

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

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

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

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Summary

Several commenters are using this proceeding as an attempt to rewrite the plain language of SHVERA and to undermine Congress's policy decision to extend the Commission's existing good faith negotiation regime to MVPDs in a wholly analogous and reciprocal fashion to what already exists for broadcast stations. The Commission should reject these attempts and should promulgate reciprocal good faith negotiation standards as proposed in the *Notice*.

- ▶ Contrary to NCTA's suggestion, MVPDs must negotiate—in good faith—with broadcast stations and cannot refuse to negotiate *ab initio*.
- ▶ The good faith negotiation requirement does *not* apply to retransmission of out-of-market signals. EchoStar's and ACA's contrary proposal would undermine the network-affiliate model of television broadcasting by forcing *every station* to negotiate in good faith with, potentially, *every MVPD* in the entire country until the MVPD ended up with the most favorable terms to retransmit a distant signal into some local market. There is no basis to interpret SHVERA to permit that absurd result.
- ▶ The good faith negotiation requirement does *not* require a local broadcast station to nullify the territorial restrictions in its programming agreements with third parties. EchoStar's contrary suggestion would gut programming exclusivity in general and contravene the Commission's long-settled policy in acknowledging and protecting the value of exclusive programming arrangements.
- ▶ The good faith negotiation requirement *does* permit broadcast stations to request that an MVPD agree not to import a significantly viewed signal into a local station's market. Inherent in an earlier finding of the Commission is that it is *not* inconsistent with competitive marketplace considerations and the good faith negotiation requirement for a local broadcast station to offer a proposal that forecloses carriage of other programming services by an MVPD that substantially duplicate the local broadcast station's programming.
- ▶ The "totality of the circumstances" should be applied on a case-by-case basis, but, given the fact-dependent nature of the inquiry, it is premature and inappropriate to make any determination that the test may differ substantively for broadcast stations and for MVPDs, as EchoStar suggests it may.
- ▶ Neither SHVERA nor its legislative history suggests that ACA's members deserve

special treatment at the expense of other MVPDs and broadcast stations. In any event, as the decision in *EchoStar Satellite Corp. v. Young Broadcasting* demonstrates, the Commission is fully capable of policing its processes.

- ▶ As a general rule, the Commission does not govern the substantive terms of retransmission consent agreements. A broadcast station may condition its retransmission consent on carriage of its multicast programming without violating the good faith negotiation requirement. If an MVPD does decline to agree to retransmit a broadcast station's multicast programming, the broadcast station may, in turn, decline to grant retransmission consent for its other signals, be they analog or digital, and the broadcast station's decision not to grant retransmission consent does not violate the good faith negotiation requirement.

The Network Affiliates respectfully request the Commission to implement Section 207 of SHVERA as recommended in their opening comments and in these reply comments.

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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 reply to the comments submitted in response to the *Notice of Proposed Rule Making* (“Notice”), FCC 05-49, released on March 7, 2005, in the above-referenced proceeding.¹

I. SHVERA Requires That MVPDs Negotiate in Good Faith

The Network Affiliates agree with many of the comments offered by the National Cable & Telecommunications Association (“NCTA”). For example, the Network Affiliates agree with NCTA that the Commission’s good faith procedural rules apply both to broadcast stations and to MVPDs.² The Network Affiliates also agree with NCTA that SHVERA does not require an MVPD actually

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

² See NCTA Comments at 2.

to enter into a retransmission consent agreement with a broadcast station,³ just as a broadcast station cannot be required to grant its retransmission consent to an MVPD. But NCTA goes further, arguing that MVPDs may simply refuse to enter into the negotiations themselves.⁴ This goes too far and vitiates the intent of Congress in making the good faith negotiation provision reciprocal.

