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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 the Tacoma Public  
Utilities Division of the CITY OF TACOMA; and  
TACOMA NEWS, INC.

TACOMA NEWS, INC. as,

Appellant.

CBS CORPORATION'S RESPONSE BRIEF

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1 ORIGINAL

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A. INTRODUCTION<sup>1</sup>

This case involves the straightforward application of a clearly established exception to the broad, but not unfettered, access to public records provided by the Washington State Public Records Act (“PRA”). While the PRA contains 141 specific exemptions from disclosure, the Legislature recognized that it could not enumerate every conceivable category of records—either then existing or possibly arising in the future—that should be exempt from disclosure. Therefore, in addition to the specific exemptions from disclosure, the Legislature adopted a general exemption for “any other statute which exempts or prohibits the disclosure of specific information or records.” RCW 42.56.070(1); RCW 42.56.230-.480. In *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994) (“PAWS II”), this Court confirmed that the Uniform Trade Secrets Act (“UTSA”), RCW 19.108 *et seq.* is an exception to the PRA’s broad disclosure mandate.

Thus, contrary to the chief contention of Tacoma News Inc., d/b/a Tacoma News Tribune’s (collectively, “TNT”) on appeal, this case is not about a “conflict” between the PRA and the UTSA; clearly there is no such conflict since this Court has already decided that trade secrets under

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<sup>1</sup> CBS understands that one or some of the other broadcasters will be filing brief(s) in opposition to TNT’s Opening Brief. CBS joins in the other broadcasters’ briefs as though fully incorporated herein.

the UTSA are exempt from PRA disclosure. Instead, the only relevant inquiries in this case are: (1) the evidentiary question of whether, giving the required deference to the trial court's factual findings, CBS Corporation ("CBS") has established that its December 31, 2011 Short Form Retransmission Agreement ("Agreement") with the Click! Network ("Click")<sup>2</sup> contains trade secrets; and, (2) whether CBS has met the requirements for issuance of an injunction. The largely uncontested record before the Court overwhelmingly demonstrates that CBS has satisfied both.

TNT made a PRA request to Click for a copy of the Agreement. CBS's Agreement contains commercially sensitive, confidential information that constitutes a trade secret under the UTSA, and therefore, is exempt from public disclosure under the PRA. As a multi-media company and news organization, CBS is a proponent of access to information and the appropriate public disclosure of documents, and is keenly aware of the importance of statutes like the PRA. TNT's request in the instant case, however, reaches far beyond the accepted bounds of Washington's public disclosure framework and seeks access to highly sensitive, protected commercial information, the release of which would

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<sup>2</sup> Click is a division of Tacoma Public Utilities ("TPU"), which is a Department of the City of Tacoma ("Tacoma").

place CBS at a severe competitive disadvantage in the marketplace, and hurt the public, Click, and CBS. The public has access to information regarding how Click spends its rate-payers' funds and makes its operational and management decisions. Click's total payment of retransmission fees as a whole, and other detailed financial information is similarly publicly available. Here, CBS seeks to protect only a narrow subset of sensitive business information that is properly classified as trade secrets under the UTSA and, as such, is exempted from disclosure under the PRA. The Superior Court correctly enjoined the release of this protected information, and this Court should affirm that injunction.

**B. STATEMENT OF THE CASE**

On March 15, 2013, Presiding Judge Ronald E. Culpepper of the Pierce County Superior Court entered a Preliminary Injunction prohibiting Click, a publicly-owned cable television provider, from disclosing the unredacted Agreement between Click and CBS. (Clerk's Papers "CP" 181-84). The injunction was the result of the Superior Court's application of a clear exception to the PRA preventing the release of protected trade secrets under the UTSA, RCW 19.108. (*Id.*). Over the course of four hearings, lasting several hours, extensive briefing and arguments were heard by Judge Culpepper, who ultimately concluded that CBS's

confidential information contained in its Agreement was a trade secret and therefore, under well-established law, exempt from public disclosure under the PRA.

The relevant facts underlying this appeal are set forth below, and are drawn largely from the numerous declarations submitted by CBS and the other broadcasters. While TNT repeatedly derides the content of these declarations as “speculative,” “conclusory,” and otherwise deficient (TNT Br. at 13-14, 27-31), the newspaper offers no contrary evidence whatsoever. As such, the following factual narrative should be viewed by the Court as essentially uncontested for evidentiary purposes.

1. CBS’s Retransmission Agreement Contains Confidential, Proprietary Business Information.

CBS is a mass media company that creates and distributes industry-leading content across a variety of platforms to audiences worldwide. (CP 559). Among other things, CBS directly or indirectly owns and operates twenty-nine (29) television stations across the country, including KSTW-TV in Tacoma. (CP 574 at ¶3). In order for cable companies or other “multichannel video programming distributors” (“MVPD”),<sup>3</sup> like Click, to retransmit the signal of a television broadcaster,

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<sup>3</sup> In addition to cable television systems, direct-to-home satellite (i.e., Dish Network and DIRECTV) and microwave (“wireless cable”) providers meet the statutory definition (47 U.S.C. §522(13)) of “multi-channel video programming distributors” (See CP 574 at ¶4).

they must have the broadcaster's permission, which usually results in the payment of a "retransmission fee."<sup>4</sup> (*Id.*). The Agreement, whereby CBS granted Click the right to retransmit KSTW's signal over Click's cable system, contains CBS's commercially sensitive trade secret information, including its pricing terms and methods of negotiating retransmission agreements. (*See* CP 573-77; 639-44).

2. Disclosure of CBS's Agreement will harm the public.

Disclosure of CBS's confidential information will harm the public, including but not limited to Click's cable television service customers and the local community. (CP 167 at ¶4). The confidentiality provision in the Agreement is designed "to protect the proprietary and commercially sensitive information found in these agreements." (*Id.*). Click, its customers, and the public will be harmed by the disclosure of the agreements through higher license fees that might result in higher cable television fees, potential non-renewals of the agreements, and the possibility that Click might be unable to compete in the cable television market. (CP 167-68 at ¶4). The public could also lose the market competition that Click's participation provides to the other cable operators

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<sup>4</sup> Under the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §609, cable television systems, such as Click and other MVPDs must have the consent of the broadcaster to retransmit the signal of a television station to its subscribers. (*Id.*).

in the area. (CP 169 at ¶5). And, the public would also lose Click's Open Access Network ("OAN") and the niche technology businesses spawned by the OAN, along with having the choice of providers for businesses decline and increase their price for cable or Internet service. (*Id.*).

Beyond just the public, the "public disclosure of the pricing information contained in the retransmission consent agreements...will cause irreparable harm to Click by damaging its competitive position and long term economic performance." (CP 167 at ¶4).

3. Disclosure of CBS's Agreement will substantially and irreparably harm CBS.

Disclosure of CBS's trade secrets will also substantially and irreparably harm CBS and the other broadcasters. (CP 575-76 at ¶¶6-9). Many households have the choice of three, and sometimes four, cable or satellite providers. (CP 575 at ¶5). In the Seattle-Tacoma market alone, CBS has retransmission agreements with more than ten MVPDs. (*Id.*). This makes for an extremely competitive environment in which the MVPDs are intensely concerned with not being placed at a disadvantage vis-à-vis their competitors in any aspect of their relationship with broadcasters. (*Id.*).

