington law because (1) a comprehensive federal regulatory system has declared such

pricing information to be "highly confidential;" (2) the fees are not readily ascertainable from another source and, thus, are novel, as that term is utilized under the UTSA; (3) the fees derive independent economic value from not being known to any parties other than Click! and the Broadcaster who are parties to a specific RCA; and (4) the Broadcasters and Click! have taken all reasonable steps under the circumstances to maintain the secrecy of the fee information.

1. **FCC Has Determined Pricing Information to Be Highly Confidential.**

The history and background of the market concerning RCAs establishes why RCAs are confidential, commercially sensitive documents and have been designated as "Highly Confidential" by the FCC. The Communications Act of 1934, as amended by the 1992 Cable Act, establishes the federal statutory scheme in which cable operators and other MVPDs must obtain a local television station's consent to carry its broadcast signal.<sup>2</sup> Once every three years, each television station elects one of two alternative paths to govern its carriage by cable systems. 47

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<sup>2</sup> Congress intended to protect the health of the broadcast companies that provide free, over-the-air broadcasting by requiring private distribution systems to obtain the broadcasters' consent for retransmission of their signals. 138 CONG. REC. S14600-03 (Sept. 22, 1992) (statement of Sen. Sanford) (retransmission consent "is merely an attempt to even out the playing field" between broadcasters and cable operators); 138 CONG. REC. S561-02 (Jan. 29, 1992) (statement of Sen. Inouye) (retransmission consent was intended to "benefit all TV viewers whether they subscribe to cable or not by helping to restore a local television marketplace that functions competitively").

U.S.C. § 325(b)(3)(B); 47 C.F.R. § 76.64(f)(2). A broadcaster may invoke the “must carry” law, under which a cable operator *must*, for no fee, retransmit the signals of local television broadcast stations; or a broadcaster may elect the “retransmission consent” provision, under which MVPDs must obtain a commercial broadcast station’s express written consent to transmit the station’s signal. An operator’s total monthly retransmission fee generally is a distinct per-subscriber rate multiplied by the number of video subscribers served by a particular MVPD.

(a) **Federal Policy Concerning RCAs is Intended to Maintain a Competitive Balance Between Broadcasters and MVPDs.**

When Congress established this federal system for cable carriage of broadcast stations in 1992, it intended for broadcasters and cable systems to engage in private, bilateral, marketplace negotiations. In passing the 1992 Cable Act, Congress sought to remedy “a competitive imbalance between the two industries,” the broadcasters and the cable operators, by “rely[ing] on the marketplace, to the maximum extent feasible.” 1992 Cable Act, §§ 2(a)(19), 2(b)(2). Implementing the law, the FCC recognized that “Congress did not intend that retransmission consent rates be directly regulated,” but instead ““inten[ded] to establish a marketplace for the disposition of the rights to retransmit broadcast signals

. . .”). *In the Matter of Implementation of the Cable Television Consumer Prot. & Competition Act of 1992*, 8 F.C.C.R. 2965 (1993) (quoting Senate Committee on Commerce, Science, and Transportation, S.Rep. No. 92, 102d Cong., 1st Sess. (1991) at 36).

Congress deliberately chose not to regulate the market with its other legislative tools, such as imposition of tariffs, direct rate regulation, required public disclosure of rates filed at the FCC, or caps on rate increases. Instead, Congress determined that market competition would be furthered by contracts, privately and bilaterally negotiated in “good faith.” 47 U.S.C. § 325(b)(3)(C). In fact, Congress and the FCC approved of a system in which broadcasters and cable operators would *not* negotiate the same price terms and conditions with all of their counterparts. *Id.*; 47 C.F.R. § 76.65.

(b) **Confidentiality is Key to Federal Policy.**

Critical to this federal system is the expectation that retransmission consent “negotiations are conducted in an atmosphere of honesty, purpose and clarity of process,” for which confidentiality is essential.<sup>3</sup>

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<sup>3</sup> See *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, First Report and Order*, 15 F.C.C.R. 5445, 5455, ¶ 24 (2000)). The FCC protects the confidentiality of RCA's to prevent giving an advantage to competitors whose agreements are not disclosed. See, e.g., *Letter from William T. Lake, Chief, Media Bureau, to Pantelis Michalopoulos, Esq. & Christopher Bjornson, Esq.*, 25 F.C.C.R. 8016, 8017 (June 22, 2010) (confirming that retransmission consent agreement should be designated “Highly Confidential” under an FCC protective order because “such information, if released to

The FCC has granted requests that RCA terms be exempt from Freedom of Information Act ("FOIA") requests pursuant to its regulation, 47 C.F.R. § 0.459.<sup>4</sup> See, e.g., *EchoStar Satellite Corp.*, 16 F.C.C.R. 15070, 15075 (2001) (granting MVPD's request for confidential treatment of exhibits to its retransmission consent complaint that "contain commercial or financial information that would not customarily be released to the public," because disclosure "could place EchoStar at a competitive disadvantage" and "would severely prejudice EchoStar's ability to compete" against other distributors); *In the Matter of: Mediacom Communications Corp.*, 22 F.C.C.R. 35, 46 n.4 (2007) (granting requests by broadcaster and cable system to keep confidential "the sensitive and proprietary nature of certain information" contained in RCAs).