A broadcast station may elect carriage, pursuant to Section 338 or Section 614 of the Communications Act, or it may elect retransmission consent pursuant to Section 325. Nothing in Section 325 requires either the broadcast station or the MVPD to reach agreement on terms of retransmission consent. If a broadcast station miscalculates its retransmission consent election and fails to come to agreement with an MVPD, then the broadcast station will be without carriage for the entire three-year cycle. But new Section 325(b)(3)(C)(iii) requires the Commission to promulgate regulations that “*prohibit a multichannel video programming distributor from failing to **negotiate** in good faith for retransmission consent.*”⁵ On its face it is clear that the statute requires that an MVPD negotiate and prohibits it from refusing to do so. While a broadcast station takes the risk, in electing to negotiate with an MVPD for retransmission consent, that the parties will fail to reach a mutually acceptable agreement, SHVERA’s new provision makes it plain that one risk the broadcast station is *not* taking is that the MVPD will simply refuse to negotiate at all.

Moreover, as the Network Affiliates pointed out in their opening comments, it is presumed that Congress acts with knowledge of the existing regulatory framework when it enacts new

³ See NCTA Comments at 6-7.

⁴ See NCTA Comments at 7-8.

⁵ 47 U.S.C. § 325(b)(3)(C)(iii) (emphasis added).

legislation, including when the new law incorporates the language of the prior law.⁶ Because the existing regulatory framework includes a provision that prohibits the “[r]efusal by a television broadcast station to negotiate retransmission consent,”⁷ because the language Congress used to apply the good faith negotiation requirement to MVPDs is *identical* to the language Congress had used in applying the requirement to broadcast stations in SHVIA, and because the legislative history of the reciprocal good faith negotiation provision states that Congress intended that the “MVPD good-faith obligations . . . be analogous to those that apply to broadcasters,”⁸ it follows that SHVERA must prevent MVPDs from refusing to negotiate for carriage. Again, the Network Affiliates agree with NCTA that the good faith negotiation requirement does not mean either party must acquiesce in the other party’s demands. But the parties must attempt to reach agreement, and they must negotiate in good faith to do so.

For these reasons, the Commission’s proposed revision to Section 76.65 of its rules, making the good faith negotiation regime reciprocal, should be adopted as proposed in the *Notice*.

II. The Good Faith Negotiation Requirement Does Not Apply to Retransmission of Out-of-Market Signals

Both EchoStar Satellite L.L.C. (“EchoStar”) and the American Cable Association (“ACA”) argue that the Commission’s good faith negotiation regime should apply to negotiations for consent to retransmit stations’ signals outside of their markets.⁹ EchoStar appears to limit its argument to

⁶ See Network Affiliates Comments at 3 & n.7 (citing *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)).

⁷ 47 C.F.R. § 76.65(b)(1)(i).

⁸ H.R. REP. 108-634 (2004), at 19.

⁹ See EchoStar Comments at 3; ACA Comments at 3-4.

significantly viewed signals, but ACA's argument is not so cabined and would appear to require New York stations to negotiate in good faith for consent to retransmit their signals in Glendive, Montana. Both arguments should be rejected for several reasons.

First, as the Network Affiliates showed in their opening comments,¹⁰ neither broadcast stations nor MVPDs have carriage rights or obligations outside of a station's DMA. Moreover, Section 340(d)(2), which expressly recognizes that a station may "withhold" retransmission consent, specifically references Section 325(b)(1), the statutory retransmission consent provision, *not* Section 325(b)(3)(C), the statutory good faith bargaining provision. If Congress had intended the good faith negotiation regime to apply, then it would have referenced Section 325(b)(3)(C). In addition, 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 obligation to reach an agreement that neither the MVPD nor the broadcast station is required to make.

Second, as NBC Telemundo License Co. ("NBC") extensively demonstrated in its comments, the 1992 Cable Act, SHVIA, and SHVERA each seek to support the value of local stations, the network-affiliate system of television broadcasting, and the rights of private property holders.¹¹ If EchoStar's and ACA's arguments were to be accepted, it would mean that *every station* would have to negotiate in good faith with, potentially, *every MVPD* in the entire country. Each MVPD could, accordingly, force broadcast station after broadcast station to negotiate in good faith until the MVPD ended up with the most favorable terms to retransmit a distant signal into some local market. This

¹⁰ See Network Affiliates Comments at 4-5.