Click operates in a market that is otherwise overwhelmingly private. (*See* CP 169). Indeed, Click is the only municipally-owned

MVPD in the state of Washington. In the private sector, the contracts negotiated between CBS (as well as other broadcasters and cable networks such as ESPN) and various MVPDs are negotiated and kept in the strictest of confidences. (*See e.g.* CP 641 at ¶9). The same is true for contracts with the few municipally-owned cable systems nationwide, which for all intents and purposes function in the same manner as privately-owned MVPDs. (*See e.g., id.*).

Disclosing commercially sensitive terms of CBS's agreements would cause every operator to press for the lowest fee that CBS had afforded to any other provider. (CP 575 at ¶6). Public disclosure of the Agreement would greatly complicate CBS's effort to negotiate advantageous terms with other operators. (*Id.*). In this respect, there is obvious and substantial economic value to CBS in keeping the terms of its agreements confidential. (*Id.*).

Maintaining the confidentiality of retransmission agreements is particularly essential because, like other program rights, agreements for the carriage of broadcast signals are often complex and include disparate provisions that make "apples-to-apples" comparisons between them very difficult. (*Id.* at ¶7). Nonetheless, despite these different non-price terms, MVPDs may be expected to invariably insist on the same terms CBS

negotiated with Click should those provisions become known. (CP 573-76 at ¶7).

The methods by which CBS negotiates its retransmission agreements and the way in which pricing and other terms are determined, constitute proprietary methods and processes that derive independent economic value from not being known to the public, and not being readily ascertainable by cable providers or other MVPDs. (CP 576 at ¶8). The precise way in which CBS negotiates its agreements - including the pricing and other terms included or excluded - is proprietary and could be used by another MVPD or cable provider to maximize its profits and minimize CBS's profits in future negotiations. (*Id.*). The unrestricted disclosure of this highly sensitive content would thus place CBS at a severe competitive disadvantage. (*Id.*).

If the pricing information in any of CBS's retransmission agreements became generally known, it would provide a competitive advantage to the cable operators and other MVPDs with which CBS negotiates such agreements. (CP 642 at ¶10). This would work to the economic disadvantage of CBS. (*Id.*). The cable operator sitting across the negotiating table from CBS's representative would know what terms CBS had accepted in another instance and would surely use that

information to resist paying a higher rate. (*Id.*) While TNT baldly asserts that this should not matter and that CBS should just explain why the present circumstances differ from those of the prior deal known to the other side, this naïve suggestion ignores negotiation room reality. (*Id.*) The economic harm of disclosure is obvious, and is manifested by the independent decisions of the other broadcasters faced with disclosure of their Click agreements to litigate the issue rather than simply accept such disclosure. (*Id.*)

The economic harm to CBS of disclosure of its Click Agreement would not be limited to the Seattle-Tacoma market. (CP 642 at ¶11). Given that the disclosure of the terms of such an agreement would be extraordinary, and indeed unprecedented, in the industry, wide dissemination in the trade press may fairly be anticipated. (*Id.*) Indeed, since TNT is also seeking Click's retransmission agreements with the independently-owned affiliates of the other major networks, such disclosure would likely affect scores of retransmission negotiations nationwide. (*Id.*) This again reflects the fact that these agreements are closely held; CBS's pricing is not known to other broadcasters, and CBS does not know theirs. (*See id.*)

Other broadcasters will doubtless have additional concerns about the disclosure of their retransmission agreements. (CP 643 at ¶12). As one example, it is typical for independently-owned television stations affiliated with a major television network to pay the network a programming fee meant to reflect the value of network programming to the affiliate. (*Id.*). The amount of this fee often takes into account what the network believes the affiliate should be able to realize in retransmission consent revenue, something that broadcasters assiduously keep to themselves. (*Id.*). The disclosure of the actual retransmission rates could cause economic harm to an affiliate in its negotiations with its network. (*Id.*).

Beyond money issues, the inclusion or non-inclusion of particular terms in CBS's retransmission agreement with an operator are in themselves trade secrets. (CP 643 at ¶13). The Agreements contain CBS's ideas concerning the way in which it negotiates its carriage agreements. (*Id.*). These ideas, as well as the resulting final agreement, are either undisclosed or disclosed only on the basis of confidentiality. (*Id.*). For example, CBS may elect to make a concession on a given issue in a particular negotiation in return for a benefit agreed to by an operator, without being willing to do so in other negotiations. (*Id.*). On the other

hand, CBS may “hold the line” on another term that one of its broadcast competitors may negotiate away. (*Id.*). Such decisions are also reflective of CBS’s negotiating methods and business practices, and are therefore trade secrets. (*Id.*). In other words, the information in the agreement, both in the particular and in the aggregate, constitutes confidential trade secrets. (*Id.*). While a given term may or may not be a trade secret, when the terms are put together in the agreement the resulting final document constitutes a trade secret evidencing the entire method or process used by CBS in its negotiations. (*Id.*).

#### 4. CBS Closely Guards its Trade Secrets.

Due to the economic importance of maintaining the confidentiality of retransmission agreements, they are very closely guarded. (CP 576 at ¶9). All of CBS’s agreements, including the one with Click, contain strict provisions preventing the disclosure of any of the agreement’s terms except to a party’s own employees and certain professionals (e.g., outside auditors and attorneys who are subject to strict confidentiality obligations and whose professional ethics bar them from disseminating information) on a need-to-know basis. (CP 640-41 at ¶9). The confidentiality provision in the Agreement recognizes Washington’s PRA, and expressly provides CBS ten (10) days notice to obtain a temporary restraining order

before Click would be allowed to release any records. (CP 588-89). That is precisely what occurred in this instance: Click provided notice of its intent to disclose the unredacted Agreement, CBS immediately moved for a TRO, and the trial court ultimately issued the injunction in this case. (See CP 592; CP 557-72; CP 181-84).

Industry-wide, the terms of these negotiations and agreements are confidential trade secrets and wholly unknown to other broadcasters or MVPDs who are not parties to the individual agreements. (CP 641-42 at ¶9). None of the similar agreements that CBS has entered into for the retransmission of the signals of its other 29 owned and operated stations with other cable providers or MVPDs are publicly known. (CP 574 at ¶3). In fact, the terms of the Agreement are so sensitive that they are only known by an extremely small group within CBS. (CP 639-40 at ¶¶3-4).

Internally, those having access to the agreements include the small group of individuals who work directly on the agreements. (CP 640 at ¶4). Beyond this small group, CBS employees do not have access to these agreements, except for three or four of CBS's most senior corporate

executives. (*Id.*)<sup>5</sup> Even television station managers are unaware of the terms of individual agreements. (*Id.*)

The few CBS employees who are privy to the terms are fully aware of the highly confidential nature of the agreements. (*Id.* at ¶4). The employees know that the information cannot be disclosed, discussed, or shared with anyone outside CBS, and the vast majority of people inside CBS. (*Id.*). CBS employees are required to certify their compliance with the CBS Business Conduct Statement (“BCS”) on a biennial basis. (*Id.* at ¶5; CP 640-41 at ¶5). The information in retransmission agreements falls within the confidentiality requirements of the BCS. (*Id.* at ¶6).

