

**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

Reciprocal Bargaining Obligations

MB Docket No. 05-89

REPLY COMMENTS OF DIRECTV, INC.

In this proceeding, broadcasters and multichannel video programming distributors (“MVPDs”) have suggested diametrically opposing views of what the Satellite Home Viewer Extension and Reauthorization Act (“SHVERA”)¹ means by “good faith negotiation” in the context of carriage in out-of-market, significantly viewed areas.² The Broadcasters,³ for their part, argue that the requirement simply does not apply in such areas. On the other hand, EchoStar and the American Cable Association (“ACA”) each seems to believe that the requirement not only applies in such areas, but also works exactly the same way there as it does in local markets.

¹ In these reply comments, DIRECTV refers to SHVERA and its two predecessors, the Satellite Home Viewer Act (“SHVA”) and the Satellite Home Viewer Improvement Act (“SHVIA”) simply as “SHVERA.”

² *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, MB Docket No. 05-89 at ¶ 1 (rel. March 7, 2005) (“Notice”).

³ In these reply comments, DIRECTV refers to the ABC, CBS, FBC, and NBC Television Associations (the “Affiliates”), the National Association of Broadcasters (“NAB”), and NBC Telemundo License Co. (“NBC Telemundo”) collectively as the “Broadcasters.”

DIRECTV, Inc. (“DIRECTV”) finds that these positions fully serve neither the negotiating parties nor consumers. On the one hand, the law is plain: broadcasters and MVPDs must negotiate in good faith for carriage in out-of-market, significantly viewed areas. On the other hand, where parties do not seek or provide carriage in such areas, “good faith” need not require pointless negotiations. DIRECTV thus urges the Commission to augment its existing good faith negotiation rules with a simple “agree with one, negotiate with all” rule for significantly viewed areas. Such a rule would work as follows:

- Broadcasters would be free to refuse to allow the retransmission of their signals in out-of-market, significantly viewed areas – so long as they did so for all MVPDs. But once they allowed one MVPD to carry signals in such areas, they would then have to negotiate in good faith with all MVPDs with respect to such carriage. Such negotiations need not lead to agreement, but they must comply with the existing rules on good faith negotiation.
- By the same token, MVPDs would be free to decide that they will not carry signals from one market into significantly viewed areas in another market (say, from New York into significantly viewed areas in Hartford). But once they carried one New York station in significantly viewed areas in Hartford, they would then have to negotiate in good faith with all New York stations that sought such carriage in Hartford (assuming, of course, they were significantly viewed in Hartford). Again, such negotiations need not lead to agreement, but they must comply with the existing rules on good faith negotiation.

Such a rule would allow the good-faith standard to evolve, just as the scope of the requirement itself has evolved. This, in turn, would help ensure that DBS customers are, to the extent possible, not denied signals received by their cable-customer neighbors.

I. BROADCASTERS AND MVPDS MUST NEGOTIATE IN GOOD FAITH FOR CARRIAGE IN SIGNIFICANTLY VIEWED AREAS

SHVERA’s plain language indicates that the obligation to negotiate in good faith applies in out-of-market significantly viewed areas. It prohibits “a television broadcast station that provides retransmission consent from engaging in exclusive contracts for

carriage or failing to negotiate in good faith,”⁴ and sets forth a nearly identical standard for MVPDs.⁵ This language does not contain a “significantly viewed” exception – certainly not an obvious one. The Broadcasters nonetheless suggest that the requirements do not apply in out-of-market significantly viewed areas. This, we are told, is because (1) broadcasters cannot demand carriage in such areas; and (2) broadcasters can withhold retransmission consent in such areas.⁶

DIRECTV finds this argument perplexing. It cannot be the case that the good faith negotiation requirement disappears in significantly viewed areas because broadcasters cannot demand carriage in such areas. The requirement has nothing to do with mandatory carriage, because it applies only to broadcasters who have foregone mandatory carriage by electing retransmission consent.⁷ Nor can it be the case that the good faith negotiation requirement disappears in significantly viewed areas because broadcasters can withhold retransmission consent in such areas. Broadcasters, after all, can already withhold consent in their local markets and still comply with their good faith obligations.⁸ (This, surely, is what Congress described when it provided that the new

⁴ 47 U.S.C. § 325(b)(3)(C)(ii).

⁵ 47 U.S.C. § 325(b)(3)(C)(iii) (prohibiting “a multichannel video programming distributor from failing to negotiate in good faith for retransmission consent under this section”).

⁶ Affiliates Comments at 5 (“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.”); NAB Comments at 3.