Due to increasing market competition and escalating retransmission fees in recent years, disputes over RCAs have become

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DISH's competitors, would allow them to gain a significant advantage in the marketplace"); *Application of News Corp. & the DirectTV Group, Inc., Transferors, & Liberty Media Corp., Transferee*, 22 F.C.C.R. 12797, 12798 (2007) (designating as Highly Confidential certain materials including RCA's, because of "fear that if competitors obtained the information, they would be able to exploit it to gain an unfair competitive advantage, causing significant harm to the Applicants' businesses.").

<sup>4</sup> In reviewing a request for confidentiality, the FCC considers such factors as whether "the degree to which the information is commercial or financial, or contains a trade secret or is privileged"; "the degree to which the information concerns a service that is subject to competition"; "how disclosure of the information could result in substantial competitive harm"; "any measures taken by the submitting party to prevent unauthorized disclosure"; and "whether the information is available to the public and the extent of any previous disclosure of the information to third parties." 47 C.F.R. § 0.459(b). All of these factors weigh in favor of non-disclosure of RCA's, as the FCC has ruled in the past.

more contentious, and negotiation impasses, which often result in television station carriage disruptions, have affected millions of consumers. Absent confidentiality, disputes between operators and broadcasters over RCAs would likely be more frequent. Thus, protecting the confidentiality of these commercially sensitive agreements is necessary for effective implementation of the federal retransmission consent system.

Furthermore, if the retransmission fees paid Broadcasters were ordered to be disclosed, this would necessarily mean that all fees paid by Click! to content providers (which would include other cable systems and production companies) must be disclosed. This far-reaching result would not only further undermine Washington trade secret law but also throw into complete disarray the level bargaining field desired by Congress. In addition, as indicated herein, the continued viability of Click! would be threatened, not only from a financial perspective, causing economic suffering to its subscribers, but also as to the other ISP services it provides and the technology businesses it fosters. (See Section D(1) herein.)

(c) **Federal Regulation Is an "Other" Statute, Exempting Public Disclosure of Retransmission Fees.**

A federal regulation prohibiting disclosure of information constitutes an "other" statute under RCW 42.56.070(1). *Ameriquest*

*Mortg. Co. v. Washington State Office of Attorney General*, 170 Wn.2d 418 (2010); *Freedom Foundation v. Washington State Dept. of Transportation Div. of Washington State Ferries*, 168 Wn.App. 278, 276 P.3d 341 (2012).

In the *Ameriquest* case, the Supreme Court concluded that federal regulations that prohibited financial institutions from disseminating "personally identifiable financial information," adopted pursuant to the federal Gramm-Bliley Act, exempted from disclosure such information in the hands of the State Attorney General. In the *Freedom Foundation* case, the court determined that a federal regulation that provided for confidentiality of drug and alcohol testing results prohibited disclosure of public employee test results sought through a Washington public records request, concluding that the regulation qualified as an "other statute" exemption under RCW 42.56.071(1). The court stated that, because the regulation at issue there "exists with and because of its enabling statute," it had the force of law, rejecting an argument of the requester that a mere regulation cannot support an exemption under the PRA.

Pursuant to 47 U.S.C. § 325(b), Congress has delegated to the FCC oversight of the retransmission of signals of broadcasting stations, including authorization to adopt rules and regulations pertaining to the industry. FCC Rule 47 C.F.R. § 0.459 provides that information and

materials submitted to the FCC pursuant to this regulatory process are to be provided confidential treatment.

While, on the one hand, TNT argues that FOIA does not protect confidentiality of retransmission fees, the newspaper, on the other, recognizes that FOIA Exemption 4 (5 U.S.C. § 552(b)(4)) protects pricing information that would cause substantial harm to the competitive position of the person from whom the information is obtained; nevertheless, TNT ignores that the FCC has declared that disclosure of retransmission fee information "could result in substantial competitive harm."

The FCC has determined, in numerous instances, that retransmission agreements are "highly confidential" and not subject to public disclosure. In the case of *In the Matter of Nat'l Rural Telephone Cooperative*, 5 F.C.C.R. 2 502 (1990), the FCC ruled that retransmission agreements between satellite carriers and home satellite dish (HSD) distributors are exempt from disclosure under Exemption 4 of FOIA pertaining to commercial and proprietary information and trade secrets. The FCC agreed with the determination of its Common Carrier Bureau that these retransmission agreements "are protected from mandatory disclosure under Exemption 4 of the FOIA." *Id.* at 503.

The agreements at issue before the FCC were retransmission distribution agreements, similar to RCAs, that detail subscriber rates paid

by the distributors to the satellite carriers. In determining that these agreements were not disclosable pursuant to the FCC's authority as set out in 47 C.F.R. § 0.459, the FCC concluded that

Disclosure of the contracts could result in substantial competitive harm. Release of the contracts at issue would provide other carriers with key contractual provisions that they can use in tailoring competitive strategies. Moreover, disclosure could adversely affect the subject carrier's negotiating posture with HSD distributors and might disrupt the carrier's business relationship with HSD distributors currently under contract with the carriers. Thus, the bureau properly concluded that the contracts fall within the scope of Exemption 4.

*Id.* at 503.

(d) **Federal Regulation Must Be Given Deference by the Court.**

Even if, assuming *arguendo*, the FCC regulation does not constitute an "other statute" under RCW 42.56.070(1), this Court must give deference to the FCC's determination that retransmission fees are highly confidential.

