

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

In the Matter of)	
)	
Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004)	MB Docket No. 05-89
)	
Reciprocal Bargaining Obligations)	

**COMMENTS OF THE
ABC, CBS, FBC, AND NBC
TELEVISION AFFILIATE ASSOCIATIONS**

The ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the FBC Television Affiliates Association, and the NBC Television Affiliates Association (collectively, the “Network Affiliates”), by their attorneys, hereby submit these comments in response to the *Notice of Proposed Rule Making* (“*Notice*”), FCC 05-49, released on March 7, 2005, in the above-referenced proceeding.¹ The *Notice* seeks comment on implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”),² which seeks to impose reciprocal good faith bargaining obligations on MVPDs for retransmission consent negotiation purposes.

The *Notice* correctly recounts the enactment of the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”) which, for the first time, imposed good faith bargaining obligations on broadcast stations in negotiating the retransmission consent of their signals and the Commission’s rulemaking

¹ The Network Affiliates collectively represent approximately 800 local television stations affiliated with the ABC, CBS, Fox, and NBC Television Networks.

² Pub. L. No. 108-447, Div. J, Tit. IX (2004), at § 207.

proceeding implementing this new statutory directive.³ In the resulting *Good Faith Order*, the Commission promulgated an objective list of negotiation standards that would be applied to broadcast stations. The Commission also set forth a non-exclusive list of negotiation proposals that are presumptively consistent with competitive marketplace considerations and the broadcasters' good faith bargaining obligations as well as a list of proposals that are presumptively inconsistent with competitive marketplace considerations.

Since SHVIA, the Commission has been confronted with fewer than 10 complaints arising from the retransmission consent process, and it has been necessary for the Commission to adjudicate a retransmission consent dispute in only one instance.⁴ In that one case, the Commission not only found that the broadcaster *had not* violated the regulatory scheme or the good faith negotiation requirement but, instead, that the MVPD complainant, EchoStar, *had* abused the Commission's

³ See Notice at ¶¶ 2-6 (citing *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, 15 FCC Rcd 5445 (2000) (“*Good Faith Order*”).

⁴ In all but the one instance, the parties either reached a private settlement or the Commission dismissed or found moot the retransmission consent issue. See *EchoStar Satellite Corp. v. Clear Channel Communications*, Public Notice, Report No. 3742 (July 24, 2000) (complaint dismissed upon request of parties); *EchoStar Satellite Corp. v. Chris-Craft Broadcasting*, Public Notice, Report No. 3743 (July 28, 2000) (complaint dismissed upon request of parties); *EchoStar Satellite Corp. v. Landmark Communications*, DA 00-2102 (rel. Sept. 15, 2000) (complaint dismissed upon request of parties); *Paxson Communications Corp. v. DirecTV*, DA 02-102 (rel. Jan. 14, 2002) (issue moot); *Monroe, Georgia, Water, Light, and Gas Comm'n v. Morris Network, Inc.*, DA 04-2297 (rel. July 27, 2004) (issue dismissed by Media Bureau); *Horry Telephone Coop. v. GE Media, Inc.*, DA 05-136 (rel. Jan. 26, 2005) (complaint dismissed upon request of parties).

In addition to these resolved disputes, on January 19, 2005, CoxCom, Inc. filed a “good faith” negotiation complaint against Nexstar Broadcasting. That matter is pending at the Commission.

Finally, the well-known dispute between Time Warner Cable and ABC, Inc. involved a question of the application of the must-carry rules at the Commission, not the retransmission consent regime, in which the Commission found Time Warner Cable's removal of ABC's stations' signals during a sweeps period to be in violation of section 614(b)(9) of the Communications Act. See *Time Warner Cable*, DA 00-987 (rel. May 3, 2000) and DA 01-636 (rel. Mar. 9, 2001).