⁷ See 47 U.S.C. § 325(b)(3)(C)(ii) (prohibiting “a television broadcast station *that provides retransmission consent* from engaging in exclusive contracts for carriage or failing to negotiate in good faith) (emphasis added); 47 C.F.R. §76.64(f) (requiring commercial television stations to elect between retransmission consent and mandatory carriage).

⁸ See, e.g., *Implementation of the Satellite Home Viewer Act of 1999*, First Report and Order, 15 FCC Rcd. 5445, 5462 (2000) (“*Good Faith Order*”) (noting that, “[p]rovided that the parties negotiate in good faith in accordance with the Commission’s standards, failure to reach agreement does not violate [then] Section 325(b)(3)(C)”).

significantly viewed rules do not “affect any right of the licensee of such station to grant (or withhold) retransmission consent.”⁹)

More fundamentally, the problem with the Broadcasters’ position is that it seems to allow stations to refuse to negotiate with DBS operators for significantly viewed carriage even where cable operators already provide such carriage. Now that DBS operators can retransmit signals in significantly viewed areas, cable-only retransmission consent would violate SHVERA’s prohibition on exclusive retransmission consent contracts, because it would create *de facto* exclusivity for cable operators in such areas.¹⁰ Granting such an advantage to the dominant MVPDs in each local market is also repugnant to sound competition policy.¹¹ Last – but by no means least – cable-only carriage in significantly viewed areas restricts the availability of channels to only those consumers who could receive them through their cable operator. This is certainly *not* what Congress had in mind when it sought to enhance “[c]able/satellite comparability.”¹²

II. GOOD FAITH NEGOTIATION NEED NOT MEAN THE SAME THING IN ALL CIRCUMSTANCES

The Broadcasters err when they suggest that the good faith negotiation requirement does not apply to out-of-market, significantly viewed areas. Yet EchoStar and ACA err equally when they suggest that the requirement must apply exactly the same way in such areas as it does in local markets.

⁹ 47 U.S.C. § 340(d)(2).

¹⁰ 47 U.S.C. § 325(b)(3)(C)(ii) (prohibiting “a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage,” and not limiting the prohibition to in-market exclusivity).

¹¹ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 05-13, MB Docket No. 04-227 at ¶4 (rel. Feb. 4, 2005) (noting that cable operators continue to serve nearly three quarters of MVPD subscribers).

¹² SHVERA, Pub. L. No. 108-447, § 202, 118 Stat. 2809, 3393 (2004).

According to EchoStar, for example, broadcasters must comply with the good faith negotiation standards found in Section 76.65 of the Commissions rules, regardless of whether they are negotiating for in-market or significantly viewed carriage.¹³ This is a policy that neither broadcasters nor MVPDs should want. From a broadcaster's perspective, such a policy improperly treats out-of-market negotiations (where public policy is relatively neutral about carriage) the same as in-market negotiations (where public policy clearly favors carriage).¹⁴ At the same time, if "good faith" really means that broadcasters must always comply with Section 76.65 in significantly viewed negotiations, it presumably imposes similar obligations on MVPDs. In such case, if a satellite operator were to conclude – as it has every right to¹⁵ – that it will not provide significantly viewed signals in a certain area (perhaps because local and significantly viewed signals are offered on different satellites),¹⁶ it would still have to go through the

¹³ EchoStar Comments at 4 (arguing that a refusal to negotiate in out-of-market significantly viewed areas should be a *per se* violation of good faith). ACA, for its part, seems to want to apply this rule to *all* out-of-market negotiations, even where the station in question is not significantly viewed. *See* ACA Comments at 4 (urging the Commission to "clarify that Section 325(b) requires that both in-and out-of-market broadcasters negotiate in good faith for retransmission consent"). This, of course, is not a subject about which the Commission sought comment. *See Notice* at ¶ 8 (seeking comment "whether, under the statute, the good faith negotiating standards may be any different for carriage of *significantly viewed television broadcast stations* outside of their designated market area") (emphasis added). The Commission should not accept ACA's invitation to expand the scope of this proceeding.

¹⁴ While Congress and the FCC have an expectation that broadcasters will (absent abuses) always seek carriage in their local markets, there is no such expectation that they will necessarily do so in significantly viewed areas. *Compare* 47 U.S.C. § 534(h)(1)(A) (providing that broadcasters can demand mandatory carriage from cable operators in their local markets) *and* 47 U.S.C. § 338(a)(1) (providing that broadcasters can demand mandatory carriage from satellite operators providing local-into-local service in their local markets) *with* 47 U.S.C. § 340(d)(1) (providing that satellite carriage of signals in out-of-market, significantly viewed areas is "not mandatory").