The *Ameriquest* and *Freedom Foundation* cases are in accord with the United States Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in which the court stated that "we have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer in the principle of deference

to administrative interpretations." *Id.* at 844. The Supreme Court further noted that "such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

Here, the FCC has determined, citing 47 C.F.R. § 0.459(b)(3), and (FOIA) Exemption 4, that RCAs are "highly confidential" and not subject to public disclosure. This combination of federal statutory and regulatory authority qualifies as an "other" exemption under RCW 42.56.070(1), and, in any event, under the mandate of *Chevron U.S.A.* and Washington case law, must be given considerable weight by this Court in evaluating whether the retransmission fees are exempt from disclosure.

2. **Pricing Information has Been Deemed a Trade Secret in Washington and Other States.**

TNT's argument that only "ideas" are protectable as trade secrets is not supported by Washington law and that of other jurisdictions interpreting the UTSA.

Under Washington law, pricing information is a protected trade secret. *Keystone Fruit Mktg., Inc. v. Brownfield*, CV-05-5087-RHW, 2006 WL 1873800 (E.D. Wash. July 6, 2006) held that information about "sales and prices" that was "specific to [the plaintiff] and not generally known or readily ascertainable by competitors," and which "would be valuable to a

competitor” if disclosed, constituted “trade secrets as a matter of law” under RCW § 19.108.010(4). *Id.* at \*8 (denying defendants’ motions for summary judgment for violation of the UTSA), aff’d, 352 F. App’x 169 (9th Cir. 2009). “[P]ricing strategies and policies” are also protected under the UTSA. *StonCor Grp., Inc. v. Campton*, No. C05-1225JLR, 2006 WL 314336 (W.D. Wash. Feb. 7, 2006) (denying motion to dismiss trade secrets claim). *See also Glacier Water Co., LLC v. Earl*, C08-1705RSL, 2010 WL 3430518, at \*4 (W.D. Wash. Aug. 30, 2010) (denying defendants’ motion for summary judgment on misappropriation of trade secrets claim where trade secrets included “[p]ricing and cost information”).

Additionally, courts in other jurisdictions have determined that pricing information is a trade secret under the UTSA. These cases are relevant here because Washington state courts “construe the UTSA to achieve uniformity among jurisdictions that have enacted it.” *Thola v. Henschell*, 140 Wash. App. 70, 78, 164 P.3d 524, 528 (2007) (citing RCW 19.108.910). In *Franz v. Johnson*, 116 Nev. 455, 468, 999 P.2d 351 (2000), the court held that a pricing list was a trade secret because it was extremely confidential, its secrecy was guarded, and it was not readily available to others. Pricing and data figures are trade secrets if protected from disclosure to the general public. *Iowa Film Producer Services v.*

*Iowa Dept. of Economic Development*, 818 N.W. 2d 207, 220 (2012); see also *In re Union Pacific R. Co.*, 294 S.W. 3d 589 (Tex. 2009), and *Vanguard Transp. Sys. Inc. v. Edwards Transfer and Storage Co.*, 109 Ohio App. 3d 786, 613 N.E. 2d 185 (1996).

The case of *Gannett River States Publishing Co., Inc. v. Energy Mississippi, Inc.*, 940 So.2d. 221 (Miss. 2004) is particularly instructive. In that case, a Mississippi newspaper sought disclosure of the price paid by a Nissan manufacturing plant for electrical services from a private utility. The price was contained in a contract between the utility and Nissan filed with the Mississippi Public Service Commission. Applying the Mississippi UTSA, the Mississippi Supreme Court affirmed denial of the request for disclosure of the negotiated utility fees, finding that the pricing information was a trade secret or confidential commercial or financial information. *Id.* at 226.

The Court accepted as proof of harm the testimony of utility employees, who opined that disclosure of the agreed upon fee would allow other utilities to underbid the privately-owned utility in its attempts to secure high volume electrical users and that other customers of the utility company would seek more attractive terms as to their utility fees, similar to the harm facing Broadcasters if their privately negotiated retransmission fees were publicly disclosed. *Id.* at 223.

3. **Broadcasters Would Suffer Severe and Irreparable Harm and MVPDs Would Obtain Significant Economic Advantage If Retransmission Fees Were Publicly Disclosed.**

Affidavits from persons intimately involved in the negotiation of RCAs demonstrate the economic value to the Broadcasters in not having the retransmission fees publicly disclosed and the countervailing value to MVPDs if the fees were made public.

The evidence before the trial court establishes that, if retransmission fees were publicly disclosed, MVPDs throughout the United States would use the one-sided fee information contained in the RCAs as negotiating leverage to bargain down the fees they pay to the Broadcasters, resulting in millions of dollars of lost revenue. (CP 34-38, 887-893, 894-903).

The economic harm to Broadcasters, if the fee information was publicly disclosed, is real; it is neither illusory, nor is it speculative.

The Affidavit of Jake J. Martinez of Belo Management establishes that, if the retransmission fees were publicly disclosed, this "would likely cost Belo hundreds of thousands of dollars of lost revenue, if not more." (CP 37), because disclosing the fees

Would place the television stations at a competitive disadvantage because cable systems, knowing what the retransmission fee is that is paid for the content of a particular station by another cable station, would be able to

bargain down the license fee it would pay the television station. In other words, if the license fee agreed upon between BMS and Click! network became publicly known, then the other cable systems with which BMS does business would seek to use such license fee as a base point and negotiate lower license fees to be paid by them. (CP 37-38).

