

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	)	MB Docket No. 05-89
of 2004	)	
	)	
Reciprocal Bargaining Obligations	)	

**COMMENTS OF NBC TELEMUNDO LICENSE CO.**

Margaret L. Tobey  
Cristina C. Pauzé  
Morrison & Foerster LLP  
2000 Pennsylvania Avenue, N.W.  
Suite 5500  
Washington, D.C. 20006-1888  
(202) 887-1500

F. William LeBeau  
NBC Telemundo License Co.  
1299 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
(202) 637-4535

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**COMMENTS OF NBC TELEMUNDO LICENSE CO.**

**I. INTRODUCTION AND SUMMARY**

NBC Telemundo License Co. agrees that the good-faith bargaining obligation now imposed by Congress on multichannel video programming distributors ("redistributors") as well as local stations was intended to facilitate viewers' access to the quality programming available on their local stations, subject to those stations' programming agreements. The text and purpose of the governing laws, including the Cable Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"),<sup>1</sup> the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"),<sup>2</sup> and the Satellite Home Viewer Extension and Reauthorization Act ("SHVERA"),<sup>3</sup> seek to uphold both the value of local stations and private property rights, including the property rights of program owners or distributors. Each of these statutes focuses on making local signals available to local viewers; they do not demand that a program provider must risk losing its control over the out-of-market or national redistribution of its programming just because that provider wants to make the programming available to a single, free, over-the-air station in a single market. Accordingly, neither the statutory good faith obligation nor the Commission's interpretation of that obligation should be read to

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<sup>1</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1471, *codified* at 47 U.S.C. § 534(a) and (b). The Commission's rules implementing Section 534(a) and (b) are set forth at 47 C.F.R. §§ 76.56-76.65.

<sup>2</sup> Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-538, *codified* at 47 U.S.C. § 325(b)(3)(C). The Commission's rules implementing Section 325(b)(3)(C) are set forth at 47 C.F.R. § 76.65.

<sup>3</sup> Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, § 207, 118 Stat 2809, 3428 (to be *codified* at 47 U.S.C. 325).

authorize a local station to commandeer the right to redistribute a program that is not granted in the station's agreement with the program provider, including to redistributors of any sort which seek to deliver that programming to viewers outside of the station's local market.

**II. THE GOOD FAITH OBLIGATION DOES NOT REQUIRE A TELEVISION STATION TO NEGOTIATE RETRANSMISSION CONSENT OUTSIDE THE GEOGRAPHIC AREA IN WHICH THE STATION HAS THE CONTRACTUAL RIGHT TO AGREE TO REDISTRIBUTE THE PROGRAMMING**

**A. In Adopting SHVIA, Congress Expressly Intended to Protect the Property Rights of Program Providers as well as the Market-Based Outcomes of Private Negotiations Between Program Providers and Local Stations**

SHVIA amended the Copyright Act by creating a limited compulsory license for the retransmission of television stations' signals within their local markets and amended the Communications Act of 1934 (the "Act") by requiring television broadcasters to negotiate in good faith with all redistributors – cable systems and satellite carriers alike – with respect to the consent required before their signals could be retransmitted by redistributors within their local markets.<sup>4</sup> When Congress adopted SHVIA, it noted that it was guided by three principles: (1) the desire to promote competition in the marketplace for the delivery of multichannel video programming to reduce costs for consumers; (2) "the importance of protecting and fostering the system of television networks as they relate to the concept of localism"; and (3) "perhaps most importantly," the need to act as narrowly as possible to protect the "exclusive property rights granted by the Copyright Act to copyright holders" and "minimize the effects of the government's intrusion on the broader market in which the affected property rights and industries operate."<sup>5</sup> Congress thus acknowledged the overriding need to protect the property rights of content owners and the private, free-market negotiations between those content owners and local distribution outlets.

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<sup>4</sup>See 47 U.S.C. § 325(b)(3)(C).

<sup>5</sup> H.R. Rep. No. 106-464, Conference Report, Joint Explanatory Statement of the Committee of the Conference, at 92 (1999) ("SHVIA Conf. Rep."); see also 145 Cong. Rec. S14708-09 (Nov. 17, 1999) (section-by-section analysis of SHVIA).

