§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Colorado, is amended by adding Channel 255C3 at Fruita and by adding Hotchkiss, Channel 258C3.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 05–89; FCC 05–119]

Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this item, the Commission adopts final rules implementing Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004. Because the Commission has in place existing rules governing good faith retransmission consent negotiations, we conclude that the most faithful and expeditious implementation of the amendments contemplated in the SHVERA is to extend to MVPDs the existing good faith bargaining obligation imposed on broadcasters under our rules. The item accordingly amends the Commission's rules to apply equally to broadcasters and MVPDs. We also conclude that the reciprocal bargaining obligation applies to retransmission consent negotiations between all broadcasters and MVPDs regardless of the designated market area in which they are located. Because the text of the statute applies without qualification to ''television broadcast stations,'' ''multichannel video programming distributors'' and ''retransmission consent agreements,'' the item concludes that the reciprocal bargaining obligation applies to all retransmission consent agreements.

DATES: Effective August 12, 2005.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Steven Broeckaert, *Steven.Broeckaert@fcc.gov* of the Media Bureau, Policy Division, (202) 418–2120.

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's Report and Order, FCC 05–119, adopted on June 6, 2005 and released on June 7, 2005. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC, 20554. These documents will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to fcc504@fcc.gov or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Paperwork Reduction Act

This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Summary of the Report and Order

1. In this Report and Order (''*Order*''), we adopt rules implementing Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (''SHVERA''). The Satellite Home Viewer Extension and Reauthorization Act of 2004, Public Law 108–447, 207, 118 Stat. 2809, 3393 (2004) (to be codified at 47 U.S.C. 325). The SHVERA was enacted on December 8, 2004 as title IX of the ''Consolidated Appropriations Act, 2005.'' The SHVERA requires that the Commission prescribe regulations implementing Section 207 within 180 days after the date of the enactment thereof. Section 207 extends section 325(b)(3)(C) of the Communications Act until 2010 and amends that section to impose a reciprocal good faith retransmission consent bargaining obligation on multichannel video programming distributors (''MVPDs''). This section alters the bargaining obligations created by the Satellite Home Viewer Improvement Act of 1999 (''SHVIA'') which imposed a good faith bargaining obligation only on broadcasters. SHVIA was enacted as title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 (relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered Sections of 17 and 47 U.S.C.), Public Law 106–113, 113 Stat. 1501, Appendix I (1999). As discussed below, because the Commission has in place existing rules governing good faith retransmission consent negotiations and because Congress did not instruct us through the SHVERA to modify those rules in any substantive way, we conclude that the most faithful and expeditious implementation of the amendments contemplated in Section 207 of the SHVERA is to extend to MVPDs the existing good faith bargaining obligation imposed on broadcasters under our rules. We also conclude that the reciprocal bargaining obligation applies to retransmission consent negotiations between all broadcasters and MVPDs regardless of the designated market area in which they are located.

II. Background

2. Section 325(b)(3)(C) of the Communications Act, as enacted by the SHVIA, instructed the Commission to commence a rulemaking proceeding to revise the regulations by which television broadcast stations exercise their right to grant retransmission consent; *see* 47 U.S.C. 325(b)(3)(C). Specifically, that section required that the Commission, until January 1, 2006:

> Prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations; *see* 47 U.S.C. 325(b)(3)(C)(ii).

The Commission issued a Notice of Proposed Rulemaking seeking comment on how best to implement the good faith and exclusivity provisions of the SHVIA; *see Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, 14 FCC Rcd 21736 (1999) (''*Good Faith Notice*''). After considering the comments received in response to the notice, the Commission adopted rules implementing the SHVIA good faith provisions and complaint procedures for alleged rule violations; *see Implementation of the Satellite Home

Viewer Improvement Act of 1999: Retransmission Consent Issues, 15 FCC Rcd 5445 (2000) *(''Good Faith Order''), recon. granted in part,* 16 FCC Rcd 15599 (2001).