The trade press regularly carries reports of retransmission deals reached between broadcasters and MVPDs. (CP 641 at ¶8). The reporting of these deals does not include any substantive details concerning their terms; rather, such reports invariably state that the “terms of the agreement were not disclosed.” (*Id.*). The uniform industry practice of closely guarding the terms of retransmission agreements supports the characterization of the information as a trade secret. (CP 641-42 at ¶9). The information included in such agreements derives economic value by

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<sup>5</sup> To put this in context, only about 20 CBS employees and executives know the terms of these agreements, out of 23,000 CBS employees company wide. (CP 639-40 at ¶3; CP 650-51). This amounts to less than 0.1% of all CBS employees having access to the terms of these agreements.

virtue of the fact that it is not generally known, as described below. (CP 641 at ¶9). And the terms of such agreements are not readily ascertainable from any other source or document. (CP 642 at ¶9). To the contrary, the information is only contained in documents that CBS vigilantly protects by the inclusion of confidentiality provisions. (*Id.*).

For the same reasons that confidentiality is important to CBS, it is equally important to MVPDs. (*See* CP 169 at ¶5; CP 642 at ¶10). Distributors, no less than programmers, do not want concessions made in a particular context to become generally known. (*Id.*).

**C. RESPONSE TO ASSIGNMENTS OF ERROR**

1. The Superior Court correctly applied the UTSA exception to the PRA to prevent the public disclosure of certain trade secrets contained in CBS's Agreement by determining that: (a) the redacted portions of CBS's Agreement were trade secrets; (b) nondisclosure was clearly in the public interest; and, (c) there would be irreparable harm to, at least, CBS, Click, and the public if CBS's entire Agreement were disclosed.

2. The Superior Court correctly determined that CBS met the requirements for an injunction and applied the correct standard under the PRA.

The Superior Court correctly determined that an *in camera* review of the documents would be unnecessary and futile, given the

uncontroverted declarations establishing the redacted material as trade secrets.

**D. ARGUMENT**

1. The Superior Court's Issuance of an Injunction is Reviewed for an Abuse of Discretion.

TNT misstates the standard of review. As this Court recently reaffirmed in *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 428, 300 P.3d 376 (2013), “[a] trial court’s decision to grant an injunction and its decision regarding the terms of the injunction are reviewed for abuse of discretion.” Judge Culpepper’s decision “is presumed to be correct and should be sustained absent an affirmative showing of error.” *Id.* at 446 (citations omitted).

CBS acknowledges that agency action challenged under the PRA is regularly reviewed de novo. Here, however, the injunction sought by and entered to protect CBS’s trade secrets is not an agency action. Moreover, any doubt of the standard of review is eliminated by the *Resident Action Council* decision reaffirming that an injunction in a PRA case is reviewed for an abuse of discretion.

The trial court’s evidentiary decision to decline *in camera* review of the broadcasters’ unredacted retransmission agreements is also reviewed for abuse of discretion. *See, e.g., Forbes v. City of Gold Bar*,

171 Wn.App. 857, 288 P.3d 384, 389 (2012); *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wn.App. 319, 328, 890 P.2d 544 (1995). The decision may be overturned under this highly deferential standard only where “the decision is manifestly unreasonable or is based on untenable grounds or untenable reasons.” *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, 774-75, 287 P.3d 551 (2012) (citation omitted).

The Superior Court rulings challenged in the instant matter easily withstand scrutiny under the above standards and should be upheld by this Court.

2. The UTSA Exempts Trade Secrets from Disclosure under the PRA.
  - a. The UTSA is an “other statute” exempting certain material from public disclosure under the PRA.

The PRA contains 141 separate provisions exempting material from public disclosure, along with a wide-ranging exemption for “any other statute which exempts or prohibits the disclosure of specific information or records.” RCW 42.56.070(1); RCW 42.56.230-480, RCW 42.56.600 -.610); *see Resident Action Council*, 177 Wn.2d at 433-34.

This Court held in *PAWS II* that the “other statute” exemption “incorporates into the Act other statutes which exempt or prohibit disclosure of specific information or records.” *PAWS II*, 125 Wn.2d at

261. Further, when other statutes “mesh with the Act, they operate to supplement it.” *Id.* at 261-62.

“[I]f another statute (1) does not conflict with the Act, and (2) either exempts or prohibits disclosure of specific public records in their entirety, then (3) the information may be withheld in its entirety notwithstanding the exemption requirement.” *Id.* In analyzing the UTSA under this framework, this Court held—unequivocally—that the UTSA qualifies as an “other statute” that exempts trade secret information that would otherwise be disclosed to the public under the PRA. *See, e.g., PAWS II*, 125 Wn.2d at 262.

The UTSA “operates as an independent limit on disclosure of portions of the records at issue here *that have even potential economic value.*” *Id.* at 262 (emphasis added). One of the purposes of the UTSA is to “protect commercial information concerning business methods.” *PAWS II*, 125 Wn.2d at 263. The Legislature has emphasized that it:

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

Laws of 1994, ch. 42, §1, p. 130 (emphasis added); *see also PAWS II*, 125 Wn.2d at 263.

This Court recently reaffirmed that the “PRA’s mandate for broad disclosure is not absolute.” *Resident Action Council*, 177 Wn.2d at 432. **“Where the legislature has exempted disclosure [under the PRA], a court has no authority to thwart that legislative mandate.”** *Harley H. Hoppe & Assoc., Inc. v. King County*, 162 Wn.App. 40, 54, 255 P.3d 819 (2011) (emphasis added) (holding that non-disseminated tax information was exempt from disclosure under the PRA when it would result in an unfair competitive disadvantage to the taxpayer). In short, **the “Public Records Act is simply an improper means to acquire knowledge of a trade secret.”** *PAWS II*, 125 Wn.2d at 262 (emphasis added).

Even without this clear precedent establishing exemptions to the PRA, basic statutory interpretation principles requiring statutes to be read together so as to obviate conflicts, prevent the Court from ignoring the plain language of UTSA’s specific disclosure exemption. *See Bldg. Indus Ass’n of Wash. v. Dep’t of Labor Indus.*, 123 Wn.App. 656, 666, 98 P.3d 537 (2004) (general mandate for PRA to be liberally construed does not permit courts to ignore plain language of a statutory exemption).

Thus, contrary to TNT's core argument in this appeal, there is no "conflict" between the PRA and the UTSA. (See TNT Br. at 19-20, 32). As a uniform law that has been adopted in substantial part by 45 out of the 50 states, the UTSA reflects a broad national consensus acknowledging the critical function trade secrets serve within the larger economy and favoring the confidentiality of such information. See e.g. Sharon K. Sandeen, *Identifying and Keeping the Genie in the Bottle: The Practical and Legal Remedies of Trade Secrets in Bankruptcy Proceedings*, 44 Gonz. L. Rev. 81, 87-88 (2008) (citations omitted). As a matter of law, the UTSA is part of the PRA's disclosure framework in the specific context of commercial trade secrets, notwithstanding that the protected information may be contained in an otherwise public record. *PAWS II*, 125 Wn.2d at 262. This Court has already determined the issue of whether a trade secret under the UTSA can be disclosed under the PRA. Any argument to the contrary essentially asks the Court to overturn well-settled precedent. See *id.*

b. The PRA does not afford separate treatment to public contracts.