As the Conference Committee explained, “the broadcast television market has developed in such a way that copyright licensing practices in this area take into account the national network structure, which grants exclusive territorial rights to programming in a local market to local stations either directly or through affiliation agreements.”<sup>6</sup> Accordingly, Congress structured the compulsory copyright license granted in SHVIA – which was similar to the cable compulsory license developed decades earlier -- “to hew as closely to those arrangements as possible.”<sup>7</sup> Further, Congress recognized the harm that would be caused if the new copyright license were not strictly limited to the station’s local market:

[T]hese arrangements are mirrored in the section 122 ‘local-to-local’ license, which grants satellite carriers the right to retransmit local stations within the station’s local market, and does not require a separate copyright payment because the works have already been licensed and paid for with respect to viewers in those local markets. By contrast, allowing the importation of distant or out-of-market network stations in derogation of the local stations’ exclusive right – bought and paid for in market-negotiated arrangements – to show the works in question undermines those market arrangements.<sup>8</sup>

Consistent with the established policies of Congress and the Commission, any good-faith requirement should not be read to override the private property rights of networks, syndicators or other program providers. A network’s or syndicator’s product is its programming. It has long been established that the public benefits when a product producer can contract with other entities to distribute its product, while limiting the rights of those independent entities to redistribute the product in a manner for which the entity has not negotiated specific distribution or redistribution rights. For example, the U.S. Federal Trade Commission and the U.S. Department of Justice have broadly recognized the value of most forms of limited exclusivity in intellectual property license agreements, especially in vertical license transactions. The joint *Antitrust Guidelines for the Licensing of Intellectual Property* (1995) issued by those agencies states in part that:

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 92-93 (emphasis added).

Field-of-use, territorial, and other limitations on intellectual property licenses may serve procompetitive ends by allowing the licensor to exploit its property as efficiently and effectively as possible. These various forms of exclusivity can be used to give a licensee an incentive to invest in the commercialization and distribution of products embodying the licensed intellectual property and to develop additional applications for the licensed property. The restrictions may do so, for example, by protecting the licensee against free-riding on the licensee's investments by other licensees or by the licensor. They may also increase the licensor's incentive to license, for example, by protecting the licensor from competition in the licensor's own technology in a market niche that it prefers to keep to itself.<sup>9</sup>

In discussing imposing the good-faith obligation on retransmission consent negotiations, neither Congress nor the Commission suggested that this requirement would limit the fundamental private property right of program owners or distributors to limit any outlet's – whether a station or cable system – legal ability to consent to further redistribution of programming that the outlet does not own – a class which includes much programming that is aired on many stations. By its terms, Section 325(b)(3)(C) requires broadcasters to negotiate in good faith with satellite carriers and other redistributors with respect to their retransmission of the broadcasters' signals.<sup>10</sup> In adopting the provision, Congress intended to prevent broadcasters from dealing exclusively with one redistributor in a market to the exclusion of all others, thus preventing some redistributors from acquiring access to programming altogether, without regard to the specific terms and conditions of such access.<sup>11</sup> It did not mention, address or otherwise intend this provision to interfere with the private contractual dealings among program providers and stations. To the contrary, as noted above, Congress expressly recognized the importance of intruding as narrowly as

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<sup>9</sup> U. S. Department of Justice and Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property* § 2.3 (Apr. 6, 1995) (emphasis added). See also NBC Universal, Inc. and NBC Telemundo License Co. Comments, American Cable Ass'n Petition for Rulemaking, RM-11203 (Apr. 18, 2005).

<sup>10</sup> 47 U.S.C. 325(b)(3)(C).

<sup>11</sup> See *SHVIA Conf. Rep.*, at 105 (“[t]he regulations would . . . prohibit a television broadcast station from entering into an exclusive retransmission consent agreement with a multichannel video programming distributor . . .”); see also *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, 5475 ¶ 69 (2000) (“2000 Report and Order”) (“ . . . Congress intended that all activity associated with exclusive retransmission consent agreements be prohibited. . . ).

possible on the exclusive property rights of television stations and other copyright owners in implementing SHVIA.<sup>12</sup>