3. The *Good Faith Order* determined that Congress did not intend to subject retransmission consent negotiation to detailed substantive oversight by the Commission; *see Good Faith Order*, 15 FCC Rcd at 5450. Instead, the order found that Congress intended that the Commission follow established precedent, particularly in the field of labor law, in implementing the good faith retransmission consent negotiation requirement; *see Good Faith Order*, 15 FCC Rcd at 5453–54. Consistent with this conclusion, the *Good Faith Order* adopted a two-part test for good faith. The first part of the test consists of a brief, objective list of negotiation standards; *see Good Faith Order*, 15 FCC Rcd at 5457–58. First, a broadcaster may not refuse to negotiate with an MVPD regarding retransmission consent. Second, a broadcaster must appoint a negotiating representative with authority to bargain on retransmission consent issues. Third, a broadcaster must agree to meet at reasonable times and locations and cannot act in a manner that would unduly delay the course of negotiations. Fourth, a broadcaster may not put forth a single, unilateral proposal. Fifth, a broadcaster, in responding to an offer proposed by an MVPD, must provide considered reasons for rejecting any aspects of the MVPD's offer. Sixth, a broadcaster is prohibited from entering into an agreement with any party conditioned upon denying retransmission consent to any MVPD. Finally, a broadcaster must agree to execute a written retransmission consent agreement that sets forth the full agreement between the broadcaster and the MVPD; *see Good Faith Order*, 15 FCC Rcd at 5457–58; 47 CFR 76.65(b)(1)(i)–(vii).

4. The second part of the good faith test is based on a totality of the circumstances standard. Under this standard, an MVPD may present facts to the Commission which, even though they do not allege a violation of the specific standards enumerated above, given the totality of the circumstances constitute a failure to negotiate in good faith; *see Good Faith Order*, 15 FCC Rcd at 5458; 47 CFR 76.65(b)(2).

5. The *Good Faith Order* provided examples of negotiation proposals that presumptively are consistent and inconsistent with ''competitive marketplace considerations;'' *see Good Faith Order*, 15 FCC Rcd at 5469–70. The *Good Faith Order* found that it is implicit in Section 325(b)(3)(C) that any effort to further anti-competitive ends through the negotiation process would not meet the good faith negotiation requirement; *see Good Faith Order*, 15 FCC Rcd at 5470. The order stated that considerations that are designed to frustrate the functioning of a competitive market are not ''competitive marketplace considerations.'' Further, conduct that is violative of national policies favoring competition—that, for example, is intended to gain or sustain a monopoly, an agreement not to compete or to fix prices, or involves the exercise of market power in one market in order to foreclose competitors from participation in another market—is not within the competitive marketplace considerations standard included in the statute; *see Good Faith Order*, 15 FCC Rcd at 70.

6. Finally, the *Good Faith Order* established procedural rules for the filing of good faith complaints pursuant to § 76.7 of the Commission's rules; *see* 47 CFR 76.65(c); 47 CFR 76.7. The burden of proof is on the complainant to establish a good faith violation and complaints are subject to a one year limitations period; *see* 47 CFR 76.65(d) and (e).

III. Discussion

7. In enacting the SHVERA good faith negotiation obligation for MVPDs, Congress used language identical to that of the SHVIA imposing a good faith obligation on broadcasters, requiring the Commission, until January 1, 2010, to:

> prohibit a multichannel video programming distributor from failing to negotiate in good faith for retransmission consent under this section, and it shall not be a failure to negotiate in good faith if the distributor enters into retransmission consent agreements containing different terms and conditions, including price terms, with different broadcast stations if such different terms and conditions are based on competitive marketplace considerations; *see* 47 U.S.C. 325(b)(3)(C)(iii).

The Commission issued a Notice of Proposed Rulemaking seeking comment on how to implement the reciprocal bargaining obligation set forth in the SHVERA; *see Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004: Reciprocal Bargaining Obligations,* FCC 05–49 (rel. March 7, 2005) (''*Notice*''). The Commission also requested comment on whether the good faith negotiating standards may be different for carriage of television broadcast stations outside of their designated market area (''DMA''). A DMA is a geographic market designation created by Nielsen Media Research that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.

A. The Reciprocal Bargaining Obligation for Entities Within the Same DMA

8. In the *Notice,* the Commission observed that Congress did not instruct the Commission to amend its existing good faith rules in any way other than to implement the statutory extension and impose the good faith obligation on MVPDs. Accordingly, the Commission stated that it did not believe that Congress intended that the Commission revisit the findings and conclusions that were reached in the SHVIA rulemaking. The little legislative history directly applicable to Section 207 supports this approach and, in pertinent part, provides:

> In light of evidence that retransmission negotiations continue to be contentious, the Committee chose to extend these obligations, and also to begin applying the good-faith obligations to MVPDs. The Committee intends the MVPD good-faith obligations to be analogous to those that apply to broadcasters, and not to affect the ultimate ability of an MVPD to decide not to enter into retransmission consent with a broadcaster; *see* H.R. Rep. No. 108–634, 108th Cong., 2nd Sess. 19 (2004) (''House Report'').

