

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

In the Matter of:

- 1) The Federal Communications Commission [hereinafter the commission] seeks comment from interested parties on *potential updates to the “totality of the circumstances test”* for evaluating whether broadcast stations and multichannel video programming distributors (“MVPDs”) are negotiating for retransmission consent in good faith.
- 2) The Commission further *seeks comment generally on the totality of the circumstances test, including whether and how the Commission should update that test.*
- 3) The Commission also seeks comment *whether there are specific practices that the Commission should identify as evidencing bad faith* under the totality of the circumstances test.

Docket No. 15-218; FCC 12-109

To: The FCC (Commission)

Vi: Office of the Secretary

COMMENTS OF ADAM M. IWANOW¹

I. INTRODUCTION

1. In this document, the Commission seeks comment on: (1) *“potential updates to the “totality of the circumstances test”² for evaluating whether broadcast stations and multichannel video programming distributors (“MVPDs”) are negotiating for retransmission consent in good faith;”³* (2) *“[t]he [Commission] seeks comment generally on the totality of the circumstances test, including whether and how the Commission should update that test;”⁴* and (3) the Commission seeks comment on *“whether there are specific practices that the Commission should identify as evidencing bad faith under the totality of the circumstances test.”⁵*

2. It is conceded that this commenter lacks the technical knowledge and expertise to make a well-founded comment. He declines to comment out of personal or professional experience, but rather comment generally through the commenter’s understanding of legal theory and of the Commission’s application of the *totality of the circumstances test*⁶ - this comment will primarily explore the test’s principle and its application.

¹ Mr. Iwanow, is a second-year law student at the University of Missouri School of Law, and holds a B.A. in Communications from Lindenwood University, In St. Charles, Missouri. While at Lindenwood, Mr. Iwanow was required to spend time with the university radio station, KCLC-FM. Additionally, Mr. Iwanow’s curriculum, while at Lindenwood, was avidly dedicated to the study of the Commission from an academic professional aspect. He sincerely thanks the Commission for its time and consideration in this matter.

² Regulations.gov, <http://www.regulations.gov/#!documentDetail;D=FCC-2015-0306-0001> (last visited Nov. 10, 2015)

³ Id.

⁴ Id.

⁵ Id.

⁶ 2015 WL 5174801 § 103 (2015) Implementation of section 103 of the Stela Reauthorization Act and explanation of the totality of the circumstances test being proposed and amended.

3. The Commission is certainly aware of the value of the *totality of the circumstances test* in dealing with the developing complexity of negotiations with MPVD's, as well as each negotiations unique characteristics requiring an *ad hoc*⁷ evaluation. In this Notice of Proposed Rule Making, the Commission establishes the foundation of its "two-part framework for determining whether . . . negotiations are conducted in good faith."⁸ First, the Commission "established . . . [nine] . . . good faith negotiation standards."⁹ Second, the Commission implements its *totality of the circumstances test* to establish whether the MPVD's negotiate in good faith.¹⁰ The Commission, through this Notice of Proposed Rule Making acknowledges the importance of protecting the public's interest, as well as the importance of fair and equitable procedure in negotiations for the MPVDs.

II. DISCUSSION

4. The Commission has laid out its purpose in this Notice of Proposed Rule Making- to comply with "Congress's directive in Section 103(c) of STELAR[.]"¹¹ This commenter seeks discuss (1)" *the totality of the circumstances test in general.*"¹²

A. The Totality of the Circumstances Test In General

1. Good Faith, Bad Faith Analysis

5. The Commission has implemented a two-part test in order to establish *whether a negotiating party is pursuing the negotiation under good faith*. Good Faith is thus defined as "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage."¹³ Alternatively, Bad Faith is defined as "[d]ishonesty [in] belief, purpose, or motive."¹⁴ Under section 76.65(a), television broadcast stations and MVPDs are under a duty to "negotiate in good faith the terms and conditions of retransmission consent agreements."¹⁵ However, the negotiating party has not violated its duty to act in good faith when the broadcast station "proposes or enters into retransmission consent agreements containing different terms and conditions . . . with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations."¹⁶ Additionally, and

⁷ See Black's Law Dictionary, <https://www.westlaw.com>. (10th ed. 2014) (last visited Nov. 10, 2015). Definition of Ad Hoc.

⁸ Notice of Proposed Rule Making, RM-15-109 ¶2 (filed October 2, 2015).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* ¶ 6; See 2015 WL 5174801 §103 (2014).

¹² *Id.* Subtitle A

¹³ See Black's Law Dictionary, <https://www.westlaw.com>. (10th ed. 2014) (last visited Nov. 10, 2015). Definition of Good Faith.

¹⁴ See Black's Law Dictionary, <https://www.westlaw.com>. (10th ed. 2014) (last visited Nov. 10, 2015). Definition of Bad Faith.