TNT attempts to avoid the well-established confidentiality for trade secrets by asserting that this protection is inapplicable to information contained in public agency contracts. (TNT Br. at 23-25). This argument

is without merit. By their plain terms, neither the UTSA nor the PRA remotely suggest any distinction between written agreements and other categories of public records. Instead, the relevant focus under both statutes is upon the nature of the information sought rather than the form of document within which this content is contained. *See* RCW 19.108.010(4); RCW 42.56.070(1); RCW 42.56.210. If the information at issue satisfies the applicable standard for an exemption, the fact that it may be located within an agency's written agreement is immaterial.

Textual examples under the Public Records Act clearly illustrate this point. Public employment contracts can (and commonly do) include the employee's home address, telephone number, Social Security number, and various other references that are clearly exempt under the PRA. *See* RCW 42.56.250(3). Under TNT's reasoning, this protected content would nevertheless be subject to disclosure simply because the underlying document is a written agreement—a result clearly inconsistent with the Legislature's intent in exempting this information in the first instance. Likewise, an agency's contracts for procurement of materials, financial services and innumerable other matters may contain credit card numbers, bank account numbers, and other sensitive financial information that is expressly exempt from disclosure under RCW 42.56.230(5). It would

obviously defeat the entire purpose of this statutory exemption if an unredacted version of any such contract was subject to public release. TNT's proffered interpretation necessarily invites this absurd result and would effectively read the PRA's numerous exemptions out of the statute in violation of well-established rules of construction. *See e.g., Tahoma Audubon Soc'y v. Park Junction Partners*, 128 Wn.App. 671, 682, 116 P.3d 1046 (2005); *State v. Blair*, 57 Wn.App. 512, 516, 789 P.2d 104 (1990).

The *Spokane Research* decision cited by TNT is inapposite. (TNT Br. at 24). Unlike the instant matter, there was no evidence demonstrating the protected trade secret status of the anchor tenant lease at issue in that case. *Spokane Research & Def. Fund v. City of Spokane*, 96 Wn.App. 568, 983 P.2d 676 (1999). Specifically, the *Spokane Research* court noted that a standard tenant lease was hardly "novel" in the manner contemplated by the UTSA. *Id.* at 578. In contrast, there is nothing "standard" about retransmission agreements. The uncontested declarations in the present case clearly demonstrate that the pricing and other commercially sensitive content of CBS's unique retransmission Agreement are indeed novel under the UTSA standard. (CP 573-77; 639-

44). TNT again ignores this critical evidentiary point—presumably because the newspaper can cite no countervailing evidence itself.

Finally, TNT relies upon *Spokane Research* for the proposition that the TPU retransmission agreements cannot be secrets since they would allegedly need to be disclosed in the event of a default. (TNT Br. at 24). This argument disregards both the confidentiality clause contained in the agreements, and the parties' ability to ensure protection of the trade secret information during the pendency of any ensuing litigation through sealing, redaction, and other applicable methods. *See e.g.*, GR 15. And while TNT correctly notes that contractual confidentiality clauses are generally non-enforceable under the PRA in the abstract, *see Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 137, 580 P.2d 246 (1978), this limitation, obviously, is inapplicable where the subject information is statutorily exempt from disclosure in the first instance. The confidentiality clause in the CBS Agreement is thus not intended to “override the requirements of the disclosure law,” *Hearst*, 90 Wn.2d at 137; rather, it contractually enables CBS to vindicate the trade secret protections afforded under the UTSA, as has happened here. This Court should reject TNT’s contrary arguments, which misrepresent both the record in this appeal and the governing law.

c. CBS has a clear legal right to prevent the release of the Agreement.

The record in this case establishes that the redacted material in CBS's Agreement is a trade secret. "[A] court shall preserve the secrecy of an alleged trade secret by reasonable means." RCW 19.108.050.<sup>6</sup> To establish a trade secret, CBS needs to show that the redacted information in the Agreement is:

- (1) Information, that can include a method or process;
- (2) That derives independent economic value, actual or potential from not being generally known;
- (3) Is not readily ascertainable by other persons who can obtain economic value from its disclosure; and,
- (4) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

RCW 19.108.010(4).

CBS's uncontroverted declarations plainly establish that its Agreement contains protectable trade secrets under the UTSA that are exempt from PRA disclosure.

- (1) The Agreement contains confidential information, including CBS's methods or processes.

The Agreement contains confidential information, including pricing information and other terms that are trade secrets to CBS. (*See*

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<sup>6</sup> Generally, information is protectable as a trade secret if it "meets the criteria of the trade secrets act." *Ed Nowgrowski Ins., Inc. v. Rucker*, 137 Wn.2d 427, 440, 971 P.2d 936 (1999).

e.g. CP 575-76 at ¶¶7-8; CP 641-44 at ¶¶9-13). “Trade secrets law protects the author’s very ideas if they possess *some novelty* and are undisclosed or disclosed only on the basis of confidentiality.” *Buffets, Inc. v. Klinke*, 73 F.3d 965, 968 (9th Cir. 1996) (emphasis added). Here, the holistic make-up of the Agreement, comprising terms both included and excluded, evidence CBS’s ideas in the way in which it negotiates. (See CP 643 at ¶13). CBS’s manner in which it concedes or “holds the line” on terms make its negotiations distinct and different from its competitors, and are therefore trade secrets. (See *id.*).

- (a) Both the individual terms and the compilation of terms in the Agreement are trade secrets.

“A trade secrets plaintiff need not prove that every element of an information compilation is unavailable elsewhere...since trade secrets frequently contain elements that by themselves may be in the public domain but together qualify as trade secrets.” See *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 50, 738 P.2d 665 (1987). That is the case here, where the terms of CBS’s Agreement, both individually and in the aggregate, constitute confidential trade secrets. (*Id.*; CP 643 at ¶13).

- (b) In Washington, pricing information is a trade secret under the UTSA.

The limited information that CBS claims as trade secrets is consistent with the type of information courts have found the UTSA to protect. Washington courts have repeatedly acknowledged the protection afforded to sensitive commercial information under the UTSA and have specifically held that pricing terms are trade secrets. For example:

- In *Keystone Fruit Mktg., Inc. v. Brownfield*, No. CV-05-5087-RHW, 2006 WL 1873800, at \*8 (E.D. Wash. Jul. 6, 2006), the United States District Court found that the compilation of sales information, regarding Keystone's sale of onions in eastern Washington, containing week-by-week records of sales, prices, locations, and future forecasts was a trade secret because as a matter of law the information was "specific to [Keystone] and not generally known or readily ascertainable by competitors." *Keystone*, 2006 WL 1873800, at \*8. The court also found that "the specific sale information would be valuable in the marketing of sweet onions in Walla Walla." *Id.*
- In *StonCor Group, Inc. v. Campton*, No. C05-1225JLR, 2005 WL 2030832, at \* 3-4 (W.D. Wash. 2005), another Federal District Court held that customer files containing pricing information were likely protected as trade secrets, given that

they were “based on confidential information such as [sic] profitability, the customer’s willingness to pay for certain services and products, and whether the customer receives a discounted or premium rate.” *StoneCor*, 2005 WL 2030832 at \*4.

Similarly here, the pricing information regarding CBS’s rates for retransmission consent, and the specific terms included in its Agreement which affect the retransmission rate, are trade secrets that are specific to CBS and not known or ascertainable by CBS’s competitors. (CP 641-42 at ¶¶9, 11). TNT has offered no evidence to rebut these facts.