The Commission, in adopting a per se test for violations of good faith obligations, included language that intended to prohibit exclusivity arrangements between stations and redistributors.<sup>13</sup> Following Congress's lead, however, the FCC also mandated that Section 325(b)(3)(C) should be narrowly construed because the statutory good faith obligation is in derogation of common law principles protecting the freedom of contract.<sup>14</sup> Therefore, the FCC's language should not be misinterpreted or improperly expanded to apply to programming for which a station does not have the right to grant retransmission consent to all redistributors. Arguably, under the Commission's current interpretation of the good faith obligation, a station cannot refuse to negotiate with a redistributor regarding retransmission consent with regard to programming that the station has the right to distribute in the areas served by the redistributor.<sup>15</sup> Similarly, a station may not be able to refuse to enter into an agreement with one redistributor that prohibits the station from entering into retransmission consent with another redistributor.<sup>16</sup> Neither of these provisions, however, prevents a station from refusing to grant out-of-market retransmission consent with respect to programming for which it does not possess such extra-territorial exhibition rights.

To illustrate the absurdity of any other result, imagine, under the new reciprocal bargaining obligations, a television station approaching a cable operator and demanding that the operator negotiate in good faith to make a national cable network, such as ESPN or HBO, available for broadcast on the television station, even if that cable operator did not have the right to grant consent to the retransmission of the cable network, either locally or in distant markets. Similarly, any government mandate that requires television broadcasters to negotiate beyond their contractual rights in particular programming in turn means

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<sup>12</sup> *SHVIA Conf. Rep.*, at 92, 95.

<sup>13</sup> *2000 Report and Order*, at 5464 ¶ 45.

<sup>14</sup> *Id.* at 5453 ¶ 20 & n.38.

<sup>15</sup> *Id.* at 5462-643 ¶ 40.

<sup>16</sup> *Id.* at 5464 ¶ 45.

that every single programming outlet must have the authority to grant retransmission consent *nationwide* with respect to the network's, syndicator's, or other program owner's programming. Such a requirement not only would vitiate the program owner's private property rights, but also would violate the territorial limits on the station's exhibition rights and undermine the program exclusivity rights of all other affiliates. Put simply, it would enable every affiliate to become a network for purposes of MVPD carriage. This is not what Congress intended when it adopted the good faith negotiation requirement.

**B. In Multiple Statutes, Congress Also Has Directed that the Commission Should Protect the Rights Afforded by Programming Providers to Local Stations Against Distant Stations**

The starting point for any analysis of the geographic scope of the good faith obligation in retransmission consent negotiations must be the statute that confirmed the right of television stations to control the redistribution of their signals on cable systems – the 1992 Cable Act. That statute established the current framework for the carriage of television signals on cable systems by allowing eligible television stations to choose between mandatory carriage or retransmission consent. This framework, however, applies only within a local market.<sup>17</sup> Thus, a television station – even a significantly viewed station – has no right to elect mandatory carriage on cable systems outside such station's local market.

Congress adopted SHVIA in 1999 for the purpose of placing satellite carriers on a more equal footing with cable operators with respect to the availability of local television signals. Thus, SHVIA granted satellite carriers a compulsory copyright license for the retransmission of local television signals into local markets,<sup>18</sup> subject to first obtaining retransmission consent for such carriage from the affected television station.<sup>19</sup> In addition to authorizing local-into-local satellite transmission, SHVIA also amended Section 325(b) of the Act by imposing on broadcasters the obligation to negotiate in good faith with all

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<sup>17</sup> See Pub. L. No. 102-385, 106 Stat. 1461 *codified* at 47 U.S.C. § 521, Note: Congressional Findings and Policy (finding that the government "has a substantial interest in having cable systems carry the signals of local commercial television stations" because such carriage is necessary to serve the goal of "providing a fair, efficient and equitable distribution of broadcast services") (emphasis added).

<sup>18</sup> See 17 U.S.C. § 122.

<sup>19</sup> See 47 U.S.C. § 325(b)(1)(A).

redistributors – cable systems and satellite carriers alike – with respect to the retransmission consent required before their signals could be retransmitted by redistributors within their local markets.<sup>20</sup> But this obligation in no way required broadcast stations to negotiate the exhibition of their programming (whether owned or licensed) beyond the boundaries of their local markets. As with the 1992 Cable Act, SHVIA’s retransmission consent framework – including its good faith negotiation obligation – is limited to local carriage of local signals.<sup>21</sup> Congress made this limitation very clear when it stated that “satellite carriers may not use the section 122 [compulsory] license to retransmit a television broadcast station to a subscriber located outside the local market of the station.”<sup>22</sup> Congress explained that this “explicit limitation[]” was necessary because the statutory compulsory license intrudes on exclusive property rights under the Copyright Act and therefore must be interpreted narrowly.<sup>23</sup>