The Broadcasters own television stations in other markets that are affiliates of the same television network. If the fee paid by Click! to Belo Management concerning its NBC affiliate in the Puget Sound area were publicly disclosed, the fee would be used by an MVPD in a different market "to negotiate the same or lower license fee for the NBC affiliate owned by Belo" in the other market. (CP 37).

If Broadcaster revenue decreases because MVPDs are able to depress the retransmission fees they will pay, rather than engage in fair, good faith negotiations, this "would present a particular hardship in an economic environment that is extremely challenging to traditional media, such as television stations," (CP 37), undermining the Congressional goal of leveling the bargaining playing field.

Charles J. Sennet, who has served for 30 years as in-house counsel for Tribune Company, the parent company of Tribune Broadcasting, is intimately familiar with the retransmission industry that has developed between Broadcasters and MVPDs. He concludes that "if the fees set out in the Agreement were publicly disclosed, cable operators and satellite

television providers (such as Direct TV and Dish Network) with which Tribune Company does business would use those fees to Tribune's disadvantage in negotiations. This would be information these companies have never had access to before. It is likely public disclosure would cost Tribune Company's 23 television stations in the millions of dollars in annual revenue." (CP 896) (emphasis supplied)).

Mr. Sennet warns that "a decrease of one cent per subscriber per month in fees payable by these systems [cable systems with which Tribune Company does business] would result in annual losses to Tribune Company of more than \$4 million." (CP 896).

KIRO General Manager Jay O'Connor states that KIRO would suffer the same adverse consequences from public disclosure:

If MVPDs had access to the rates and terms of retransmission consent agreements executed by other parties in the market – especially if they had knowledge of the rates and terms of prior KIRO agreements – the MVPDs would have extraordinary, one-sided leverage in negotiating with individual broadcasters like KIRO. For example, if Comcast knew the rates and terms of KIRO's current retransmission consent agreement with Click!, Comcast would have undue leverage in its negotiations with KIRO, especially if KIRO did not have access to the rates of terms of Comcast's current retransmission consent agreements.

There are many reasons for strict confidentiality of the terms of retransmission consent agreements. As mentioned above, public disclosure of the terms of a retransmission consent agreement would place KIRO at a distinct

disadvantage in negotiating retransmission consent agreements with other cable systems and MVPDs. For instance, if license fees were made public, then large cable systems and MVPDs with which KIRO does business would use those license fees as the maximum they would pay KIRO for retransmitting its signal. Such an outcome would, more than likely, cost KIRO hundreds of thousands of dollars in lost revenue. License fees are assessed monthly based on the number of cable customers, so the reduction of ten cents in the monthly license fee paid to KIRO concerning a cable system with 100,000 customers would result in an annual loss in revenue of \$120,000 to KIRO.

In addition, Cox [Media (the parent company of KIRO)] and its subsidiaries have broadcast properties in several other markets and negotiate retransmission consent agreements with cable operators and other MVPDs in those markets. If the terms of the retransmission consent agreement with Click! were made public, then other cable systems with which Cox and its subsidiaries do business in other markets would use the license fees and other terms from the Click! agreement as leverage in negotiating agreements in other markets. . . .

Moreover, if KIRO were negotiating with an MVPD that had detailed knowledge of the rates and terms of KIRO's prior retransmission consent agreements, but KIRO did not have equal access to the rates and terms of the MVPDs' own prior retransmission consent agreements, KIRO would be at a significant disadvantage in negotiations. In my experience, neither side has access to such information, and that equality ensures the ability of both sides to engage in good faith negotiation of the terms of retransmission consent agreements. . . .

Disclosure solely of KIRO's agreement with Click!, or even a handful of broadcasters' retransmission consent agreements with Click!, would distort the competitive market by revealing only a tiny, unrepresentative sample of

agreements with a single municipally-owned operator.  
(CP 889-891).

The evidence presented to the trial court clearly establishes that Belo Management, Tribune Broadcasting and KIRO would suffer significant economic harm if the retransmission fees were made public and that MVPDs, particularly those with significant negotiating leverage, would suffer economic benefit by public disclosure of the fees in an atmosphere where these fees have never been publicly disclosed.

4. **All Reasonable Steps Have Been Taken to Maintain Confidentiality of Retransmission Fees.**

The evidence is unrefuted that all reasonable steps have been taken by the Broadcasters and Click! to maintain the confidentiality of the retransmission fees.<sup>5</sup>

The record establishes that retransmission fees have never been disclosed to any entities, most particularly MVPDs, other than Click! and the particular Broadcaster that is party to a specific RCA. It is further uncontroverted that retransmission fees are maintained as confidential not only between Broadcasters and Click! but also between broadcasters and MVPDs throughout the United States. (CP 35, 890, 895).

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<sup>5</sup> TNT's argument that the retransmission fees would necessarily be disclosed if the RCAs became the subject of litigation is explicitly refuted by RCW 19.108.050, which states that a court shall protect secrecy of trade secrets by granting protective orders as to discovery proceedings, holding *in camera* hearings, sealing court records, and ordering persons involved in litigation not to disclose trade secrets.

This undisputed record of adherence to confidentiality demonstrates that the pricing information is novel and thus qualifies as a trade secret, because it is not "readily ascertainable from another source," which is the definition of "novel" under the UTSA. *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 749, 958 P.2d 260 (1998).