(c) Other information, similar to pricing, is a trade secret under the UTSA.

Beyond pricing information, Washington courts have also found that other information, similar to pricing, is a trade secret:

- In *Nat’l City Bank, N.A. v. Prime Lending, Inc.*, 737 F.Supp.2d 1257 (E.D. Wash. 2010), the court held that the UTSA protected a bank’s pipeline reports containing bank employee’s compensation and whether employees had loans scheduled for completion, and information about bank’s operations that a competitor could use for a potential acquisition.

- In *Pac. Aerospace & Elecs., Inc. v. Taylor*, 295 F.Supp.2d 1188 (E.D. Wash. 2003), the court held that a customer or client list containing identities, preferences and project information of client contacts constituted a protectable trade secret.

Washington courts have even found a genuine issue of material fact existed as to whether a player's grade in a football scouting report was a trade secret. *Nat'l Football Scouting, Inc. v. Rang*, 912 F.Supp.2d 985 (W.D. Wash. 2012). In short, price is not the only information that can constitute a trade secret.

- (d) In Washington, trade secret exemptions are applied to documents held by governmental agencies.

Trade secret protection applies even when they are contained in documents held by governmental agencies because the PRA "is simply an improper means to acquire knowledge of a trade secret." *PAWS II*, 125 Wn.2d at 262. In *PAWS II*, the documents sought through the PRA from the University of Washington could not be disclosed because the unfunded research grants contained trade secrets consistent with the UTSA's definition. In *Boeing*, 108 Wn.2d at 52, this Court held that Boeing's submission of engineering documents containing trade secrets to the

Federal Aviation Administration (“FAA”) did not permit their disclosure because, if such information was not exempt, it could substantially harm the competitive position of entities required to submit information to a governmental agency.

- (e) Similar information and pricing terms are regularly considered a trade secret under the UTSA in other jurisdictions.

Outside of Washington, countless others courts have also construed the UTSA to include pricing and other similar information. *See e.g. LeJeune v. Coin Acceptors, Inc.*, 381 Md. 288, 311, 849 A.2d 451 (Ct.App.Md. 2004) (pricing and cost data, and pricing documents are confidential); *Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351 (2004) (pricing list is a trade secret because it was extremely confidential, its secrecy was guarded, and it was not readily available to others); *Whyte v. Schlage Lock Co.*, 101 CalApp.4th 1443, 125 Cal.Rptr.2d 277 (Ct. App. Cal. 2004) (cost and pricing data unique to plaintiff are trade secrets); *Hydraulic Exch. & Repair, Inc. v. KM Specialty Pumps, Inc.*, 690 N.E.2d 782, 785, 46 U.S.P.Q.2d 1291 (Ct.App.Ind. 1998) (customer and pricing information together constituted trade secret); *Iowa Film Prod. Svcs. v. Iowa Dept of Econ. Dev.*, 818 N.W.2d 207, 220 (Iowa S. Ct. 2012) (price and data figures can be trade secrets if protected from public disclosure);

*Gannett River States Publ'g Co., Inc. v. Entergy Mississippi, Inc.*, 940 So.2d 221, 225 (Sup.Ct.Miss. 2006) (disclosure would impact plaintiff's ability to offer competitive prices, cripple its ability to negotiate, and jeopardize its ability to keep high volume user contracts to compensate for lower smaller user contracts).

Trade secrets have been established under the UTSA where efforts were made to keep the information secret and when there is an independent economic benefit derived from being generally unknown. *See LeJeune*, 381 Md. at 311. As discussed in more detail below, CBS's redacted Agreement meets these qualifications.

- (2) CBS's trade secret information derives independent economic value from not being generally known.

CBS's trade secret information has "independent economic value" because it gives CBS "a competitive advantage over those who do not know the information." 6A Wash. Prac. WPI 351.05. The mere fact that CBS and its competitors uniformly seek to protect their retransmission agreements is evidence alone of the desire to keep this information confidential from one another. (CP 641-42 at ¶9).

If the trade secret information were publicly disclosed, pricing information would assist cable providers and other MVPDs in their

negotiations. Cable operators and other MVPDs would be at a competitive advantage knowing CBS's pricing information because the competitors would know what CBS had accepted in another instance and would want to use that to pay CBS the lowest possible rate. (CP 642 at ¶10). This would be an economic disadvantage to CBS and an unjust economic advantage to cable operators and other MVPDs. (*Id.*). The pricing information in the Agreement could also be used by cable providers or other MVPDs as a ceiling in future negotiations with CBS. (CP 644 at ¶14). These economic harms would be felt in all of CBS's negotiations nationwide. (CP 642 at ¶11).

CBS has submitted two declarations from its Senior Vice President for Business Development, Joan Nicolais, providing concrete examples of the type of economic value CBS derives from the redacted material in the Agreement (CP 573-77; 639-44); critically, TNT has submitted no declarations—or any other evidence—contradicting Ms. Nicolais's statements, or any of the ten other declarations made by the broadcasters and Click.

Unlike the declarations in other cases which have been found insufficient because they were conclusory, CBS's declarations contain direct examples illustrating how the methods and processes used to

negotiate its Agreement, including the pricing terms themselves, are different than its competitors and how CBS obtains independent economic value from keeping the information confidential. For example, in *Woo v. Fireman's Fund Ins. Co.*, 137 Wn.App. 480, 489, 154 P.3d 236 (2007), the court held that one of the reasons the insurance company manuals were not trade secrets was that the declarations from the insurance company offered “no proof that any rival company would want to copy the manuals nor [did] they quantify in any meaningful way the competitive advantage that the hypothetical plagiarizer would enjoy.” *Woo*, 137 Wn.App. at 489; *see also Buffets*, 73 F.3d at 968 (internal citations omitted) (recipes for common American food dishes were not trade secrets where there was no independent economic value – no relationship between the lack of success of plaintiff's competitors and the unavailability of the recipes).

Unlike *Woo*, CBS's competitors, along with the cable providers and other MVPDs, would want the information in the Agreement and would enjoy a competitive advantage over CBS if the information were available to them. A factor in determining whether CBS's information is a trade secret is whether there is value to a competitor who sets its prices to meet or undercut those of CBS. *See Whyte*, 101 Cal.App.4th at 1455. Unlike *Buffets*, CBS's trade secrets are tied to both the success of its

competitors (who would gain in their own position by knowing CBS's rates and other negotiating terms) and the cable providers and other MVPDs (who would use CBS's terms with Click as the ceiling for their own negotiations).

Through Ms. Nicolais's specific examples, it is clear that the advantages to other broadcasters, cable companies, and MVPDs – and the resultant disadvantages to CBS – demonstrate how CBS's trade secrets derive independent economic value within the meaning of the UTSA.

- (3) CBS's trade secret information is novel; it is not readily ascertainable by others.

“For trade secrets to exist, they must not be ‘readily ascertainable by proper means’ from some other source, including the product itself.” *Boeing*, 108 Wn.2d at 49-50. The test for whether the information is novel is determined by the same analysis. *West v. Koenig*, 146 Wn.App. 108, 120, 192 P.3d 926 (2008) (“To fall within the ambit of the trade secret exemption such information must be ‘novel’ in the sense that the information must not be readily ascertainable from another source.”).

