

**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)	

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)¹ submits these reply comments in response to the Commission’s *Notice of Proposed Rulemaking* in the above-captioned proceeding.² The *Notice* sought comment on Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”),³ which modifies Section 325(b)(3)(C) of the Communications Act to extend the retransmission consent good faith bargaining standards that presently apply to broadcasters, to cover multichannel video programming distributors (“MVPDs”). *Notice* at ¶ 7. The *Notice* also asked whether the good faith bargaining obligations should be expanded to also cover negotiations concerning MVPD carriage of broadcast stations outside of their designated market area (“DMA”). *Id.* at ¶ 8.

The record in this proceeding supports the Commission’s tentative conclusion to amend its rules to extend the good faith bargaining obligations to also cover MVPDs.⁴ Only NCTA

¹ NAB is a nonprofit incorporated association of radio and television stations, which serves and represents the American broadcasting industry.

² *Notice of Proposed Rulemaking* in MB Docket No. 05-89, FCC 05-49 (*rel.* March 7, 2005) (“*Notice*”).

³ 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).

⁴ See, e.g., Network Affiliates Comments in MB 05-89 at 3; NAB Comments in MB 05-89 at 2; ACA Comments in MB 05-89 at 3; EchoStar Comments in MB 05-89 at 2;.

contends that the good faith obligations should not be reciprocal for broadcasters and MVPDs in negotiations for retransmission consent of local broadcast signals. NCTA argues that the “substantive aspect” of the Commission’s good faith standards, which “prohibit a broadcaster from refusing to engage in retransmission consent negotiations,” should not be “equally applied” to MVPDs.⁵ In other words, NCTA seeks a special exemption that would allow cable operators, but not broadcasters, to refuse to even sit down at the bargaining table.

NCTA’s view of SHVERA ignores the statute’s unmistakable language and intent. As the *Notice* states, in imposing good faith negotiating standards on MVPDs in SHVERA, Congress used the exact same language it used in the Satellite Home View Improvement Act of 1999,⁶ when creating good faith standards for broadcasters.⁷ Moreover, SHVERA’s legislative history reveals Congress’ design that the “MVPD good-faith obligations . . . be analogous those that apply to broadcasters. . . .”⁸ Thus, the Commission’s decision to implement Congress’ expressed will and amend its rules to expand the good faith rules to cover MVPDs is correct. NCTA’s unsubstantiated allegations of unfairness in certain retransmission consent situations provide no basis for ignoring the statute. The Commission therefore must reject NCTA’s request, and implement Congress’ will to make the good faith obligations reciprocal for negotiations concerning MVPD carriage of local broadcast signals.

Contrary to the assertions of EchoStar and ACA,⁹ however, the good faith bargaining obligations should not apply to negotiations for consent to retransmit broadcast signals outside of

⁵ NCTA Comments in MB 05-89 at 2-4; *see also* 47 C.F.R. § 76.65(b)(1)(A).

⁶ The Satellite Home Viewer Improvement Act of 1999 (“SHVIA”), Pub. L. No. 106-113, 113 Stat. 1501, Appendix I (1999).

⁷ *Notice* at ¶ 7; 47 U.S.C. § 325(b)(3)(C)(iii).

⁸ H.R. Rep. No. 108-634, 108th Cong., 2nd Sess. 19 (2004) (“*SHVERA Report*”).

⁹ EchoStar Comments at 2; ACA Comments at 3.

a television station's market.¹⁰ These MVPDs argue that neither the retransmission consent requirements, nor the good faith obligations, make any distinction between the retransmission of local, and out-of-market, broadcast signals. This lack of specificity, they assert, therefore opens the door for expansion of the good faith obligations to cover negotiations for carriage of both local and non-local broadcast signals.¹¹

NAB disagrees. As the Commission notes, television stations do not enjoy mandatory carriage rights outside their markets; MVPD carriage of non-local broadcast signals is purely "permissive." *Notice* at ¶ 8. Moreover, SHVERA expressly states that satellite carriage of a non-local signal is "not mandatory",¹² and that the ability of a non-local signal to be carried by an MVPD "does not affect any right of the licensee of such station to grant (or withhold) retransmission consent under section 325(b)(1)."¹³