¹⁵ 47 CFR § 76.65(a) (2015)

¹⁶ *Id.*

alternatively, there has not been a good faith violation if the MPVD “enters into retransmission consent agreements containing different terms and conditions . . . if such different terms and conditions are based on competitive marketplace considerations [, and mere] failure to reach an agreement is not an indication of a failure to negotiate in good faith.”¹⁷

6. The Commission clearly intended that good faith be at the center of section 76.65. The Commission, by its own devices, is required to not only examine whether a negotiating party is acting in good faith, but also compare the negotiating parties conduct in relation to community, industry, and marketplace standards. Under this market place theory approach, the Commission clearly acknowledges that marketplace standards are not static and that the Commission’s determinations and its discretion are governed by such standards. This flexible good faith standard guarantees an equitable process for the negotiating parties. This is affirmed by the notion that merely because the parties do not come to a negotiated agreement is not a per se violation- this will subsequently promote a more facilitative environment for parties to negotiate retransmissions, as well as eliminates the presumption that a non-agreement in itself is enough to qualify as bad faith, resulting in sanctions from the Commission for failure to negotiate in good faith.

2. Commission’s Proposed Good Faith Standards (Part One)

7. The Commission, under section 76.65(b)(1), in order to establish *whether the negotiating party is acting in good faith* has *proposed a list of nine good faith standards* it will consider in its determination.¹⁸ The nine proposed standards of good faith are:

(i) Refusal by a Negotiating Entity to negotiate retransmission consent; (ii) Refusal by a Negotiating Entity to designate a representative with authority to make binding representations on retransmission consent; (iii) Refusal by a Negotiating Entity to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations; (iv) Refusal by a Negotiating Entity to put forth more than a single, unilateral proposal; (v) Failure of a Negotiating Entity to respond to a retransmission consent proposal of the other party, including the reasons for the rejection of any such proposal; (vi) Execution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programming distributor;(vii) Refusal by a Negotiating Entity to execute a written retransmission consent agreement that sets forth the full understanding of the television broadcast station and the multichannel video programming distributor; and (viii) Coordination of negotiations or negotiation on a joint basis by two or more television broadcast stations in the same local market . . . to grant retransmission consent to a multichannel video programming distributor, unless such stations are directly or indirectly under common de jure control permitted under the regulations of the Commission. (ix) The imposition by a television

¹⁷ *Id.*

¹⁸ Notice of Proposed Rule Making, RM-15-109 ¶ 2, (released October 2, 2015).

broadcast station of limitations on the ability of a multichannel video programming distributor to carry into the local market of such station a television signal that has been deemed significantly viewed, within the meaning of § 76.54 of this part, or any successor regulation, or any other television broadcast signal such distributor is authorized to carry under 47 U.S.C. 338, 339, 340 or 534, unless such stations are directly or indirectly under common de jure control permitted by the Commission.¹⁹

The essence of the above standards is for the Commission to promote and gauge “competitive marketplace considerations.”²⁰

7. Through an analysis of these nine standards, this commenter, with confidence, can say that they are reasonably lenient, and a violation of which can be reasonably avoided by simply participating in a negotiation. The standard will only apply to those negotiating parties that in effect do nothing to further the negotiation in a “non-negative” or deconstructive manner. In analyzing these standards, one must always keep in mind the flexible Good Faith principle that the Commission has implemented as the foundation of its test. Again, the Commission has expressly stated that terms and conditions may differ among different negotiating parties so long as there is a reasonable explanation through market standards, and the Commission has further stated that a mere failure to come to an agreement does not create a per se violation.²¹ It is this commenter’s understanding that the Commission is in not in effect dictating the process or manner in which negotiations occur, but rather acting with the intent to simply creating or facilitating a negotiation between the negotiating parties.

3. Totality of the Circumstances Test (Part 2)

8. After the Commission has examined the proposed standards in 76.65(b)(1), the Commission, under 76.65(b)(2), will then apply the *totality of the circumstances test*, where “a complainant may attempt to demonstrate that . . . a party has failed to negotiate retransmission consent in good faith.”²² The test suggests, but its nature that there is “no single deciding factor,” and that “*one must consider all the facts, the context, and conclude from the whole picture* whether there is probable cause, or [whether a negotiating party is acting under good faith.]”²³

8. The foundational principle of a *totality of the circumstances test* is to promote an *ad hoc* balancing of practicality and the original principled purpose of the legal doctrine. The commission, in this Notice of Proposed Rule Making, asks commenters “[h]ow can the Commission most effectively address complaints that do not allege per se violations[,] but involve behavior that is asserted to be inconsistent with good

¹⁹ 47 CFR § 76.65(b)(1) (2015)

²⁰ Notice of Proposed Rule Making, RM-15-109 ¶ 2

²¹ 47 CFR § 76.65(a) (2015)

²² *Id.*

²³ Knowledge Base of Legal Concepts, <http://www.csudh.edu/dearhabermas/totcirc.htm> (last visited Nov. 10, 2015) definition of and explanation of the principle of a totality of the circumstances test.

faith?”²⁴ The commenter defers to the test that has already been established by the Commission. Again, through the analysis of the proposed good faith standards, as well as section 76.65(a), the Commission is for all intents and purposes trying to avoid a per se violation from any negotiating party.²⁵ The Commission, in this Notice of Proposed Rule Making, has laid out a rubric for the negotiating parties to follow, as well as a secondary holistic examination of the conduct of the negotiators through the totality of the circumstances test to determine whether there has been a good faith negotiation. The commenter thus advocates that the current test has adequate flexibility to properly address behavior that is alleged to be inconsistent with the standards of good faith.