¹¹ See generally NBC Comments.

would be an absurd result, and it is a fundamental canon of statutory construction that statutory language should not be interpreted to result in an absurdity, especially when another, more reasonable interpretation is available.¹² Moreover, EchoStar's and ACA's arguments presume that each station must necessarily have the authority to actually grant retransmission consent on a nationwide basis, but neither network affiliation nor syndicated programming agreements grant nationwide rights. Taken to their (il)logical conclusion, EchoStar's and ACA's arguments would undermine the entire network-affiliate system. *Preserving*, not destroying, the network-affiliate relationship has been a central concern of Congress since the original Satellite Home Viewer Act in 1988:

The Committee believes that historically and currently the network-affiliate partnership serves the broad public interest. It combines the efficiencies of national production, distribution and selling with significant decentralization of control over the ultimate service to the public. It also provides a highly effective means whereby the special strengths of national and local program services support each other. This method of reconciling the values served by both centralization and decentralization in television broadcast service has served the country well.

. . . The Committee intends . . . [to] preserv[e] the exclusivity that is an integral part of today's network-affiliate relationship.¹³

The legislative history of SHVERA itself, 16 years later, manifests this continuing concern as follows:

Where a satellite provider can retransmit a local station's exclusive network programming but chooses to substitute identical

¹² See, e.g., *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (citing cases); *Sorrells v. United States*, 287 U.S. 435, 446 (1932) (discussing cases).

¹³ H.R. REP. 100-887 (Part 2) (1988), at 20; see also H.R. REP. 100-887 (Part 1) (1988), at 14-15 (“[T]he bill [SHVA] respects the network/affiliate relationship and promotes localism . . . [and] prevent[s] disruption of the networks’ special exclusivity arrangements with their numerous affiliates.”).

programming from a distant network affiliate of the same network instead, the satellite carrier *undermines* the value of the license negotiated by the local broadcast station as well as *the continued viability of the network-local affiliate relationship*.¹⁴

Because the good faith negotiation provision is capable of a reasonable interpretation—viz. the good faith negotiation standards apply both to broadcast stations and to MVPDs with respect to retransmission of signals within a station’s local market and do not apply either to broadcast stations or to MVPDs with respect to retransmission of signals outside of a station’s local market—the Commission should interpret SHVERA in this reasonable fashion rather than in a fashion, as proposed by EchoStar and ACA, that would jeopardize, if not destroy, the network/local affiliate model of television broadcasting.

Third, and finally, both EchoStar and ACA rely on the *Monroe* decision,¹⁵ but that reliance is misplaced. For several reasons, the Commission is not bound by, nor should it follow, the statement that the good faith “statute *appears* to apply equally to stations and MVPDs in the same local market or in different local markets.”¹⁶ The statement is obvious *dicta* in a Bureau decision. The Media Bureau specifically said that “we need not reach the question of whether the broadcaster has acted in good faith during the course of the negotiations,”¹⁷ and so its footnote remark about the extent of the good faith obligation is not germane to the matter decided. In any event, the statement is couched in equivocal language—“[t]he statute *appears* to apply.” Moreover, even this indefinite language is unaccompanied by any analysis of the language of the statute or of the full Commission’s

¹⁴ H.R. REP. 108-660 (2004), at 11 (emphases added).

¹⁵ *See Monroe, Georgia, Water, Light & Gas Comm’n v. Morris Network, Inc.*, 19 FCC Rcd 13977 (2004) (the “*Monroe*” decision).

¹⁶ *Monroe* at ¶ 9 n.24 (emphasis added).

¹⁷ *Id.*

Good Faith Order.¹⁸ Furthermore, in July 2004, when the decision was released, Section 325(b)(3)(C) did *not* apply to, and impose good faith bargaining obligations upon, MVPDs—regardless of the market involved—which the Bureau statement suggests it did. Thus, the statement has no probative value. Lastly, Section 325(b)(3)(C) itself has been amended by Congress since July 2004 in SHVERA. When SHVERA is read as a whole, and considered together with its purpose and legislative history, as demonstrated above, it is evident that the Media Bureau’s earlier *dicta* does not, and cannot, reflect the current meaning of the statute.