Thus, out-of-market broadcasters have the statutory right to "withhold" consent to retransmit their signals. Broadcast stations are not required to grant consent to allow such carriage, and MVPDs are not required to carry non-local signals. In this light, since neither party is obligated to even begin retransmission consent negotiations, or to reach a retransmission consent agreement, logic dictates that there cannot be any obligations to negotiate in good faith.¹⁴ Surely this is an area where market-place forces should guide discussions. Moreover, as persuasively demonstrated in the Network Affiliates Reply Comments, a contrary interpretation

¹⁰ Network Affiliates Comments at 4-5; NAB Comments at 3.

¹¹ *See supra* note 9.

¹² 47 U.S.C. § 340(d)(1).

¹³ *Id.* at § 340(d)(2).

¹⁴ In addition, as NBC extensively details in its comments, the 1992 Cable Act, SHVIA, and SHVERA are all designed to minimize potential harms to local broadcast operations that could diminish the ability of stations to provide quality local programming, and preserve the private property rights of program suppliers. As NBC explains, the MVPDs' suggested approach would undermine the entire network-affiliate system of broadcasting, and in turn, the service that broadcast television licensees provide to their audiences. *See* NBC Comments in MB Docket No. 05-28, at 2-10.

would mean that every television station in the country would have a good faith obligation to negotiate with thousands of cable systems and that these thousands of cable systems would have a reciprocal, affirmative obligation to negotiate with every television station. The Commission should reject this plainly erroneous and illogical suggestion.¹⁵

NAB also urges the Commission to reject ACA's effort to obtain special procedural protections for small and medium-sized cable operators, against broadcaster complaints alleging a failure to negotiate in good faith. ACA seeks, for example, (1) 30-days advance written notice of a broadcaster's intent to file a complaint; and (2) an extended, 30-day period for the cable operator to respond. ACA Comments at 5. These matters are wholly outside the scope of the *Notice*, in which the Commission asked only whether the good faith obligations should be reciprocal, and if they should apply to negotiations for carriage of non-local broadcast signals.

Even if the request that ACA makes were properly part of this proceeding, the Commission should reject them as an unjustified departure from well-established procedures.¹⁶ In the *Good Faith Order*, the Commission found a "general consensus among the commenters [including ACA] that the general pleading provisions of Section 76.7 provide appropriate procedural rules for good faith and exclusivity complaints."¹⁷ The Commission specifically concluded that "[n]o commenters justified a departure" from these procedures.¹⁸ Section 76.7 sets forth the comment period deadlines for retransmission consent complaints. Here, ACA offers no evidence to support a change in the rules, other than a naked assertion that some small and mid-sized cable companies may lack the resources to finance retransmission consent

¹⁵ Network Affiliates Reply Comments in MB Docket No. 05-98 (filed May 9, 2005), at 4-6.

¹⁶ See, e.g., *Report and Order* in MM Docket No. 99-346, 16 FCC Rcd 2281, 2282 (2001).

¹⁷ *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, 15 FCC Rcd 5445, 5447 (2000) ("*Good Faith Order*").

¹⁸ *Id.*

disputes.¹⁹ Fewer than 10 retransmission consent complaints have been filed with the Commission since SHVIA was enacted, all without any concerns that the complaint procedures are too burdensome. ACA's requested changes will do little more than delay the Commission's review of retransmission consent disputes, which typically require an expedited resolution.²⁰ The Commission's rules provide MVPDs with 20 days to respond to retransmission consent complaints, and ACA has failed to explain how extending this deadline will significantly improve the quality of such answers. The better course is to let the Commission's rules continue to work, and allow the Commission to deal with individual requests for extensions of time on a case-by-case basis.