That all efforts to protect the confidentiality of the fees have been undertaken cannot be disputed. Mr. Martinez points out in his Affidavit that Belo Management limits access to the RCAs to himself, three corporate executives of Belo Management, legal staff, and a third party billing company, which is also bound by a confidentiality agreement. (CP 36). Even general managers of Belo Corp's 20 television stations do not know the content of RCAs pertaining to their stations. (CP 36).

Mr. Sennet testified that access at Tribune Broadcasting and Tribune Company to RCAs "is limited to station management personnel and counsel, strictly on a need-to-know basis, with the understanding that the information is to be treated in strict confidence." (CP 895). Mr. Sennet states that "the compensation payable to the broadcaster is never, in my experience, released publicly," (CP 895) and Mr. Martinez agrees, "I am not aware of any public disclosure of license fees set out in any retransmission consent agreement entered into by BMS." (CP 36).

Both Mr. Martinez and Mr. Sennet state that this confidentiality has also been stressed by cable system operators, including Click!. (CP 37, 895).

KIRO takes extra measures to ensure confidentiality of its RCAs with Click! and other MVPDs. General Manager O'Connor states:

The contents of [KIRO's] retransmission consent agreements, and specifically the provisions relating to the license fees charged by KIRO to Click! and any other consideration flowing to the broadcaster or to Click!, are known only to me and two or three other persons at KIRO and relevant executives at Cox. Even other employees at KIRO and Cox are not permitted to know this information.

Cox and its television broadcast subsidiaries take similar extraordinary measures to maintain the strict confidentiality of the terms of their retransmission consent agreements across the country. (CP 890).

In addition, the Click! RCAs with both Belo Management and KIRO contain confidentiality provisions that their terms are not to be disclosed to third parties, unless otherwise ordered by a court. (CP 327, 874).

TNT engages in a circular argument that, because case law states that confidentiality provisions cannot bind a public agency not to release an otherwise non-exempt public record, the trade secrets contained in the RCAs must be released because Broadcasters had to know that release of the RCAs could not be prevented by a confidentiality provision. In other words, TNT begs the question by reading out of existence the case law

that establishes the UTSA as an "other" statute prohibiting public disclosure under RCW 42.56.071(1) and that a trade secret does not lose its confidential status once it is submitted to a public agency. *See, Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 52, 738 P.2d 665 (1987).

Having argued that confidentiality provisions are ineffective because they cannot guarantee non-disclosure, TNT then does an about face and argues that, because the Tribune Broadcasting term sheet does not contain a confidentiality provision, it must be publicly disclosed -- a sort of "damned if you do," and then "damned if you don't" approach. In making this about-face argument, TNT ignores the unrefuted evidence that the Tribune Broadcasting term sheet and the retransmission fee information contained therein were treated by both Tribune Broadcasting and Click! as confidential.

Charles Sennet, Assistant General Counsel for the Tribune Company, states in his affidavit that:

While the two-page agreement does not carry a specific confidentiality provision, it was the understanding of Tribune, in negotiating the Agreement with Click!, that the terms of the Agreement would be confidential, particularly those terms that pertain to the fee that is paid monthly by Click! to Tribune based on the number of Click! subscribers. Tribune intends to execute a long form retransmission agreement with Click! containing a detailed confidentiality clause, as it generally does with other cable companies after signing a short document, like the Agreement, containing the key economic terms. (CP 895).

Tenzin Gyaltzen, the General Manager of Click!, substantiates Mr. Sennet's affidavit:

Nevertheless, I understand Tribune Broadcasting fully expected the fees stated in its term sheet to be confidential and Click! agreed, consistent with industry practices, to treat the fee information as such. So, even though a formal Retransmission Consent Agreement was never executed with Tribune Broadcasting, the fee information in the term sheet that was executed was mutually understood and agreed to be commercially sensitive and confidential. (CP 236).

TNT's argument that the non-disclosure of the retransmission fees limits the public's ability to understand how the fees impact Click's budget is refuted by the affidavit of Click!'s general manager. Mr. Gyaltzen states:

That I understand the public interest in knowing how Click! spends its rate-payers' funds and how Click! makes its operational and management decisions. However, full disclosure of Click!'s retransmission agreements is not the only way such information can be obtained. Detailed financial information concerning Click! Network's business operations and management, including an accounting of its operating budget, revenues, costs and expenditures is available to the public in the form of Click!'s budget. That budget is presented bi-annually for public review and comment when Click! presents it for approval by the Tacoma public utility board and the city council. Additional documentation regarding Click!'s revenues, expenditures and other costs and service information is also publicly disclosed as part of each rate case Click! publicly presents for approval by the utility board and city council. As for management and operations information, that information is available in Click!'s annual Business Plan,

which is available to the public upon request. (CP 170-171).

While the public does not know the specific fee charged by each Broadcaster, general information as to the total retransmission fees paid by Click! is, thus, available to the public and can be analyzed as a component of Click!'s overall budget and financial plan.

**D. The Trial Court Applied Appropriate Standards in Granting Injunctive Relief.**

Uncontroverted evidence before the trial court satisfies the elements of RCW 42.56.540 necessary to grant injunctive relief – that public disclosure of the retransmission fees would clearly not be in the public interest and public disclosure of the fees would substantially and irreparably damage the Broadcasters.