The trade secret information in CBS's retransmission agreements is not readily ascertainable from any other source or document. (CP 641-42 at ¶9). All documents containing CBS's trade secrets are protected by

the inclusion of confidentiality provisions. (*Id.*). Industry-wide, the terms of retransmission agreements are unknown amongst competing broadcasters and/or cable companies and MVPDs. (*Id.*). Given the competitive advantage that would result from knowing another broadcaster's terms, if it were possible to deduce or ascertain that information through any means other than the confidential retransmission agreements themselves, someone would have done so already. (*See id.*).

The present situation is distinguishable from *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 748, 958 P.2d 260 (1998), where this Court held that the tribe's efforts to label its two percent community contribution as a trade secret (because it would indicate information about the tribal casino's profitability) failed because there was no evidence that the casino's profitability could not be generally ascertained by visiting the casino, through newspaper articles, or through employees. *Confederated Tribes*, 135 Wn.2d at 749. To the contrary, here, CBS has established that its trade secrets cannot either generally or specifically be ascertained through any other source. (CP 642 at ¶9). Evidence of this is found in the fact that the trade secret information is kept in the closest confidence, both within and outside of CBS. (CP 639-42 at ¶¶ 3-9). Of course, given the overwhelming secrecy that is afforded

to these documents in the industry, aside from assuming pricing terms are included in other retransmission agreements, CBS can only guess as to what may or may not be in its competitors' agreements. (See CP 641 at ¶¶ 8-9). This factor in and of itself underscores the unavailability of the subject information.

(4) CBS takes reasonable efforts to maintain its trade secret information.

Far beyond “reasonable efforts,” CBS has taken extraordinary measures to maintain the confidentiality and secrecy of its trade secrets; in fact, it is difficult to imagine what else CBS could have done to safeguard its trade secrets other than not contract with Click at all. CBS meets each of the factors identified in the Washington Pattern Jury Instructions for courts to consider in determining whether efforts that were reasonable under the circumstances were made to maintain secrecy. (6A Wash.Prac. WPI 351.108).<sup>7</sup>

CBS does not share its retransmission agreements outside of its business unless they are kept strictly confidential. (CP 640-41 at ¶¶3-6,

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<sup>7</sup> The factors in WPI 351.108 are: (1) The extent to which the information is known outside the plaintiff's business; (2) the extent to which employees and others in the plaintiff's business know the information; (3) the nature and extent of the measures the plaintiff took to guard the secrecy of the information; (4) the existence or absence of an express agreement restricting disclosure; and, (5) the extent to which the circumstances under which the information was disclosed to others indicate that further disclosure without plaintiff's consent was prohibited.

7). The terms are not shared between broadcasters, television stations, or in the press. (CP 641-42 at ¶¶8-9). Within CBS, its retransmission agreements are so closely held that they are only available to a handful of CBS employees – many senior executives do not even have access to the information, nor do the individual television station managers. (CP 640 at ¶4). When CBS employees are allowed access to the information, they must have certified their compliance with CBS’s BCS that prevents the dissemination of confidential or proprietary information about CBS. (CP 640-41 at ¶¶5-6).<sup>8</sup>

The Agreement with Click contains an express confidentiality provision restricting disclosure. (CP 641 at ¶7; CP 576 at ¶9). While the Agreement acknowledges the PRA, it requires Click to provide ten days notice prior to a production so that CBS can obtain exactly the type of injunctive relief it did in this case. Unlike the lease agreement in *Spokane Research*, 96 Wn.App. at 571, there is a confidentiality provision in the Agreement and in the event of a default, both CBS and Click would still

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<sup>8</sup> The BCS provides in part that: “[i]n carrying out CBS’s business, you often learn confidential or proprietary information about CBS[.] Employees, officers, and directors must maintain the confidentiality of all information entrusted to them[.] Confidential or proprietary information includes, among other things, any non-public information concerning CBS, including its businesses, financial performance, results, or prospects, and any non-public information provided by a third party with the expectation that the information will be kept confidential and used solely for the business purpose for which it was conveyed...”

be bound to maintain confidentiality. CBS's extensive precautions to safeguard its trade secrets easily meet the requirement under the UTSA.

3. The Trade Secret Provisions in FOIA and the PRA are not Analogous.

TNT detours into irrelevance with its lengthy discussion of trade secret case law under the federal Freedom of Information Act ("FOIA"). (TNT Br. at 34-38). As TNT itself candidly concedes, FOIA contains wholly different standards for disclosure than the PRA, and the federal statute—which by its terms applies only to federal agencies—simply does not govern review of the instant case. 5 U.S.C. § 552; (TNT Br. at 37). Washington courts have repeatedly recognized that FOIA “differs in many ways” from the PRA. *See, e.g., Cowles Publ'g Co. v. State Patrol*, 109 Wn.2d 712, 731, 748 P.2d 597 (1988). Although Washington courts occasionally look to FOIA for guidance in construing the PRA, *see, e.g., King County v. Sheehan*, 114 Wn.App. 325, 344, 57 P.3d 307 (2002), the federal act and its interpretative case law are not controlling in any manner here.<sup>9</sup>

The federal cases cited by TNT are also easily distinguishable from the present matter on both legal and factual grounds. (TNT Br. at 35-

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<sup>9</sup> Notably, the real importance of FOIA is not merely the applicable standard, but the similarity in that FOIA recognizes that trade secrets are exempt from disclosure, just as they are exempt under the PRA.

37).<sup>10</sup> The statute at issue in the cases cited by TNT was the generic FOIA exemption for trade secrets and commercial information, a provision with different criteria than the UTSA and one not contained in the Public Records Act. Similarly, none of the case law cited by TNT concerns broadcast retransmission agreements. More fundamentally, the evidence supporting confidentiality of the information at issue in these cases was nowhere near as substantial, detailed and lopsided as the numerous uncontroverted and unopposed declarations and affidavits submitted by the broadcasters in the instant litigation.<sup>11</sup> Unlike the “conclusory” and “speculative” justifications for nondisclosure in the cited federal cases, the uncontested record in this case demonstrates—in great detail—the protected status of pricing and related content contained in the broadcasters’ retransmission agreements with TPU, as well as the very real harm that would occur if that information were disclosed. (TNT Br. at 37).

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<sup>10</sup> Citing *Racal-Milgo Gov't Sys, Inc. v. Small Bus. Admin.*, 559 F. Supp. 4 (D.D.C. 1981); *Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37 (D.D.C. 1987); *G.C. Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109 (9th Cir. 1994); *Pac. Architects & Eng., Inc. v. U.S. Dep't of State*, 906 F.2d 1345 (9th Cir. 1990); *JCI Metal Prod. v. U.S. Dep't of the Navy*, 09-CV-2139-IEG, 2010 WL 2925436 (S.D. Cal. July 23, 2010).

<sup>11</sup> See e.g. CP34-38, 379-84; 325-61; 362-78; 142-156; 445-84; 573-77, 894-903; 887-893; 639-644.

Like TNT's other legal arguments, addressed *supra*, the newspaper's FOIA theory is ultimately an attempt to mask the utter lack of evidence supporting its position. The Court should disregard this attempted distraction and focus exclusively upon well-established Washington law and the standards codified in the UTSA.