ACA also asks the Commission to clarify that it would not be a violation of the good faith negotiation requirement for an MVPD to decline to carry multicast programming.²¹ ACA Comments at 6. In support of this request, ACA states that broadcasters routinely require small and medium-sized cable operators to carry unspecified digital programming as a condition of consent to carry the broadcaster's primary programming, and that such cable operators "face the

¹⁹ ACA references statements in the Commission's order granting News Corp.'s acquisition of Hughes/DirecTV. However, this decision concerned, in relevant part, the relationship between small and mid-sized cable operators and a vertically integrated provider of both video programming and programming distribution services. ACA's concerns are not relevant to the *Notice* because, as ACA is well aware, other than FOX, , broadcast stations are not integrated with competing MVPDs. Also, the particular language that ACA cites concerns the ability of small and mid-sized cable operators to bear the costs of commercial arbitration, while the *Notice* in this proceeding relates only to the Commission's good faith bargaining obligations. See *Memorandum Opinion and Order* in MB Docket No. 03-124, 19 FCC Rcd 473, 552-553 (2004).

²⁰ Were serious consideration given to ACA's request, then fairness would mandate that the Commission create special provisions for MVPD complaints brought against small and mid-sized broadcasters.

²¹ EchoStar also argues that contractual restrictions by third parties (*e.g.*, broadcast networks) on a local broadcaster's discretion to negotiate retransmission consent rights, outside its market, should be deemed a violation of the good faith bargaining obligations. EchoStar Comments at 4. The Commission should reject these proposals as unwarranted governmental intrusions into private contractual relations. EchoStar's objections relate to contracts between stations and their program suppliers that limit geographically a station's right to grant retransmission consent. These types of provisions serve legitimate business and public policy goals and should not be restricted. See *Opposition to American Cable Association Petition for Rulemaking of NAB, Network Affiliates, CBS, Disney and NBC* (filed April 18, 2005), at 17-19.

threat” that a television station will file a retransmission consent complaint if the operator refuses to carry such programming. *Id.* This request is a variation on ACA’s continued theme of objecting to any bundling arrangements that broadcasters might legitimately obtain during free-market, arms-length, retransmission consent negotiations.²² NAB has articulated at length the reasons why such bundling proposals are entirely appropriate.²³ The Commission specifically anticipated, and approved such arrangements over five years ago in the *Good Faith Order*. There, the Commission provided guidance in response to challenges to the legitimacy of certain retransmission consent bargaining proposals. Included among the kinds of proposals that are “presumptively . . . consistent with competitive marketplace considerations and the good faith negotiations requirement,” the Commission listed proposals for carriage “conditioned on carriage of any other programming, *such as a broadcaster’s digital signals. . .*”²⁴ ACA provides no evidence of changed circumstances since the *Good Faith Order* that would justify a modification of the Commission’s rules.²⁵

Accordingly, NAB supports the Commission’s decision to apply the good faith bargaining obligations equally to MVPDs in negotiations for carriage of local broadcast signals, but urges the Commission not to extend the obligations to cover negotiations for the carriage television broadcast signals outside of their DMAs.

²² See, e.g., American Cable Association, Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103, RM No. 11203 (filed March 2, 2005).

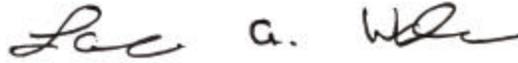
²³ See, e.g., NAB Comments in MB Docket No. 05-28 (filed March 1, 2005); NAB Reply Comments in MB Docket No. 05-13 (filed March 31, 2005).

²⁴ *Good Faith Order*, 15 FCC Rcd at 5469 (emphasis added).

²⁵ In fact, the ink is barely dry on the most recent decision in which the Commission reiterated its views on this exact question. In the *Multicast Order*, adopted only three months ago, the Commission specifically held that cable operators may “choose to carry additional video programming streams through retransmission consent agreements.” *Second Report and Order and First Order on Reconsideration in CS Docket No. 98-120, FCC 05-27 (rel. Feb. 23, 2005)*, at ¶ 44.

Respectfully submitted,

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A handwritten signature in cursive script, appearing to read "Marsha J. MacBride".

Marsha J. MacBride
Benjamin F.P. Ivins
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Dated: May 9, 2005