The *Notice* stated that the Commission believed that the implementation of Section 207 most consistent with the apparent intent of Congress is to amend our existing rules to apply equally to both broadcasters and MVPDs and tentatively concluded §§ 76.64(l) and 76.65 should be amended accordingly. The *Notice* sought comment on that approach and any other reasonable implementation of Section 207.

9. The majority of commenters agreed with the implementation proposed by the Commission in the *Notice* as it applies to in-market negotiations. The Network Affiliates assert that:

> [b]ecause it is presumed that Congress acts with knowledge of the existing regulatory framework when it enacts new legislation, including when the new law incorporates the language of the prior law, the *Notice*'s conclusion that ''Congress did not intend that the Commission revisit the findings and conclusions that were reached in the SHVIA rulemaking'' is undoubtedly correct, as is the *Notice*'s tentative conclusion ''to amend our existing rules to apply equally to both broadcasters and MVPDs.''

10. EchoStar asserts, however, that MVPDs and broadcasters occupy significantly different positions when negotiating retransmission consent and

that the Commission should recognize this distinction when applying the totality of the circumstances test and in determining whether specific terms and conditions are consistent with ''competitive market place conditions.'' EchoStar asserts that it would be premature to provide an extensive list of bargaining conduct that could be considered a failure to negotiate in good faith under the totality of the circumstances test and advises that the Commission pursue such measures on a case-by-case basis. Finally, EchoStar argues that the Commission should clarify that tying is not consistent with competitive marketplace considerations if it would violate the antitrust laws.

11. NCTA argues that:

> Congress intended that broadcasters *have to* offer to make their programming available to all MVPDs at some price or other terms. Otherwise, one MVPD could obtain de facto exclusivity over a broadcaster's signal.
>
> * * * * *
>
> MVPDs, on the other hand, have a duty to carry a local broadcast signal if the broadcaster opts for mandatory carriage, but no duty to agree to pay or carry a broadcaster if it elects *retransmission consent.* Indeed, Congress made clear in Section 207 that it intends the ''analogous'' good faith obligations to ''*not affect the ultimate ability of an MVPD to decide not to enter into retransmission consent with a broadcaster.*''

Absent an MVPD's ability to ultimately refuse carriage of a broadcaster that has elected retransmission consent, argues NCTA, reciprocal good faith bargaining rules simply turn retransmission consent into another form of must carry but with the possibility of payment in addition. NCTA states that it is broadcasters' unique status as users of public spectrum with the obligation to provide free over-the-air signals and ability to exact mandatory carriage on cable and satellite providers that triggers their obligation to negotiate retransmission consent in good faith in all instances. NCTA asserts that there are ''no corresponding reasons why cable operators should be required to negotiate to carry the signals of broadcasters that have specifically elected to forgo their statutory right to be carried.'' Citing a ''host of legitimate editorial and business reasons why a cable operator could decide not to carry a particular broadcast station,'' NCTA maintains that the Commission should interpret the good faith negotiation rules to give MVPDs the right to refuse to enter into retransmission consent negotiations. NAB counters that NCTA's argument nullifies the language of the statute imposing a reciprocal good faith negotiation obligation on MVPDs and Congress's intent that such obligation ''be analogous [to] those that apply to broadcasters.'' At the very least, NCTA asserts, the Commission should confirm that cable operators have the right to insist upon carriage compensation in all retransmission consent negotiations.