4. CBS Meets the PRA's Injunction Requirements.

a. The Superior Court applied the correct injunction standard

Contrary to TNT's contention, the Superior Court applied the correct legal standard in issuing its injunction below. The examination of a public record may be enjoined if it (1) would clearly not be in the public interest; and, (2) would substantially and irreparably damage any person, or would substantially and irreparably damage vital government functions. RCW 42.56.540.<sup>12</sup> Notably, *Resident Action Council* applied the traditional injunction test to a matter arising under the PRA. *Resident Action Council*, 177 Wn.2d at 428. Regardless of whether the PRA's heightened standard or the traditional standard applies, CBS has met its burden.

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<sup>12</sup> TNT argues that there is a conflict between courts applying the injunction standard with the public harm element versus the traditional injunction standard. This Court's decision in *Resident Action Council* should resolve any question in that regard. Moreover, the claimed conflict is irrelevant because CBS has met the criteria for an injunction under either standard.

Judge Culpepper heard extensive argument from all parties regarding the stricter injunction standard of the PRA, RCW 42.56.540. Since TNT advocates for application of the stricter PRA standard, and because the parties all argued regarding the elements of this standard to the Superior Court, the lower court clearly considered and applied this standard in issuing the challenged injunction.

CBS's Opposition to Direct Review cites to the countless portions of the record before Judge Culpepper where CBS and the other broadcasters established the harm to the public, where TNT argued that no such harm existed, and where the Superior Court considered these arguments. Each of the broadcasters, including CBS, submitted either affidavits or declarations describing the public harm and damage to the broadcasters. TPU also described the public harm in an affidavit from Click's manager. Yet, TNT did not submit any evidence opposing these affidavits or declarations. TNT cannot credibly assert that Plaintiffs failed to satisfy this prong of the standard when the uncontroverted evidence submitted clearly established public harm. CBS meets the requirements for injunctive relief.

b. Disclosure of CBS's trade secret information would be against the public interest.

The first criterion of RCW 42.56.540 requires that, in order for the release of a record to be enjoined, disclosure must “clearly not be in the public interest.” RCW 42.56.540. The declaration of Click’s manager establishes that the disclosure will harm the public, including Click’s cable television service customers and the local community. (CP 167-68 at ¶4). The public will be harmed because of the possibility of higher license fees that might result in higher cable television fees, potential non-renewals of the agreements, and the possibility that Click might be unable to compete in the cable television market, harming the public through the loss of market competition. (CP 168-69 at ¶¶ 4-5). The public may also be harmed if it lost Click’s Open Access Network (“OAN”), its technology business, and the resultant lack of a choice of providers and increased prices for cable or internet service. (*Id.*). Further, relative to Click, the “public disclosure of the pricing information contained in the retransmission consent agreements...will cause irreparable harm to Click by damaging its competitive position and long term economic performance.” (CP 167-68 at ¶ 4).

Against this uncontroverted factual background, TNT baldly contends that the public will not be harmed and that the public interest

compels release of the trade secret information. This argument wholly disregards the competing public policy favoring the confidentiality of trade secret information. In addition to the serious, substantial and irreparable harm, within the meaning of RCW 42.56.540, that disclosure will cause CBS, there are strong public policy reasons why the UTSA's purpose of protecting trade secrets is essential to apply here.

(1) Well-established public policy favors the preservation of trade secrets.

The unrestricted public release of the financial information contained in broadcast retransmission agreements would contravene the dual public interests underlying the UTSA—*i.e.*, promoting business activity and preventing unfair competition. *PAWS II*, 125 Wn.2d at 262-63 citing Laws of 1994, ch. 42, § 1, p. 130. The UTSA offers broad legal protection for sensitive, valuable commercial information. In recognition of the significant role such protection plays in the market economy, the clear legislative purpose of this statute is to ensure the confidentiality of trade secrets. *Id.* (it is a “matter of public policy that the confidentiality of such information be protected, and its unnecessary disclosure be prevented.”).

The public policy underlying the UTSA thus seeks to promote and protect economic vitality. The statute implicitly acknowledges that a

vibrant market economy is premised largely upon profit-driven innovation. *See id.* This in turn requires companies to invest time, capital and other resources to create commercially valuable research, data, processes and other sensitive information. Such efforts—vital to the larger economy—would be disincentivized and undercut if competitors could obtain this proprietary information at will and at no cost. The protection afforded by the UTSA prevents this outcome and creates a cause of action to prevent trade secrets from being misappropriated or otherwise disclosed.

The policy underpinnings of RCW 19.108 are not unique to Washington. The UTSA has been adopted in substantial part by 45 of the 50 States, *see* Sandeen at 87-88 (2008), reflecting a broad national consensus favoring protection of confidential trade secrets. The statute is to be applied and construed in furtherance of this general purpose. RCW 19.108.910.

- (2) Disclosing the unredacted Agreement would have an immediate, negative effect upon the local public interest.

The public interest harm that would result from disclosing CBS's confidential trade secret information is not merely theoretical, but would have an immediate, negative impact upon Click and other municipal cable

providers. Through its creation of Click, TPU has essentially determined that the public interest is served by providing cable television service to local residents. But if an otherwise confidential retransmission agreement with a municipal cable provider must be publicly disclosed under the PRA, retransmission negotiations between broadcasters and other cable providers or other MVPDs inevitably will be affected. (CP 643-44 at ¶14).

While the full range of consequences that would result from this action may be uncertain, at the very least, it is certainly reasonable to conclude that broadcasters aware of the likelihood that the rates negotiated with such a provider will become public may be inclined to seek a premium over the rate they would otherwise have accepted because other, private operators may seek to use the municipal rate as a ceiling for the rates they should have to pay. (*Id.*) This eventuality has been recognized by TPU itself. TPU acknowledges that the compulsory disclosure of retransmission agreement pricing information would potentially jeopardize Click's continued viability and in TPU's view would *not* be in the public interest. (CP 167-69 at ¶¶4-7).

- c. CBS would be substantially and irreparably harmed by the release of the unredacted Agreement.

As explained in more detail in §§B(3) and D(2) *supra*, CBS will suffer substantial and irreparable harm should its unredacted Agreement be publicly disclosed.

If CBS's pricing information for Click were disclosed, it would provide a distinct competitive advantage to other cable operators and MVPDs in future negotiations because they would know CBS's pricing history. (CP 642 at ¶10). Such disclosure would unquestionably affect the dynamics of future negotiations. (CP 642-43 at ¶¶10-12).<sup>13</sup> This result—allowing competitors to access a company's sensitive proprietary information and employ it to that company's commercial disadvantage—is precisely what the UTSA seeks to prevent. Such disclosure irreconcilably contravenes the legislative policy of the UTSA and would harm the very public interest the statute was enacted to protect.<sup>14</sup>

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<sup>13</sup> Notably, even if all retransmission agreements with Click were to be disclosed, it would not level the playing field since the vast majority of agreements (that are with private cable companies and satellite providers) would not be known to the public, to other MVPDs or to the broadcasters.

<sup>14</sup> The Court should reject TNT's unsupported contention that CBS, as a corporation, is not a "person" who can suffer substantial and irreparable harm under RCW 42.56.540. It is black letter law that corporations are legal "persons." *Cf.* RCW 23B.01.400(23) (defining "person" as including corporations). TNT's attempt to challenge a fundamental precept of American law bespeaks nothing so much as desperation.