In sum, the Network Affiliates urge the Commission to reject any application of reciprocal good faith bargaining obligations to retransmission of significantly viewed or of other out-of-market 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 those contexts.

III. The Good Faith Negotiation Requirement Does Not, and Cannot, Nullify Third-Party Exclusive Programming Agreements

EchoStar attempts to use the *Monroe* decision as a springboard to argue that third-party programming agreements cannot restrict the authority of a local station to grant retransmission consent outside of its local market. Indeed, EchoStar goes so far as to suggest that a local station’s refusal to bargain in the face of such a programming contract restriction is “a *per se* violation of good faith or, at the very least, presumptively inconsistent with competitive marketplace considerations.”¹⁹ EchoStar’s argument is tantamount to an attack on programming exclusivity in general and should

¹⁸ See *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445 (2000) (“*Good Faith Order*”).

¹⁹ EchoStar Comments at 4.

be rejected as contrary to the Commission’s long-settled policy in acknowledging, protecting, and promoting the value of exclusive programming arrangements.

In its *Program Exclusivity Order*, the Commission extensively analyzed the benefits of exclusive programming arrangements.²⁰ The Commission determined that without enforceable exclusivity “program suppliers are likely to receive less than the full market value of programs broadcast on distant signals that are retransmitted by cable, and therefore will not get good price information about the value of such programs to cable viewers”²¹ while broadcasters are put “at a competitive disadvantage relative to their rivals who can enforce exclusive contracts; their advertisers’ abilities to reach as wide an audience as possible are impaired; and consumers are denied the benefits of full and fair competition: higher quality and more diverse programming, delivered to them in the most efficient possible way.”²²

In addition, EchoStar’s misreading of the *Monroe* decision contradicts the very limitation expressly set forth in *Monroe* itself:

Our decision here is not intended to suggest any opinion as to whether Morris’s grant of retransmission consent for WMGT is consistent with any contractual agreement to which it may be a party. We will not interject ourselves into specific arguments concerning private agreements between broadcasters and MVPDs. Contractual issues are to be resolved by the parties or by courts of proper jurisdiction.²³

Monroe, therefore, makes it clear that the particular terms of programming agreements, be they

²⁰ See *Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 5299 (1988) (“*Program Exclusivity Order*”), at ¶¶ 49-89.

²¹ *Program Exclusivity Order* at ¶ 57.

²² *Program Exclusivity Order* at ¶ 62.

²³ *Monroe* at ¶ 10.

network affiliation or syndicated programming agreements, do not fall within the Commission’s purview for retransmission consent purposes.

There is nothing in SHVERA or its legislative history to suggest that Congress intended the Commission either to implement or to apply good faith negotiation standards to effectively nullify the territorial restrictions in programming agreements that serve to grant, and to limit, program exclusivity. But that is what EchoStar is essentially asking the Commission to do—to force a broadcast station to negotiate in good faith to grant a right to an MVPD that the broadcast station’s program supplier expressly limited the ability of the broadcast station to grant. As stated above, EchoStar’s proposal contravenes long-standing Commission policy, is beyond the Commission’s purview, and has no basis in SHVERA. It should be rejected.

IV. Broadcast Stations May Negotiate with an MVPD Not to Carry Duplicating Programming

EchoStar also suggests that a local station should not be able to request, in its negotiation with an MVPD for retransmission consent, that the MVPD agree not to import a significantly viewed signal into the local station’s market.²⁴ The Commission’s *Good Faith Order* implementing the good faith bargaining obligations imposed by SHVIA does not specifically address the negotiating proposal about which EchoStar complains, but a similar bargaining proposal that is addressed is highly informative. In its *Good Faith Order*, the Commission found that it would be presumptively inconsistent with competitive marketplace considerations and the good faith negotiation requirement for a broadcast station to offer a proposal that “specifically foreclose[s] carriage of other programming services by the MVPD that *do not substantially duplicate the proposing broadcaster’s*

²⁴ See EchoStar Comments at 4-5.