The geographic limitation of the good faith obligation intended by Congress is confirmed by statements made by the Commission when it adopted the original good faith standards in the *2000 Report and Order*. First, the Commission noted that Section 325(b)(3)(C), which established the good faith requirement, “requires satellite carriers to obtain retransmission consent for the local broadcast signals they carry . . . .”<sup>24</sup> Further, the Commission noted that a provision of SHVIA, codified in Section 325(b)(2)(E), established a six-month exemption period prior to the effectiveness of the satellite retransmission consent requirement during which satellite carriers were permitted to “retransmit the signals of local broadcasters

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<sup>20</sup> See 47 U.S.C. § 325(b)(3)(C); *2000 Report and Order*.

<sup>21</sup> Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-531, *codified* at 47 U.S.C. § 338 (governing carriage of local television signals by satellite carriers); 113 Stat. 1501, 1501A-537, *codified* at 47 U.S.C. § 325(b)(2) (covering exceptions for retransmission consent outside of station’s local market).

<sup>22</sup> *SHVIA Conf. Rep.*, at 94. Any retransmission of a station to a satellite subscriber located beyond the station’s local market is governed by the Section 119 compulsory license and is permitted only when all of the conditions of that very limited license are satisfied, including a demonstration, with respect to a network station, that the subscriber resides in an unserved household as defined by Section 119(a)(2)(B). 17 U.S.C. § 119(a)(2)(B).

<sup>23</sup> *SHVIA Conf. Rep.*, at 95.

<sup>24</sup> *2000 Report and Order*, at 5446 ¶ 2 (emphasis added).

without a broadcaster's express retransmission consent."<sup>25</sup> The Commission stated that Section 325 requires "strict enforcement of, and severe penalties for, satellite carrier retransmission of local broadcast signals without consent after this six-month period expires" and that "[t]hese rules will provide a framework under which broadcasters and satellite carriers can achieve retransmission consent before the expiration of the six-month period set forth in Section 325(b)(2)(E) so as to avoid the highly undesirable interruption of local broadcast signals that satellite carriers have begun to provide to their subscribers in many cities across the nation."<sup>26</sup>

Thus, the good faith negotiation standards were adopted by the Commission entirely in the context of the carriage by redistributors of local television signals within their local markets and should not be applied outside of that context. Any other interpretation would be contrary to congressional intent and would undermine the system of geographical program exclusivity that Congress expressly recognized and endorsed when it adopted SHVIA.

**C. When Congress Adopted the 1992 Cable Act and SHVIA, It Expressly Recognized and Endorsed the Concept of Exclusive Territorial Rights to Programming in Local Television Markets**

Established territorial exclusivity rules confirm that neither Congress nor the Commission has intended that distant network stations should replace local stations to the extent the two sets of stations carry identical programming. Broadcast networks and syndicators have long included provisions limiting the ability of local stations to consent to the redistribution of the network's or syndicator's programming beyond a specified geographic area.<sup>27</sup> Conversely, stations have long negotiated for the right to claim

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<sup>25</sup> *Id.* at 5449 ¶ 12 (emphasis added). Section 325(b)(2)(E) provides:

This subsection [prohibiting MVPD retransmission of local broadcast signals without express consent] shall not apply . . . during the 6-month period beginning on the date of enactment of the Satellite Home Viewer Act of 1999, to the retransmission of the signal of a television broadcast station with the station's local market by a satellite carrier directly to its subscribers under the statutory license of section 122 of title 17. . . .

<sup>26</sup> *2000 Report and Order*, at 5449 ¶ 12.

<sup>27</sup> Affiliates are free, however, to separately license the programming they produce or otherwise own for exhibition outside their markets or on other platforms.

program exclusivity within their specified geographic area. Under the Commission's network nonduplication and syndicated exclusivity rules, stations that have been granted the right to exclusivity by their networks or syndicators can directly assert their exclusive rights vis-à-vis other distributors of the same programming within a defined geographic zone, thereby preserving the value of local advertising opportunities and generating the revenues needed to invest in local program production.<sup>28</sup> Program providers likewise benefit because these contractual provisions allow them to control the distribution of programming in which they have proprietary interests (either via copyright or contract), thus preserving the value of that programming and encouraging the production of new and diverse programming.

