

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 NBC TELEMUNDO LICENSE CO.

I. INTRODUCTION

The comments filed by multichannel video programming distributors (“redistributors”) in this proceeding confirm that they want to have it both ways – willing to take the popular programming of local television stations when it is offered to them for free and refusing to even *negotiate* – despite the good faith obligation Congress has imposed on them – with television broadcasters who exercise their statutory right to elect retransmission consent.¹ This interpretation of “good faith” renders meaningless Congress’s imposition of a good faith obligation on redistributors in the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”)² and is contrary to the interests of the redistributors’ own subscribers. At the same time, the redistributors contend that the good faith standard previously imposed on broadcasters requires television stations to negotiate retransmission consent even beyond the boundaries of their DMAs – whether or not they have the contractual right under their programming agreements to grant such consent.³ This interpretation of the broadcasters’ good faith obligation disregards the established property rights of program providers, undermines the system of geographic

¹ See Comments of the National Cable & Telecommunications Association, *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Apr. 25, 2005) (“NCTA Comments”); Comments of American Cable Association, *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Apr. 25, 2005) (“ACA Comments”).

² 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).

³ ACA Comments at 2; Comments of EchoStar Satellite L.L.C., *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, at 3-4 (Apr. 25, 2005) (“EchoStar Comments”).

program exclusivity on which the redistributors' compulsory copyright licenses are based, and jeopardizes the network-affiliate relationship that Congress has sought to protect. Accordingly, the Commission must reject the redistributors' distorted interpretations, reaffirm the fundamental property right of program providers to control the distribution of their product, and confirm that the newly reciprocal good faith obligation imposes the same duty to negotiate on both broadcasters and redistributors.

II. THE COMMISSION MUST REAFFIRM THE FUNDAMENTAL PROPERTY RIGHT OF PROGRAM PROVIDERS TO CONTROL THE DISTRIBUTION (AND REDISTRIBUTION) OF THEIR PRODUCT

The Commission should reject the attempts by redistributors to rewrite the existing good faith obligations of broadcasters by requiring television stations to negotiate retransmission consent beyond the boundaries of the geographic areas within which they have the rights to exhibit programming or to agree to its redistribution.⁴ The compulsory copyright licenses provide no support for the redistributors' arguments. These limited statutory licenses provide an administratively convenient means to permit redistribution of proprietary television programming via cable and satellite, but only *after* the redistributor has received the express consent of the affected television station, subject to the terms of that station's existing programming agreements with regard to territorial exclusivity.⁵ Indeed, as set forth in detail in NBC Telemundo's opening comments in this docket and in response to ACA's petition for rulemaking, Congress relied on the protections afforded to broadcasters by the Commission's existing geographically-based program exclusivity rules, including the "national network structure," in fashioning the compulsory copyright licenses and retransmission consent regimes that enable cable and satellite operators to retransmit

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

⁵ Thus, ACA is simply wrong in arguing in its petition for rulemaking that the cable compulsory copyright license somehow overrides the right of content owners to control the distribution and redistribution of their product. See Reply Comments of American Cable Association, *Petition of American Cable Association for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103*, RM No. 11203, at 30-33 (May 3, 2005) ("RM No. 11203").

television signals.⁶ Congress also recognized that because compulsory copyright regimes intrude on the broader market in which “the affected property rights and industries operate,” the compulsory licenses needed to be as narrow as possible to protect the exclusive property rights granted to copyright holders.⁷ Accordingly, the good faith bargaining obligation must not be construed in a manner that expands the existing geographical limitations of the compulsory copyright licenses, violates the sanctity of contractual terms between program providers and television stations limiting the territorial exclusivity of their exhibition rights, and intrudes on the private property rights of program owners.

As NBC Telemundo demonstrated in its opening comments, the good faith obligation 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, SHVERA being the most recent, seek to uphold both the value of local stations and private property rights, including the property rights of program owners or distributors.⁸ The statutes focus 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, geographically limited market. Accordingly, neither the statutory good faith obligation nor the Commission’s interpretation of that obligation should be read to require or authorize a local station to make programs that are subject to geographical limitations available to redistributors of any sort which seek to deliver that programming to viewers outside of the station’s local market.

⁶ See Comments of NBC Telemundo License Co., *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Apr. 25, 2005) (“NBC Comments”); Joint Comments of NBC Universal, Inc. and NBC Telemundo License Co., RM 11203 (Apr. 18, 2005).

⁷ See NBC Comments at 2, quoting H. R. Rep. No. 106-464, at 92.

⁸ *Id.* at 2-9.