12. Arguing that the Commission has recognized the imbalance of power in retransmission consent negotiations between media conglomerates and small and medium sized cable operators, ACA requests that the Commission adopt procedural protections for these cable operators. ACA requests that the Commission require that broadcasters give 30 days written notice to a small or medium sized cable operator of their intent to file a good faith complaint. In addition, ACA asks that the Commission provide an extended 30 day period in which to respond to good faith complaints filed against them. ACA argues that these procedural protections should apply not just to cable companies that serve 400,000 or fewer subscribers, but should also extend to ''all medium-sized, non-vertically integrated cable companies.'' ACA emphasizes that these protections are solely procedural and that the substantive good faith rules would be the same for MVPDs of all sizes. NAB and the Network Affiliates assert that ACA offers no support for a procedural distinction for medium and small cable operators and argue that the better course would be to grant individual requests for extensions of time on a case-by-case basis. Finally, ACA asks the Commission to clarify that it is not a violation of the good faith rules for a cable operator to decline to carry a broadcaster's multicast programming. NAB and the Network Affiliates assert that the Commission, in the *Good Faith Order,* found that proposals for carriage ''conditioned on carriage of any other programming, *such as a broadcaster's digital signals. * * *''* to be consistent with competitive marketplace considerations. These commenters argue that ACA provides no evidence to justify a departure from the Commission's finding. Indeed, NBC asks the Commission to clarify that, now and after completion of the digital transition, the good faith obligation requires MVPDs to negotiate for the entire free, over-the-air signal offered by a television station.

13. After reviewing the record in this proceeding, we adopt the tentative conclusion set forth in the *Notice* in order to implement the will of Congress as indicated in Section 207 and the legislative history. Accordingly, we will amend our existing rules to apply equally to both broadcasters and MVPDs. Sections 76.64(l) and 76.65 will be amended. Broadcasters will now be able to file a complaint against an MVPD alleging that such MVPD breached its duty to negotiate retransmission consent in good faith. Broadcasters and MVPDs must comply with the seven objective negotiation standards set forth in § 76.65(b)(1) as amended herein. In addition, MVPDs and broadcasters will now be equally subject to, and able to file, a complaint based on the totality of the circumstances.

14. We cannot agree with NCTA's assertion that, because of the differences between MVPDs and broadcasters, MVPDs should have the option of refusing outright to negotiate retransmission consent with any broadcaster within that MVPD's DMA. To agree with NCTA's assertion would be to render Section 207 a virtual nullity. Under NCTA's interpretation of Section 207, the good faith negotiation obligation is not triggered unless and until an MVPD has determined that retransmission of a broadcaster's signal is attractive. The Commission rejected similar arguments raised by broadcasters in implementing the good faith provisions of the SHVIA:

> [W]e do not interpret section 325(b)(3)(C) as largely hortatory as suggested by some commenters. As we stated in the Notice, Congress has signaled its intention to impose some heightened duty of negotiation on broadcasters in the retransmission consent process. In other words, Congress intended that the parties to retransmission consent have negotiation obligations greater than those under common law. * * * We believe that, by imposing the good faith obligation, Congress intended that the Commission develop and enforce a process that ensures that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process; *see Good Faith Order,* 15 FCC Rcd at 5455.

This ''heightened duty of negotiation'' has now been imposed by Congress on MVPDs. In drafting Section 207, Congress was fully aware of the Commission's implementation of the SHVIA good faith provision; *see Lorillard* v. *Pons,* 434 U.S. 575, 580–81 (1978) (''Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.'') (citations omitted); *Bragdon* v. *Abbott,* 524 U.S. 624, 645 (1998) (same).

Armed with this knowledge, Congress crafted the reciprocal bargaining provision to mirror the obligation imposed by the SHVIA and the House Report stated that it was intended to be ''analogous'' to the SHVIA good faith obligation; *see* House Report at 19. We believe that if Congress had intended that this duty apply to MVPDs only when they were affirmatively interested in a prospective carriage arrangement, it would have so indicated in the statute or legislative history. Of course, the reciprocal bargaining obligation would be largely unnecessary if it were limited in this manner. Moreover, we do not believe that the obligations imposed herein will unduly burden MVPDs. First, the good faith obligation merely requires that MVPDs comply with the per se negotiating standards of § 76.65(b)(1) and refrain from insisting on rates, terms and conditions that are inconsistent with competitive marketplace considerations. Second, as discussed below, because we conclude that negotiations involving truly distant broadcasters and MVPDs and negotiations for which a broadcaster is contractually precluded from reaching consent may be truncated, MVPDs and broadcasters alike will not be required to engage in an unending procession of extended negotiations. Finally, provided that a party to a reciprocal bargaining negotiation complies with the requirements of the Commission's rules, failure to reach agreement would not violate either § 325(b)(3)(C) or § 76.65 of the Commission's rules. Accordingly, NCTA's argument that the reciprocal bargaining obligation will lead to another form of must carry is incorrect.