9. The Commission further asks whether there should be any “*potential updates . . . ma[de] to the totality of the circumstances test to ensure that the conduct of broadcasters and MVPDs during negotiations . . . meet the good faith standard.*”²⁶ The commenter emphasizes that the good faith standard, along with the totality of the circumstances test are both self-serving in this respect. As previously established in section 76.65(a), television broadcast stations and MVPDs are under a duty to negotiate in good faith.²⁷

10. However, the negotiating party has not violated its duty to act in good faith when the broadcast station “proposes or enters into retransmission consent agreements containing different terms and conditions . . . *if such different terms and conditions are based on competitive marketplace considerations.*”²⁸ Alternatively, there has not been a good faith violation if the MPVD “enters into retransmission consent agreements containing different terms and conditions . . . *if such different terms and conditions are based on competitive marketplace considerations* [, and mere] failure to reach an agreement is not an indication of a failure to negotiate in good faith.”²⁹ The commenter has placed emphasis on the Commission’s recognition of the importance of marketplace considerations. Furthermore, under the *totality of the circumstances test*, each instance requires an *ad hoc* examination- “*one must consider all the facts, the context, and conclude from the whole picture* whether there is probable cause, or [whether a negotiating party is acting under good faith.]”³⁰ Thus, the test itself is flexible in its very nature. Because marketplace considerations are never static, and because the totality of the circumstances test examines the whole picture circumstance-by-circumstance, the test is self-updating and requires no additional concrete elements.

III. Summary

11. “Negotiations [for] retransmissions consent have become significantly more complex in recent years, and . . . in some cases one or both parties may be engaging in tactics that push . . . negotiations toward a breakdown . . . result[ing] in consumer

²⁴ Notice of Proposed Rule Making, RM-15-109 ¶ 2

²⁵ See 47 CFR § 76.65(a) (2015) a mere non-agreement is not a per se violation of the good faith standards.

²⁶ Notice of Proposed Rule Making, RM 15-109 ¶ 6

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Knowledge Base of Legal Concepts, <http://www.csudh.edu/dearhabermas/totcirc.htm> (last visited Nov. 10, 2015)

harm.”³¹ The unique and complex nature of the negotiation process, emphasizes the Commission’s inability to create or implement specific bright line rules or practices. The commenter believes that creating such specific rules would run counter to the principle of equity and may inappropriately draw a line where the *totality of the circumstances test* may provide necessary relief or enable effectiveness.

12. The commission’s implementation of the two-part totality of the circumstances test is a flexible and effective means to for the Commission to achieve its general purposes, as well as to achieve its specific purposes of determining if parties are negotiating in good faith. The commenter wishes to remind the Commission of its general purpose, which is to “obtai[n] maximum effectiveness from the use of radio and wire communications in connection with safety of life and property, the Commission shall investigate and study all phases of the problem and the best methods of obtaining the cooperation and coordination of these systems.”³² With considerations so fluid and non-static as market place considerations and conduct as undefined as good faith, there is no other reasonably viable method to effectively satisfy for the general and specific purposes of the Commission, than by the implementation of the totality of the circumstances test.

IV. CONCLUSION

13. Wherefore, for the forgoing reasons, this comment respectfully suggests the Commission: 1) maintain its current use of the totality of the circumstances test, 2) continue using the flexible good faith standards, and 3) continue using marketplace considerations as a self-updating tool for the test.

14. As currently implemented, the totality of the circumstances uses flexible and attainable standards, which promote good faith negotiation practices. As conceptualized by this comment, any proposed rule change must maintain the balance between “maxi[mizing] effectiveness [and accessibility] from the use of radio and wire communications”³³ and “Promoting competition, innovation and investment in broadband services and facilities.”³⁴ The general analysis described by this comment, was intended to express the explicit reasonableness of the totality of the circumstances test- the Commission’s current test minimizes or avoids inequitable line drawing.

Respectfully Submitted,
/s/ Adam M. Iwanow

³¹ Notice of Proposed Rule Making, RM 15-109 ¶ 3

³² 47 U.S.C.A § 154(o) (1996). The organic doctrine of the FCC establishing the Commission’s governing principles.

³³ Id.

³⁴ F.C.C., <https://www.fcc.gov/what-we-do> (last visited Nov. 10, 2015) explanation of the general purposes of the FCC used in addition to the specific purposes of the totality of the circumstances test.