Congress expressly recognized and endorsed this territorial structure when it adopted the 1992 Cable Act and SHVIA. The Senate Report accompanying what became the version of Section 325 enacted into law in 1992 specifically endorsed the FCC's program exclusivity rules and emphasized that local stations are to be preferred to the exclusion of distant stations carrying the same programming:

[T]he Committee has relied on the protections which are afforded local stations by the FCC's network nonduplication and syndicated exclusivity rules. Amendments or deletions of those rules in a manner which would allow distant stations to be substituted on cable systems for carriage [of] local stations carrying the same programming would, in the Committee's view, be inconsistent with the regulatory structure created in [the 1992 Cable Act].<sup>29</sup>

Seven years later, when Congress adopted SHVIA, it again stated its intention to uphold the system of programming exclusivity exemplified by the "national network structure."<sup>30</sup> Because Congress recognized and endorsed – indeed, in its own words, *mirrored* – the system of granting exclusive exhibition rights within a specified geographic territory when it adopted SHVIA, the Commission cannot interpret that statute's good faith negotiation obligation in a manner that would destroy, rather than support, that publicly beneficial system.

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<sup>28</sup> 47 C.F.R. §§ 76.92 (cable network non-duplication), 76.101 (cable syndicated exclusivity), 76.122 (satellite network non-duplication) and 76.123 (satellite syndicated exclusivity).

<sup>29</sup> S. Rep. No. 102-92, at 38, 106 Stat. 1133, 1171 (1991) (accompanying S. 12, 102d Cong. (1991)).

<sup>30</sup> *SHVIA Conf. Rep.*, at 92.

**D. SHVERA's Amendments Do Not Alter the Existing Territorial Boundaries on the Good Faith Obligation in Retransmission Consent Negotiations**

With respect to retransmission consent issues, SHVERA amended SHVIA in only two respects: by extending the existing ban on exclusive agreements between broadcast stations and redistributors until 2010 and by amending Section 325(b)(3)(C) of the Act to impose reciprocal good faith retransmission consent bargaining obligations on redistributors.<sup>31</sup> As the Commission noted in the NPRM, in enacting the SHVERA good faith negotiation obligation for redistributors, Congress used language identical to that used in SHVIA to impose a good faith negotiation obligation on broadcasters, and obviously did not intend to create new law that would have overcome decades of precedent preferring, with very limited exceptions, market-based negotiations between program providers and program distributors.<sup>32</sup>

**III. CONCLUSION**

Congress and the FCC have been vigilant in protecting the viability of free television broadcasting through local stations because these stations have proven an effective means of communicating local news, weather and other local information to communities across the country. Congress and the Commission have taken multiple steps to protect and preserve local stations, including SHVIA and SHVERA. For the Commission to read a good faith obligation imposed by those statutes to require negotiations outside of a station's local markets plainly contradicts both the language and context of those statutory requirements, and the Commission's own long history of protecting local stations. Further, the right to control the redistribution of programming produced, owned or licensed by a network or other

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<sup>31</sup> The Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, § 207, 118 Stat 2809, 3393 (2004) (to be codified at 47 U.S.C. 325).

<sup>32</sup> See *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004: Reciprocal Bargaining Obligations*, Notice of Proposed Rulemaking, FCC 05-49, ¶ 7 (Mar. 7, 2005); see 47 U.S.C. § 325(b)(3)(C)(iii). SHVERA also authorized satellite carriers to retransmit significantly viewed stations into the local markets in which they are significantly viewed. Thus, the statute essentially treats significantly viewed stations in the same manner as local stations for purposes of the compulsory copyright license. To the extent programming agreements reflect that local stations may not be able to assert program exclusivity against significantly viewed stations, these provisions are consistent with the intent of SHVERA.

program distributor must remain with that distributor, both as a matter of fundamental property law and to ensure continued delivery of valuable programming to the public.

Respectfully submitted,

NBC TELEMUNDO LICENSE CO.

By: /s/ Margaret L. Tobey

Margaret L. Tobey  
Cristina C. Pauzé  
Morrison & Foerster LLP  
2000 Pennsylvania Avenue, N.W.  
Suite 5500  
Washington, D.C. 20006-1888  
(202) 887-1500

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NBC Telemundo License Co.  
1299 Pennsylvania Avenue, N.W.  
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