*programming.*²⁵ Inherent in the Commission’s finding is that it is *not* inconsistent with competitive marketplace considerations and the good faith negotiation requirement for a local broadcast station to offer a proposal that forecloses carriage of other programming services by the MVPD that *do* substantially duplicate the local broadcast station’s programming. Otherwise, the Commission would not have qualified its finding in the manner that it did. As discussed above, the Commission is well aware of the importance of program exclusivity to the economic viability of local broadcast stations,²⁶ and it is critical to local broadcast stations that they be permitted to negotiate at arm’s length with MVPDs to protect the exclusivity of their programming from duplicating programming.

Moreover, there is an element of reciprocity in this context since satellite carriers are neither required to retransmit local commercial broadcast stations that substantially duplicate the programming of another local commercial broadcast station²⁷ nor required to retransmit a distant broadcast station that is significantly viewed and that broadcasts programming that is duplicative of programming aired by a local broadcast station.²⁸ Because the good faith negotiation requirement now applies to satellite carriers (and other MVPDs),²⁹ and satellite carriers are not legally required to retransmit duplicating signals (whether significantly viewed or otherwise), satellite carriers have

²⁵ *Good Faith Order* at ¶ 58 (emphasis added).

²⁶ *See generally Program Exclusivity Order*; Network Affiliates Comments and Reply Comments in MB Docket No. 05-28; NAB Comments and Reply Comments in MB Docket No. 05-28.

²⁷ *See* 47 U.S.C. § 338(c)(1) (providing exception to general carry one, carry all local station carriage requirement by not requiring carriage of signal of local commercial broadcast station that substantially duplicates the signal of another local commercial broadcast station).

²⁸ *See* 47 U.S.C. § 340(d)(1) (providing that carriage of significantly viewed signals is not mandatory).

²⁹ *See* 47 U.S.C. § 325(b)(3)(C)(iii).

no obligation to bargain in good faith with a broadcast station for carriage of a duplicating signal. Given this freedom, and in the interest of regulatory parity, there can be no restriction on a broadcast station bargaining to prevent importation of a substantially duplicating significantly viewed signal whose carriage is not legally mandated. This is an additional reason—to maintain the reciprocity of the good faith negotiation requirement—why such a bargaining proposal is consistent with the good faith bargaining standards.

In short, localism and the public interest would best be served by allowing local stations and MVPDs to determine the extent to which duplicating signals may be retransmitted.

V. The “Totality of the Circumstances” Test Should Be Applied on a Case-by-Case Basis

EchoStar suggests that the “totality of the circumstances” test for determining whether a party negotiated in good faith may be substantively different for a broadcast station than it is for an MVPD, but it concedes that assessments should be made on a case-by-case basis.³⁰ The Network Affiliates agree with EchoStar that the “totality of the circumstances” test should be applied on a case-by-case basis, but it is premature and inappropriate to make any determination that the test may differ substantively for broadcast stations and for MVPDs. The “totality of the circumstances” is obviously a fact-dependent inquiry that depends on the “circumstances” presented.³¹ The very nature of the test makes it impossible to determine in advance whether it will, or even can, be applied differently to broadcast stations and to MVPDs in some substantive manner. If a dispute presents itself for adjudication, the Network Affiliates are confident that the Commission will examine the

³⁰ See EchoStar Comments at 2.

³¹ See *Good Faith Order* at ¶ 32 (stating that the test considers the facts presented to the Commission).

totality of the circumstances to determine whether either the broadcast station or the MVPD failed to negotiate in good faith. Furthermore, Congress intended to make the good faith obligations reciprocal, and they would hardly be reciprocal if they differed substantively.

VI. SHVERA Contains No Special Provisions Benefitting Only Small Cable Operators

ACA seeks special rules to benefit small—and now also medium-sized—cable companies.³² Not only does SHVERA lack any basis to grant special favors to ACA’s members, but ACA’s request itself is replete with mischaracterizations and misstatements.