15. With regard to the totality of the circumstances test, we agree with EchoStar that MVPDs and broadcasters occupy different positions when negotiating retransmission consent and that the Commission should recognize this distinction when applying the totality of the circumstances test and in determining whether specific terms and conditions are consistent with competitive marketplace considerations. The Commission must always take into account the relative bargaining positions of the parties when examining the totality of the circumstances for a failure to negotiate in good faith. For example, a negotiating proposal put forth by a small cable operator might be found consistent with competitive marketplace considerations, whereas the same proposal put forth by the nation's largest MVPD might not. We also agree that identifying additional negotiating proposals that can be considered to reflect a failure to negotiate in good faith under the totality of the circumstances test should be done on a case-by-case basis. Finally, we clarify that tying is not consistent with competitive marketplace considerations if it would violate the antitrust laws; *see Good Faith Order,* 15 FCC Rcd at 5470 (''Conduct that is violative of national policies favoring competition—that is, for example, intended to gain or sustain a monopoly, is an agreement not to compete or fix prices, or involves the exercise of market power in one market in order to foreclose competitors from participation in another market—is not within the competitive marketplace considerations standard included in the statute.'').

16. We decline to establish special procedures for medium and small cable operators as requested by ACA. We agree with NAB and the Network Affiliates that ACA has failed to justify different procedural treatment for smaller cable operators. We fail to see what benefit the 30 day pre-complaint notice would have for these operators, particularly in instances where a retransmission consent agreement will imminently expire with the attendant loss of the broadcaster's signal. Because the Commission concluded in the *Good Faith Order* that MVPDs cannot continue to carry a broadcaster's signal after the existing consent expires even if a complaint is pending with the Commission, it benefits both broadcasters and MVPDs alike that the Commission decline to institute a procedural delay that would preclude the filing of a good faith complaint as soon as possible after the alleged violation; *see Good Faith Order,* 15 FCC Rcd at 5471–2. Accordingly, we believe that the more prudent course is to entertain individual requests for extensions of time on a case-by-case basis through which MVPDs and broadcasters, large and small, can establish that the existing pleading cycle set forth in § 76.7 of the Commission's rules is inadequate to allow that party to present an effective defense to a good faith complaint.

17. ACA requested that the Commission clarify that it is not a violation of the good faith rules for a cable operator to decline to carry a broadcaster's multicast programming. Conversely, NBC asks that the Commission determine that now, and after completion of the digital transition, the good faith obligation requires MVPDs to negotiate for the entire free, over-the-air signal offered by a television station. The Commission stated numerous times in the *Good Faith Order* that ''proposals for carriage conditioned on carriage of any other programming such as a broadcaster's digital signals'' are presumptively consistent with competitive marketplace considerations and the good faith negotiation requirement *see Good Faith Order,* 15 FCC Rcd at 5469. As the Commission stated:

> We do not find anything to suggest that, for example, requesting an MVPD to carry * * * digital broadcast signals is impermissible or other than a competitive marketplace consideration. * * * After passage of the 1992 Cable Act, Congress left negotiation of retransmission consent to the give and take of the competitive marketplace. In SHVIA, absent conduct that is violative of national policies favoring competition, we believe Congress intended this same give and take to govern retransmission consent. In addition, *we point out that these are bargaining proposals which an MVPD is free to accept, reject or counter with a proposal of its own; see Good Faith Order,* 15 FCC Rcd at 5469–70.

Whether an MVPD carries a broadcaster's entire free, over-the-air signal, be it high definition or multicast, is a matter to be determined through the retransmission consent negotiation process. The reciprocal bargaining obligation neither requires nor prohibits the carriage of a broadcaster's entire free signal. If it is important for a broadcaster to obtain full carriage of its digital signal, the broadcaster must be willing to accommodate the reasonable requests of an MVPD in order to secure such carriage. If it is important for an MVPD to carry part, but not all, of a broadcaster's digital signal it likewise must negotiate in good faith. In each instance, either party must be willing to forgo carriage if agreement is not reached after negotiating in accordance with the rules established herein.