The trial court cited RCW 42.56.540 in granting injunctive relief (RP 108). The court made it clear that the retransmission fees qualify as trade secrets (RP 111), and the court outlined the harm to the public interest from Click! facing "potential higher prices, loss of control" (RP 111), and to the Broadcasters from the the "ripple effect" (RP 111) they would face from large MVPDs seeking to limit fees paid to the Broadcasters.

These findings were made at the initial hearing where Broadcasters' motion for a preliminary injunction was granted. Once the

court determined that a preliminary injunction should issue, TNT immediately moved at the same hearing to certify the order for appeal, pursuant to Civil Rule 54(b) (RP 112), in essence converting the preliminary injunction to a permanent injunction, pending appeal, based on TNT's representation that the Order affected a substantial right and effectively determined the outcome of the proceeding (RP 112).

Given the extensive evidence before the Court concerning the harm which would be suffered by Click! and cable subscribers in the Tacoma area and the millions of dollars of projected lost revenue to the Broadcasters, the trial court's Order granting injunctive relief was not only appropriate but necessary.

1. **Click! and Its Subscribers Would Suffer Clear Harm from Public Disclosure of Retransmission Fees.**

The record demonstrates that disclosure of retransmission fees is clearly not in the public interest.

The City of Tacoma has made the decision to provide cable services to approximately 22,000 households in the Tacoma area. Because of the competition offered by Click! to Comcast, the privately owned cable system in the area, "Click! customers have benefitted from the competition that Click! injects into the market" by being able to receive television content at approximately 60% of the subscriber fees charged by

Comcast. This competition has also resulted in Comcast charging lower rates in the Tacoma area "than in other markets where it is the only operator" to the benefit of non-Click! subscribers.

According to the General Manager of Click!,

If Click! were to fail, the Comcast price disparity currently enjoyed by Click! and non-Click! customers within Click!'s service territory would be lost. Comcast, the country's largest multi-channel video program distributor (MVPD), would become the sole cable television service provider for the Tacoma area, resulting in higher cable television service rates for consumers. (CP 169).

In addition to increased fees paid incurred by cable subscribers in the Tacoma area, according to Click!'s General Manager, "the public would be harmed in additional ways due to adverse impacts disclosure of Click!'s retransmission agreements would have on its economic performance and continued viability." (CP 169) The General Manager cited three other harms that would occur from public disclosure of fees: (1) the loss of Tacoma's unique "open access network" model which provides the platform and hosts internet service providers (ISP), on its network; (2) technology businesses spawned by the open access network might be shuttered, and these locally based businesses "are a vital part of the local economy and provide vitally needed low-cost broadband service to the local community;" and (3) "the choice of service providers for local

businesses will decline, resulting in higher prices from the incumbent service providers." (CP 169-170).

Thus, the General Manager of Click!, who has over 19 years of experience in cable TV operations (CP 235), is adamant that significant harm would be caused to the public if the retransmission fees were disclosed.

2. **Broadcasters Would Suffer Substantial and Irreparable Damage from Public Disclosure.**

The evidence is unrefuted that substantial and irreparable damage would be suffered by the Broadcasters from disclosure.

(a) **TNT's Argument that Broadcasters, as Corporations, May Not Seek Injunctive Relief, is Meritless.**

In a rather amazing argument, TNT claims, for the first time,<sup>6</sup> that since the Broadcasters are not "persons," they are not entitled to any protection from disclosure of their confidential trade secrets. Such a position is contrary to Washington law that trade secret protection is provided to corporations. *See, e.g., Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 58, P.3d 292 (2002), *recon. den.* 149 Wn.2d 1034, 58 P.2d 1292; *Boeing Co. v. Sierracin Corp.*, 108 W.2d 38, 738 P.2d 665 (1987).

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<sup>6</sup> Not only is this argument amazingly meritless, it is untimely since it was never asserted before the trial court, and, thus, TNT has not preserved this issue for appellate review. TNT's assertion does not raise a jurisdictional or constitutional issue, and, therefore, is not subject to review on appeal. RAP 2.5; *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

In addition, the term "person," as utilized in Washington statutes, has been construed to apply to corporations. *See*, RCW 19.108.010(3) defining a "person" under the UTSA to include a "corporation," among others, and RCW 1.16.080(1), defining the term "person" as used throughout the Revised Code to include "any public or private corporation or limited liability company."

Moreover, the PRA, RCW Chapter 42.56, was originally codified as part of RCW Chapter 42.17. RCW 42.17.005(35), now codified as RCW 42.17A.005(35) includes the definition of the term "person" as "an individual, partnership, joint venture, public or private corporation, association, federal, state or local government, entity or agency, however constituted."<sup>7</sup>

TNT's argument, thus, must be rejected not only as irrational, as defeating the protection from disclosure to corporations provided by the

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<sup>7</sup> Moreover, the PRA is replete with exemptions from disclosure that apply to corporate entities. *See e.g.*, RCW 42.56.360(d), proprietary financial and commercial information submitted by an "entity;" RCW 42.56.400(7), information submitted by banks, savings banks, savings and loan associations and credit unions; RCW 42.56.270(2), financial information "supplied by and on behalf of a person, firm or corporation" for the purpose of submitting a bid for construction of a ferry system; and RCW 42.56.270(10)(a), information submitted by a "person, firm, corporation, limited liability company, partnership or related entity" for a liquor license. Nevertheless, according to TNT's argument, none of these entities could seek injunctive protection concerning disclosure of their protected records because under TNT's strained interpretation, RCW 42.56.540 protects only damage to a "person."