First, ACA claims that its request for special procedural protections is “to prevent broadcasters from abusing the retransmission consent complaint process against small and medium-sized cable companies.”³³ ACA, naturally, presents no evidence that broadcast stations have ever “abused” the Commission’s complaint process—because there is none. In the only good faith complaint adjudicated on the merits, the Commission found that the *MVPD*, not the broadcaster, had abused the Commission’s process.³⁴

Second, ACA claims that the Commission’s promulgation of the rule that Congress told the Commission to promulgate “will increase media conglomerates’ and affiliate groups’ *power* in the retransmission consent process by giving them another *weapon* to deploy against small and medium-sized cable companies to *pressure* them to carry programming they would not otherwise

³² See ACA Comments at 4-5.

³³ ACA Comments at 4.

³⁴ See *EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070 (2001).

accept: a complaint for failure to negotiate in good faith.”³⁵ ACA’s (mis)characterization is preposterous. ACA fails to explain how the Commission, in fulfilling a congressional mandate to make good faith bargaining obligations reciprocal, is arming broadcast stations with the means to cow ACA’s members. In any event, as the Commission’s decision in *Young Broadcasting* demonstrates, the Commission is fully capable of policing its processes. And it is worth noting that since being admonished in *Young Broadcasting* for abusing the Commission’s processes nearly four years ago, EchoStar has not filed another good faith complaint.

Third, and finally, ACA seeks special rules that benefit only its members.³⁶ Of course, neither SHVERA itself nor its legislative history anywhere suggests that ACA’s members are entitled to special treatment. ACA is, apparently, untroubled by its suggestion that its members should be privileged vis-à-vis large cable operators, satellite carriers, and telephone companies, let alone broadcast stations. Moreover, ACA, naturally, fails to explain how the special procedural protections it seeks for its members will actually prevent the parade of horrors it envisions from broadcast stations.

In short, ACA’s request for special rules to benefit its members is without merit and should be summarily rejected.

VII. It Is Not a Violation of the Good Faith Negotiation Standards for a Broadcast Station to Condition Retransmission Consent on Carriage of Its Multicast Programming

It is well-settled that a broadcast station may condition retransmission consent on carriage of its multicast programming without violating the good faith negotiation requirement. In the *Good*

³⁵ ACA Comments at 4-5 (emphases added).

³⁶ See ACA Comments at 5.

Faith Order, the Commission specifically found that it is presumptively consistent with competitive marketplace considerations and the good faith negotiation requirement for a broadcast station to condition retransmission consent “on carriage of *any* other programming, such as a broadcaster’s *digital signals*.”³⁷ Multicast programming is clearly encompassed by the *Good Faith Order*’s broad language referring to *any* programming and by the specific reference to the plural form of digital signals, which must necessarily reach multicast programming.

If an MVPD does decline to agree to retransmit a broadcast station’s multicast programming,³⁸ the broadcast station may, in turn, decline to grant retransmission consent for its other signals, be they, for instance, the station’s analog signal or the station’s HD signal, and the broadcast station’s decision not to grant retransmission consent does not violate the good faith negotiation requirement. This principle follows from the *Good Faith Order*’s determination that a broadcast station may condition carriage of its signal on carriage of any other programming, including the digital signals.

In short, the good faith negotiation standards govern the process, but not the substance, of retransmission consent negotiations. What the Commission said in its *Good Faith Order* five years ago equally applies now: “The Commission should enforce the process of good faith negotiation and . . . the substance of agreements generally should be left to the market. . . . Indeed, in the aggregate, retransmission consent negotiations *are* the market through which the relative benefits and costs to the broadcaster and MVPD are established.”³⁹

³⁷ *Good Faith Order* at ¶ 56 (emphases added).

³⁸ *See* ACA Comments at 6.

³⁹ *Good Faith Order* at ¶¶ 39, 53 (emphasis added).