B. The Reciprocal Bargaining Obligation and Entities Located in Different DMAs

18. In the *Notice*, the Commission noted that the original SHVIA good faith provision by its terms applied to ''television broadcast stations.'' Similarly, the SHVERA good faith provision applies to ''multichannel video programming distributors.'' The Commission sought 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 DMA. Significantly viewed television broadcast stations do not have carriage rights outside of their DMA and carriage of their signals by out-of-market MVPDs is permissive. The *Notice* asked whether the same good faith negotiation standard should apply to broadcasters and MVPDs regardless of the DMA in which they reside, or whether the good faith retransmission

consent negotiation obligation should apply only to MVPDs and broadcasters located in the same DMA. As discussed below, we do not interpret section 325(b)(3)(C) to limit the geographic scope of the reciprocal bargaining obligation in retransmission consent negotiations. At the same time, we conclude that the nature of this obligation may vary according to where the MVPD and the broadcaster are located. With regard to significantly-viewed and in-market signals, we believe that the obligation should be essentially the same. With regard to more distant signals, the obligation applies, but distance is likely to be a critical factor in determining compliance under the totality of circumstances test.

19. The Network Affiliates, NAB, and NBC assert that the good faith bargaining obligation should not apply to negotiations for consent to retransmit broadcast signals outside of a television station's market. The Network Affiliates argue that:

> Indeed, SHVERA itself, in enacting new § 340, the significantly viewed provision, expressly provides (1) that ''[c]arriage of a signal under this section is not mandatory'' by a satellite carrier and (2) that the ''eligibility of the signal of a station to be carried under this section does not affect any right of the licensee of such station to grant (or withhold) retransmission consent under section 325(b)(1).''

The Network Affiliates stress that, in granting significantly viewed broadcasters the right to withhold retransmission consent, the SHVERA ''specifically references section 325(b)(1), the statutory retransmission consent provision, not section 325(b)(3)(C), the statutory good faith bargaining provision.''

20. NBC argues that, in adopting the 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 broadcasters. Citing the legislative history of SHVIA, NBC asserts that Congress was guided by three principles: (1) The desire to promote competition in the marketplace for MVPD programming to reduce costs to subscribers; (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 narrowly to protect the ''exclusive property rights granted by the Copyright Act to copyright holders'' and ''minimize the effects of government intrusion on the broader market in which the affected property rights and industries operate.'' NBC maintains that neither Congress nor the Commission suggested that the good faith requirement should be read to override the private property rights of networks, syndicators or other program providers and permit a distribution outlet, either broadcaster or cable operator, to consent to further redistribution of programming that the outlet does not own. NBC concedes that under the good faith requirements, a station cannot refuse to negotiate with an MVPD located in the same DMA regarding retransmission consent. Similarly, argues NBC, a station cannot enter into an agreement with an MVPD that prohibits the station from entering into retransmission consent with another MVPD. Neither of these concepts, however, prevents a station from refusing to grant out-of-market retransmission consent with respect to programming for which it does not hold extra-territorial rights. NBC also argues that Congress has consistently, both in the 1992 Cable Act and the SHVIA, protected the rights afforded by programming providers to local stations against distant stations; *see* S. Rep. No. 102–92, at 38, 106 Stat. 1133, 1171 (1991). The legislative history to the 1992 Cable Act provides that ''the 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 that 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];'' *see also* SHVIA Conference Report at 92. The legislative history of the SHVIA states that ''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.'' The SHVIA Conference Report went on to state that ''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.'' Accordingly, Congress structured the compulsory copyright license in SHVIA ''to hew as closely to those arrangements as possible.'' The Network Affiliates note that this concern is carried through in the legislative history of the SHVERA. The SHVERA House Report provides that ''[w]here a satellite provider can retransmit a local station's exclusive network programming but chooses to substitute identical 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;'' *see* House Report at 11. NBC also cites numerous points in the *Good Faith Order* in which the Commission discussed the ''local'' nature of the good faith negotiation obligation.

21. Several commenters argue that the reciprocal bargaining obligation should be the same regardless of whether or not the entities are located in the same DMA, or at a minimum, extended to those areas in which a station is significantly viewed. EchoStar argues that ''[i]n the absence of specific limiting language, the good faith standards established by the Commission under section 325(b)(3)(C) apply to all cases where retransmission consent is required.'' As support for this conclusion, EchoStar, and other commenters, cite the Media Bureau's decision in *Monroe, Georgia Water Light and Gas Commission* v. *Morris Network, Inc.*, in which the Media Bureau stated that ''[w]e caution broadcasters to be aware of existing contractual obligations that affect a television station's ability to negotiate retransmission consent in good faith. The statute appears to apply equally to stations and MVPDs in the same local market or different markets.'' The Network Affiliates argue that reliance on the Media Bureau's *Monroe* decision is misplaced because the statement quoted is no more than equivocal *dicta*.