processes.⁵

Against this background, Congress, in SHVERA, has imposed *identical* bargaining obligations on MVPDs and has extended the now reciprocal good faith bargaining regime until January 1, 2010. In addition, the legislative history makes clear that Congress intended “the MVPD good-faith obligations to be analogous to those that apply to broadcasters.”⁶ Because it is presumed that Congress acts with knowledge of the existing regulatory framework when it enacts new legislation, including when the new law incorporates the language of the prior law,⁷ the *Notice*’s conclusion that “Congress did not intend that the Commission revisit the findings and conclusions that were reached in the SHVIA rulemaking”⁸ is undoubtedly correct, as is the *Notice*’s tentative conclusion “to amend our existing rules to apply equally to both broadcasters and MVPDs.”⁹ In short, the Network Affiliates agree with the Commission’s proposed rule amendments.

The *Notice* also asks, however, whether these good faith bargaining obligations apply to broadcasters and MVPDs alike when it comes to negotiating for consent to retransmit signals in

⁵ See *EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070 (2001).

⁶ H.R. REP. 108-634 (2004), at 19.

⁷ See *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.” (citations omitted)); *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (“When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well”).

⁸ *Notice* at ¶ 7.

⁹ *Notice* at ¶ 7.

areas *outside* of a television station’s home DMA in which the signals are significantly viewed.¹⁰ The answer must be “no.” As the Commission correctly notes, “[s]ignificantly viewed television broadcast stations do not have carriage rights outside of their DMA and carriage of their signals by out-of-market MVPDs is permissive.”¹¹ Indeed, SHVERA itself, in enacting new Section 340, the significantly viewed provision, expressly provides (1) that “[c]arriage of a signal under this section is not mandatory”¹² by a satellite carrier and (2) that the “eligibility of the signal of a station to be carried under this section does *not* affect any right of the licensee of such station to grant (*or withhold*) retransmission consent under *section 325(b)(1)*.”¹³ The legislative history of this provision provides:

Cable operators are under no obligation to carry in a local market a distant significantly viewed signal, and the Committee intends satellite carriage of such a distant signal in a local market to be similarly voluntary. . . .

. . . Cable operators must obtain retransmission consent to carry significantly viewed signals into a local market and the Committee intends the same obligation to apply to satellite.¹⁴

The statute and its legislative history then, when read together, make plain that MVPDs are under no obligation to retransmit significantly viewed signals and broadcast stations are under no obligation to grant retransmission consent. In fact, the statute expressly states that broadcast stations have the right to “*withhold*” retransmission consent, and it specifically references Section 325(b)(1), the statutory retransmission consent provision, *not* Section 325(b)(3)(C), the statutory good faith

¹⁰ See Notice at ¶ 8.

¹¹ Notice at ¶ 8.

¹² 47 U.S.C. § 340(d)(1).

¹³ 47 U.S.C. § 340(d)(2) (emphases added).

¹⁴ H.R. REP. 108-634, at 14.

bargaining provision. Because there are no MVPD obligations to retransmit and no broadcaster obligations to grant retransmission consent to permit carriage, it follows that there cannot be any good faith bargaining obligations to attempt to come to an agreement that neither the MVPD nor the broadcast station has any legal obligation to enter into.

The first of the Commission's proposed good faith negotiation standards prohibits the refusal by either an MVPD or a broadcast station to negotiate retransmission consent.¹⁵ This standard would apparently be violated by any MVPD or broadcast station that simply determined to exercise its right not to enter into a retransmission consent agreement for carriage of a significantly viewed signal. Given the statutory language and its legislative history, that cannot be right. Moreover, it would be illogical and inappropriate to force sophisticated business parties to incur costs to negotiate an agreement that one of the parties may lawfully refuse to enter into.

In sum, the Network Affiliates urge the Commission to reject any application of reciprocal good faith bargaining obligations to retransmission of significantly viewed signals and suggest that the Commission make clear, either in its order or in its regulations, that the good faith negotiating regime does not apply in the significantly viewed context.

Conclusion

For the foregoing reasons, the Network Affiliates respectfully request that the Commission implement Section 207 of SHVERA as explained herein.

¹⁵ *See Notice*, Appendix A (proposed § 76.65(b)(1)(A)).

Respectfully submitted,

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