Without the Superior Court's injunction in place, Click will release the unredacted Agreement. Once the Agreement is released, CBS's confidential, proprietary trade secrets are available for public consumption, and the severe business damage to CBS will be done. Maintaining the present injunction is the only remedy that CBS has to prevent this clear harm.

5. The Superior Court Properly Enjoined the Release of Other Records Containing the Same Trade Secret Information as is in the Redacted Agreement.

The Superior Court enjoined the release of any records "related to the retransmission agreements that are the subject of this consolidated case." (CP 300). In so doing, the trial court "acted within its broad discretionary power to shape and fashion injunctive relief to fit the particular facts, circumstances, and equities of the case before it." *Resident Action Council*, 177 Wn.2d at 445 (citations and quotations omitted).

Given the pending PRA requests from another party for the *exact same* information requested by TNT, along with other documents containing the same protected trade secret information for which CBS sought an injunction, it was a matter of both judicial efficiency and consistency to prevent the release of the related records. The impractical

result, if TNT's argument is accepted, would be that if *the same* trade secrets contained in CBS's Agreement were contained in other documents possessed by Click, CBS would need to separately move for a temporary restraining order each time any other documents were requested. In enjoining the release of other related records, Judge Culpepper, in the exercise of his considered discretion, determined that requiring CBS to continually return to court to seek TRO after TRO was inefficient for both counsel and the court, and risked inconsistent decisions by the court.

6. The Superior Court Correctly Relied on the Twelve Uncontested Declarations Submitted by CBS, the other Broadcasters, and Click, rather than conducting an *In Camera* Review.
  - a. TNT waived its right to request an *in camera* review by not raising it until after the Court issued an injunction.

TNT did not request an *in camera* review of CBS's Agreement until *after* the Court issued the injunction and the parties had stipulated to a certification of appeal pursuant to Civil Rule 54(b). CBS offered to submit its entire, unredacted Agreement for *in camera* review by the Court in its preliminary injunction motion. (CP 633 at n.7). TNT did not respond to CBS's offer in either briefing or oral argument; in fact, TNT did not make any request at all for an *in camera* review until after the Court issued the injunction, certified the case for appellate review, and

TNT unsuccessfully moved for reconsideration. (See CP 534-36). TNT accordingly waived this argument and should not be allowed to raise it for the first time after the fact when it never requested an *in camera* review in its briefing or at oral argument, and when it had the court certify the case for appeal without making a request for an *in camera* review. See *Yakima County v. E. Wash. Growth Mgmt. Hearings Bd.*, 146 Wn.App. 679, 192 P.3d 12 (2008) (“if a party raises an issue but fails to provide argument relating to the issue in his or her brief, the party waives any challenge to the alleged issue.”); *Felsman v. Kessler*, 2 Wn.App. 493, 498, 468 P.2d 691 (1970) (new evidence may only be submitted before a final judgment is entered).

- b. The Superior Court’s decision to rely on the affidavits submitted by CBS and the other broadcasters is reviewed for an abuse of discretion.

Regardless of TNT’s waiver, the Superior Court’s decision to rely on the uncontested declarations and to decline to conduct an *in camera* review was reasonable and should not be overturned. Trial court determinations of this type are reviewed under an abuse of discretion standard. See §D(1) *supra*. There is no evidence that the Superior Court’s decision to rely on the twelve uncontroverted declarations, including nine from the broadcasters and two from the general manager of Click, was an

abuse of discretion. This is especially true where the PRA statute specifically allows the court to decide whether to conduct an *in camera* review or rely on declarations alone.

- c. The PRA allows the court to issue an injunction by relying on the affidavits submitted and without conducting an *in camera* review.

Courts are not required to conduct *in camera* reviews of documents that are being withheld from disclosure under the PRA. *See Yakima Newspapers*, 77 Wn.App. at 328. The PRA gives the Court the option of whether or not to conduct an *in camera* review, stating that “[t]he court *may* conduct a hearing based solely on affidavits.” RCW 42.56.550(3). In cases determining whether documents, or portions of documents, should be produced under the PRA, *in camera* reviews are permissive and are within the discretion of the trial court. *See Spokane Research*, 96 Wn.App. at 577 (upholding the trial court’s decision to exempt loan application documents from disclosure temporarily without an *in camera* review).

Recently, in another PRA case, the Court of Appeals held that the trial court did not abuse its discretion by declining to conduct an *in camera* review of certain documents. *Forbes*, 171 Wn.App. 857, 288 P.3d at 389. The court emphasized that “[a] public records case may be

decided based on affidavits alone.” *Id.* The Superior Court, here, consistent with the direction of the PRA and guidance from the appellate courts, opted not to conduct an *in camera* review, and instead to make its decision based on the declarations submitted.

The Superior Court’s decision cannot be an abuse of discretion where the broadcasters and Click filed a total of twelve uncontroverted declarations establishing the redacted material as trade secrets. These declarations stand in stark contrast to the dearth of any countervailing evidence produced by TNT. Given the lack of evidence contradicting the declarations establishing the redacted material as trade secrets, the court did not have to conduct an *in camera* review where such a review would serve no purpose.

The declarations, without more, establish that the retransmission agreements are trade secrets; that the public will be harmed by their disclosure; and that CBS will suffer substantial and irreparable injury from such disclosure. *See* §D(2) *supra*.<sup>15</sup> TNT did not submit any evidence contradicting or disproving these uncontroverted statements. To the extent TNT relies on its own news articles to contradict the broadcasters’ overwhelming evidence, these self-serving materials must be ignored for

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<sup>15</sup> *See also* CP 34-38, 379-84; 325-61; 362-78; 142-156; 445-84; 573-77, 894-903; 887-893; 639-644

their obvious bias and lack of probative value. The PRA allows the Superior Court to rely only on the declarations submitted without conducting an *in camera* review, which cannot be an abuse of discretion where there was no countervailing evidence submitted by TNT.

**E. CONCLUSION<sup>16</sup>**

CBS's trade secrets, contained in its redacted Agreement, fall within the UTSA's well-established exception to the PRA. CBS meets the requirements to establish its redacted material as trade secrets. Because the disclosure of CBS's trade secrets will be harmful to the public and Click; and, because the disclosure would substantially and irreparably harm CBS, an injunction is appropriate. Where all of the evidence in this case supports protection of CBS's trade secrets at issue, this Court should affirm the Superior Court's order enjoining Click from releasing the trade secrets contained in CBS's unredacted Agreement.

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<sup>16</sup> CBS does not address TNT's argument regarding attorneys' fees available from Click. TNT correctly does not argue, and does not have, any basis for attorneys' fees or costs from CBS.

RESPECTFULLY SUBMITTED this 11th day of September, 2013,

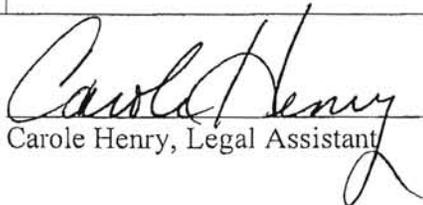
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CERTIFICATE OF SERVICE

I certify that on the 11<sup>th</sup> day of September, 2013, I caused a copy of the foregoing CBS CORPORATION'S RESPONSE BRIEF to be served on the following by the method indicated:

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Attached for filing is CBS Corporation's Response Brief.

Case Name: Belo Management Services, Inc., et al. v. Click! Network, et al.

Case No.: 88934-1

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