III. CONGRESS INTENDED TO REQUIRE REDISTRIBUTORS TO NEGOTIATE IN GOOD FAITH WITH TELEVISION BROADCASTERS WITH RESPECT TO THEIR ENTIRE FREE, OVER-THE-AIR SIGNAL

NBC Telemundo agrees with the National Cable & Telecommunications Association (“NCTA”) that the good faith negotiation requirement does not mean that either party must acquiesce in the other party’s demands.⁹ But NCTA misreads the plain text of the statute when it argues that “[t]he good faith negotiation rules . . . should be interpreted to give MVPDs the right to refuse to *enter* into retransmission consent negotiations” with local television stations.¹⁰ Although NCTA proffers several contorted rationales for this non sequitur, the reality is that NCTA is asking the Commission to nullify an act of Congress – an action that clearly is beyond the Commission’s authority.¹¹ The unambiguous language in Section 207 of SHVERA requires the Commission to adopt regulations that will “prohibit a multichannel video programming distributor from failing to negotiate in good faith for retransmission consent under this section”¹²

Congress had two purposes in enacting Section 207 – to extend until 2010 the time period in which exclusive contracts between television stations and redistributors are prohibited and to extend the good faith negotiation obligation to redistributors in view of the evidence that these negotiations continue to be contentious.¹³ Because broadcasters already *had* a duty to negotiate in good faith, Congress clearly was focused on making the duty reciprocal by imposing it on redistributors. There is nothing ambiguous about this intention. What Congress did not intend – in using language identical to that used previously in the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”) to impose a good faith negotiation obligation on broadcasters – was to create new law that would overcome decades of precedent preferring, with very

⁹ NCTA Comments at 4, 7.

¹⁰ *Id.* at 7 (emphasis added).

¹¹ See *Southwestern Bell Corporation v. FCC*, 43 F.3d 1515, 1519-20 (1995).

¹² See SHVERA, Section 207 (amending Section 325(b)(3)(C) of the Communications Act of 1934).

¹³ H.R. Rep. No. 108-634, at 19 (2004).

limited exceptions, market-based negotiations between program providers and program distributors.¹⁴

Thus, NCTA's arguments are contrary to Congress's clear intent to apply the same standard to redistributors that the statute and the FCC's rules currently apply to television broadcasters.

Under the Commission's current interpretation of the good faith obligation, a television station cannot refuse to enter into negotiations with a redistributor regarding retransmission consent concerning programming that the station has the right to distribute in the areas served by the redistributors within the station's local market.¹⁵ The standard as applied to a redistributor, accordingly, also must include the obligation to enter into negotiations with a television station electing retransmission consent within those areas, and NCTA's arguments to the contrary must be rejected. NBC Telemundo agrees with NCTA, however, that once the parties have commenced negotiations, the existing procedural rules governing those negotiations should apply to both parties,¹⁶ and, as both Congress and the Commission have stated repeatedly, the substance of the agreements reached through the process of good faith negotiation (including payment terms) should be left to the competitive marketplace.¹⁷

The Commission also should clarify that the reciprocal obligation to enter into good faith negotiations encompasses the entire free, over-the-air signal offered by the television station. Accordingly, once the digital transition has been completed and the must-carry/retransmission consent framework has shifted to the digital signal, redistributors should be required to negotiate in good faith with respect to all programming channels offered for free over the air by digital television stations. In the interim, the Commission should reaffirm its earlier ruling that the good faith obligation permits television broadcasters to

¹⁴ 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).

¹⁵ *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, 5462-643 ¶¶ 40 (2000) ("2000 Report and Order"); see also 47 C.F.R. § 76.65 (a), (b)(i) (2004).

¹⁶ See NCTA Comments at 2; 47 C.F.R. § 76.65.

¹⁷ See *2000 Report and Order*, 15 FCC Rcd at 5462 ¶¶ 39.

offer retransmission consent with respect to carriage of their main video channels in exchange for carriage of affiliated cable channels, another commonly owned television station, or their digital signals, including digital multicast channels.¹⁸ When Congress enacted the current must-carry/retransmission consent regime in the Cable Consumer Protection and Competition Act of 1992, it expressly endorsed the concept that, while some broadcasters electing retransmission consent would prefer cash compensation, others would negotiate with another currency, including news cut-ins on cable channels and the right to program additional cable channels.¹⁹ The Commission also endorsed this concept when it adopted the current good faith obligation and specifically rejected arguments that it prohibit proposals, in the course of carriage negotiations, of substantive terms offering retransmission consent in exchange for carriage of other programming, including digital signals.²⁰ Thus, although the issue is well settled, the Commission should reiterate its earlier conclusion so there will be no ambiguity in the upcoming must-carry/retransmission consent election cycle that redistributors may not categorically refuse to negotiate with respect to multicast digital programming channels broadcast by television stations within the areas where stations have the right to distribute that programming.

¹⁸ See *id.*; cf. ACA Comments at 6 (requesting Commission to clarify that it is not a violation of the good faith requirement for a redistributor to decline to carry multicast programming). To the extent ACA is suggesting that digital multicast channels are beyond the scope of the good faith negotiation requirement, NBC Telemundo disagrees for the reasons set forth in the text.

¹⁹ S. Rep. No. 102-92, at 35-36 (1991).

²⁰ 2000 Report and Order, 15 FCC Rcd at 5462, ¶ 39.

Respectfully submitted,

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