¹⁵ *See* 47 U.S.C. § 340(d)(1) (providing that "carriage of a signal under this section is not mandatory").

¹⁶ *See* DIRECTV Comments in MB Docket No. 05-49 at 15-16 (filed Apr. 8, 2005) (observing that there are 61 markets in which either DIRECTV provides local-into-local service from a central orbital location but would provide significantly viewed signals that are currently retransmitted from 72.5° W.L., or vice versa, and noting that either scenario would require the use of two dishes to receive both local and significantly viewed signals).

motions of “negotiating” with broadcasters about such carriage. This would presumably be so even if a satellite operator could not technically deliver such signals (if, for example, the significantly viewed area were outside of the spot beam on which the station is carried).¹⁷ Such pointless exercises cannot be what Congress had in mind when it instructed MVPDs and broadcasters to negotiate in good faith.

III. THE COMMISSION SHOULD ADOPT AN “AGREE WITH ONE, NEGOTIATE WITH ALL” RULE

The good faith negotiation requirement applies to out-of-market, significantly viewed carriage. But simply grafting the Commission’s existing rules onto this new context would lead to predictably absurd results. DIRECTV thus proposes this single addition to the Commission’s rules, applicable only to out-of-market significantly viewed carriage: *If a party agrees with one, it must negotiate with all.* That is, all parties are free to refuse to negotiate for carriage in such areas. But once a party agrees to significantly viewed carriage, it must negotiate for such carriage with all other similarly situated parties, in compliance with the Commission’s rules.¹⁸

For broadcasters, the “agree with one, negotiate with all” rule would mean this: any broadcaster would be free, if it wished, to categorically reject negotiations for carriage in out-of-market, significantly viewed areas – but only if it did so with respect to *all* MVPDs. Once the broadcaster granted consent for one MVPD to carry such signals, however, it would have to negotiate with all other MVPDs for such carriage, and such negotiations would have to comply with the Commission’s good faith negotiation

¹⁷ Indeed, if “good faith negotiation” *really* meant negotiation in all circumstances, DIRECTV would presumably be obligated to negotiate with *local* broadcasters in markets where it has not even launched local-into-local service. See 47 U.S.C. § 338(a)(1) (setting forth “carry one, carry all” – not “must carry” – requirement).

¹⁸ See 47 C.F.R. § 76.65 (setting forth seven objective standards and a totality of the circumstances test for good faith negotiation).

standard.¹⁹ This would not, of course, mean that the broadcaster must actually reach agreement for such carriage in all cases.²⁰ It would only mean that the broadcaster must negotiate for such carriage in good faith.

This rule would apply reciprocally to MVPDs. DIRECTV would be free to decide, for example, that it will not carry New York stations in significantly viewed areas in the Hartford DMA and, having made that decision, would be free not to negotiate with New York stations regarding such carriage. If, however, it were to carry one New York station in a Hartford significantly viewed area, it would have to negotiate with all New York stations seeking carriage in Hartford (assuming, of course, that they were significantly viewed in Hartford, and that DIRECTV's New York spot beam reached the area in Hartford in which the station in question was significantly viewed).²¹ Again, this would not require DIRECTV to reach agreement with such stations. It would only require DIRECTV to negotiate with them in compliance with the Commission's good faith standards.

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The meaning of "good faith" must evolve, even as the law itself has evolved. The Commission should thus clarify that, in the significantly viewed context, good faith

¹⁹ Thus, a broadcaster that has granted cable operators significantly viewed retransmission rights must negotiate with DIRECTV, EchoStar, and other MVPDs for such rights. By the same token, if the broadcaster grants DIRECTV such rights, it must then negotiate with EchoStar, the cable operator, and any other MVPDs as well.

²⁰ See n.8, above.

²¹ To be clear, the rule would not mean that DIRECTV must negotiate with New York stations for carriage in other significantly viewed areas, such as Wilkes-Barre/Scranton. Nor would it mean that DIRECTV must negotiate with non-New York stations regarding carriage in Hartford. Rather, the rule would apply "good faith" on a DMA-by-DMA basis. Thus, if DIRECTV were to import New York Station A into only one county in the New Haven DMA, it would then have to negotiate with New York Station B with respect to carriage in all areas in the New Haven DMA where Station B was significantly viewed.

means that a party that agrees with one must negotiate with all. This will rationalize the good faith negotiation regime in its new context, fulfill Congress's goal of increasing MVPD competition, and ensure that DBS subscribers have, to the extent possible, access to the same channels as their cable subscriber neighbors.

Respectfully Submitted,

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