PRA, but also as contrary to the definition of the term "person" under RCW Chapter 42.17 and other Washington statutes and case law.

(b) **Harm to Broadcasters from Disclosure is Unrefuted.**

It is unrefuted that the Broadcasters would suffer substantial and irreparable damage if the retransmission fees were released because large MVPDs would use the retransmission fees paid to Click! as a basis for seeking to depress fees paid to the Broadcasters. As an example, the Tribune Company owns 23 television stations and is party to hundreds of RCAs across the United States. Tribune Company Assistant General Counsel Charles Sennet states in his affidavit that public disclosure of the Click! retransmission fees likely "would cost Tribune Company's 23 stations in the millions of dollars in annual revenue;" a decrease of one cent per subscriber per month in fees payable by the cable systems to Tribune "would result in annual losses to Tribune Company of more than \$4 million." (CP 895-896).

The General Manager of KIRO states that KIRO is party to 24 RCAs. Among his concerns is that "one of the parties with whom KIRO has entered into RCAs is Comcast, and "if Comcast knew the rates and terms of KIRO's current retransmission consent agreement with Click!, Comcast would have undue leverage in its negotiations with KIRO,

especially if KIRO did not have similar access to the rates and terms of Comcast's current retransmission consent agreements." (CP 889-890).

Mr. O'Connor states that "if large cable systems and MVPDs learned of the retransmission fees in the Click! RCA, "such an outcome would more than likely, cost KIRO hundreds of thousands of dollars in lost revenue." (CP 890).

Jake Martinez of Belo Management estimates that, if the retransmission fees were made public, it "would likely cost Belo hundreds of thousands of dollars of lost revenue, if not more." (CP 37).

The purpose of the UTSA is to prevent the owner of a trade secret from suffering economic harm and to prevent other entities from obtaining economic value from disclosure of the trade secret, precisely the situation presented in the case at bar. RCW 19.108(4)(a).

**E. The Trial Court Properly Determined That *In Camera* Review Was Not Necessary.**

**1. TNT did not Request *In Camera* Review Until After Order Granting Injunction was Entered and Certified for Appeal.**

At no time prior to entry of the Order for Injunctive Relief at the hearing on March 15, 2013, wherein TNT asked the court to certify the Order for appeal, did TNT ever request that the RCAs be reviewed *in camera*.

It was seven days after entry of the Order and certification that TNT moved for reconsideration, requesting that the unredacted RCAs be reviewed by the court *in camera*. (CP 196-200). The Broadcasters agreed that copies of the RCAs, with the retransmission fee information redacted, could be reviewed by the trial court and publicly disclosed, but resisted *in camera* review by the court of the unredacted RCAs because such review was not necessary to the decision to enjoin disclosure of retransmission fees, which the Court had already determined were trade secrets. (CP 527-530).

The Broadcasters submitted affidavits to the court that the only information that had been redacted from the RCAs was information related to pricing. (CP 325-384). The court then determined that it was not necessary for the court to review the unredacted documents:

I am convinced from what I've heard and read that the only thing that has been redacted are pricing information or trade secret information, items related to pricing, maybe the negotiating strategy with this free advertising, for example, that I think also would constitute a trade secret. So I am going to decline to review the documents.

(RP 176).

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2. *In Camera* Review Was Not Necessary to Determine that Trade Secret Exemption was Properly Claimed.

The trial court's ruling was appropriate. *In camera* review is not mandatory under the PRA, which authorizes a court to make a determination as to exemption of records from disclosure "in a hearing based solely on affidavits." RCW 42.56.550(3). Generally, *in camera* review is undertaken only if it is the exclusive way to determine if an exemption has been properly claimed. *Spokane Research and Defense Fund v. City of Spokane*, 96 Wn. App. 568, 577, 983 P.2d 76 (1999), rev. den., 140 Wn.2d 1001, 999 P.2d 1259 (2000); *see also*, *King County v. Parmelee*, 162 Wn.App. 337, 254 P.3d 927 (2011).<sup>8</sup>

The issues decided by the trial court did not necessitate review of the specific retransmission fees charged by each of the Broadcasters. As a first step, the trial court decided that the UTSA, was an "other" statute providing for exemption of records, pursuant to RCW 42.56.070(1). Review of the specific retransmission fees does not assist in resolution of this statutory interpretation issue.

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<sup>8</sup> Since FOIA parallels the PRA, FOIA cases are helpful in interpreting the PRA. *Hearst v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978). Under FOIA *in camera* review is not required, should not be a matter of routine, and should be engaged in only in rare cases. 37 Am. Jur. 2d, Freedom of Information Act § 544.

Secondly, the court determined that the retransmission fees constituted trade secrets. This involves an analysis of whether the disclosure of the specific retransmission fees would result in harm to the Broadcasters and would provide economic value to third parties and whether reasonable steps had been taken to assure the confidentiality of the retransmission fees. The disclosure of the specific retransmission fees does not assist in determining that the Broadcasters would be harmed by public disclosure of the fees. The evidence presented to the trial court establishes conclusively that the Broadcasters would potentially incur damages of millions of dollars if disclosure of the fees were made public so that large MVPDs could use the fees negotiated with Click! to impact the fees the MVPDs would pay to the individual Broadcasters. This does not require an analysis of the specific fees charged.

Similarly, the evidence is unrefuted that, if the fees were publicly disclosed, large MVPDs would gain an economic advantage by being able to use those fees in their negotiations with Broadcasters as to retransmission fees to be paid under their RCAs. Again, disclosure of the specific fees is not critical to this analysis.

Thirdly, harm to Click! and the public interest is easily determined without resort to the specific fees charged, particularly where the overall

financial effect on Click! from payment of the fees is, in any event, disclosed in financial budgets and records publicly disclosed by Click!

Finally, a review of the specific retransmission fees charged would not assist the court in analyzing whether confidentiality has been maintained, which the unrefuted evidence clearly establishes.

Because RCW 42.56.550(3) provides that exemption from disclosure may be based on affidavits and whether retransmission fees should be exempted may be determined without an analysis of the specific fees charged, the trial court properly determined *in camera* review of the unredacted RCAs was not necessary.<sup>9</sup>

**F. Order Is Not Overly Broad.**

Defendant's assertion that the Order entered by the trial court exempting from disclosure the retransmission fees in the RCAs and in other "related documents" is overly broad is without merit. The Order merely clarifies that Click! and Broadcasters, in responding to future public records requests concerning RCA's, may redact from related

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<sup>9</sup> TNT argues that the Amendment to the Belo Management RCA (CP 343-346) does not implicate specific retransmission fees charged and, therefore, was improperly redacted. That is incorrect because Schedule C to the Amendment (which is the only part of the Amendment containing redactions) sets out specific retransmission fees that Click! and Belo Management agreed to for the three-year period beyond expiration of the initial term of their RCA. (CP 343), ("Schedule C, 'Consideration,' is amended with the new rates effective the first day of the new term (retroactive to January 1, 2012) and attached.") TNT also asserts that the years a specific fee was assessed is unclear because of the redactions. That is incorrect, because the years covered by the Amendment -- January 1, 2012 through December 31, 2014 -- are set out in the unredacted Amendment. (CP 343).

documents retransmission fee information, as an efficient way of handling such future requests.

The language with regard to "related documents" was included in the court's Order for Injunctive Relief at the request of Click! because Click! had received other public records requests "related to these agreements" and sought to ensure that the Order covered not only the retransmission fees in the RCAs but the same fees as set out in other public records. (RP 181).

Although it was explained to counsel for Click! at the May 10, 2013 hearing concerning *in camera* review that requests to Click! for disclosure of related documents could be handled by providing the Broadcasters notice of such requests and an opportunity to object, counsel for Click! stated that "I would rather go off the court's April 12<sup>th</sup> Order. It's clear and to the point and educated based on the actual facts of this case." (RP 183). Counsel's statement was in reference to the court's determination that the retransmission fees would be redacted from the RCAs, which, thus, would also give the City guidance for redaction of the retransmission fees in related documents subject to subsequent public records requests.

Simply put, there is no blanket order that all related documents are exempt from disclosure, but rather the Order reflects that the City of

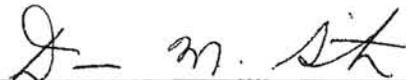
Tacoma may take into account, in reviewing related documents subject to other public records requests, that the trial court has already determined that retransmission fees shall not be publicly disclosed. TNT's objection to the wording of the Order is much ado about nothing, and TNT has pointed to no specific situation where related documents have been redacted more broadly than the original RCAs at issue in this case.<sup>10</sup>

## VI. CONCLUSION

For the reasons set out above, Broadcasters respectfully request that the Order for Injunctive Relief entered by the trial court be upheld.

Respectfully submitted this 11<sup>th</sup> day of September, 2013.

WITHERSPOON · KELLEY



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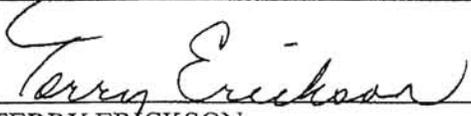
<sup>10</sup> Both TNT and Arthur West have made public records requests subsequent to the one at issue for disclosure of other records related to the RCAs. The approach the City of Tacoma has taken is to inform the Broadcasters of the requests, indicate what it intends to disclose, and then provide the Broadcasters an opportunity to redact retransmission fee information. In reviewing and responding to these subsequent requests, the Broadcasters have not redacted any information other than the same retransmission fees redacted in the Belo Management and KIRO RCAs and the Tribune Broadcasting term sheet.

CERTIFICATE OF SERVICE

I certify that on the 11<sup>th</sup> day of September, 2013, I caused a copy of the foregoing BRIEF OF RESPONDENTS BELO MANAGEMENT SERVICES, INC., KIRO-TV, INC. and TRIBUNE BROADCASTING SEATTLE, LLC to be served on the following by the method indicated:

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**Subject:** Belo Management Services, Inc., et al. v. Click! Network; Tacoma News, Inc. as Appellant; No. 88934-1 -- Brief of Respondents

Good afternoon,

We were advised by Attorney James Beck that the brief submitted on 9/11/13 and served upon counsel was missing page 48. We apologize for this inadvertent omission. Submitted herewith is the Brief of Respondents Belo Management Services, Inc., KIRO-TV, Inc. and Tribune Broadcasting Seattle, LLC, with missing page inserted. Should you have any questions, please do not hesitate to contact this office.

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Case Number: 88934-1

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