22. DirecTV and EchoStar argue that the fact that out-of-market broadcasters have no carriage rights is inapposite because once an in-market broadcaster forgoes mandatory carriage, it too has no guaranteed carriage rights. DirecTV asserts that allowing significantly viewed broadcasters to refuse to negotiate with DBS operators where cable operators already distribute such programming would violate SHVERA's prohibition on exclusive retransmission consent agreements. ACA states that this situation is particularly problematic for its members, many of which serve rural communities on the edges of DMAs in which out-of-market signals from an adjoining DMA are considered ''local'' by subscribers.

23. EchoStar argues further that contractual provisions that restrict a

broadcaster's ability to negotiate retransmission consent in good faith (*e.g.*, certain network affiliation agreements) must be declared per se good faith violations by the Commission. Citing the *Good Faith Order*, EchoStar states that the Commission has already determined that ''[p]roposals that result from agreements not to compete or fix prices'' are presumed inconsistent with competitive marketplace considerations. EchoStar asserts that NBC's ''protection of property rights'' argument is flawed because it assumes that copyright holders have the ''unfettered right to control further redistribution of broadcast programming.'' EchoStar maintains that Congress limited copyright holders' absolute control over redistribution of broadcast programming when it created the cable and satellite compulsory licenses for retransmission of broadcast signals. NBC asserts that compulsory copyright licenses offer no refuge from territorial exclusivity because ''[t]hese limited statutory licenses provide an administratively convenient means to permit redistribution of proprietary television programming via cable and satellite, but only *after* the [cable or satellite provider] 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.'' EchoStar argues that contractual provisions that prevent the granting of retransmission consent to out-of-market MVPDs would thwart Congress's intent to make out-of-market stations available to MVPD subscribers through the compulsory licensing provisions of the Copyright Act. ACA agrees asserting that the plain language of section 325(b), the legislative history of SHVIA and the Commission's implementing regulations prohibit market exclusivity provisions in network affiliation agreements. The Network Affiliates counter that there is nothing in SHVERA or its legislative history to justify the sweeping effect that EchoStar desires—''to effectively nullify the territorial restrictions in programming agreements that serve to grant, and to limit, program exclusivity.''

24. EchoStar also contends that local broadcasters are beginning to demand that MVPDs contract away their right to import significantly viewed out-of-DMA stations as part of retransmission consent negotiations. The Network Affiliates defend this practice. Citing the *Good Faith Order*, the Network Affiliates state that 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 programming*.'' Thus, argue the Network Affiliates, broadcasters can offer proposals that foreclose the carriage of other programming services by an MVPD that substantially duplicate the local broadcast station's programming.

25. DirecTV advises the Commission to adopt an ''agree with one, negotiate with all'' rule that applies to negotiations for significantly viewed broadcast signals. Under this rule, both broadcasters and MVPDs are free to refuse outright to negotiate carriage of significantly viewed signals under certain conditions. Once a party has agreed to significantly viewed carriage with any other party, however, it must negotiate in good faith for carriage with all other similarly situated parties. DirecTV explains its proposal as follows:

> 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 a 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 standard. * * * 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 [in good faith] with all [significantly viewed] New York stations seeking carriage in Hartford.* * *

Under either scenario, DirecTV asserts, the parties would not be required to reach agreement, but only to negotiate in good faith in accordance with the Commission's rules.

26. As noted above, the SHVIA good faith provision by its terms applied to ''television broadcast stations.'' Similarly, the SHVERA good faith provision applies to ''multichannel video programming distributors.'' Neither the text of the SHVIA or the SHVERA, nor their respective legislative histories, expressly delineate a territorial boundary of the good faith negotiation obligation. Some commenters argue that the reciprocal bargaining obligation attaches to negotiations between MVPDs and broadcasters that are significantly viewed outside of their DMA. Others assert that these obligations attach to any retransmission consent negotiation regardless of where the MVPD and the broadcaster are situated. For the reasons discussed below, we agree with the latter interpretation of section 325(b)(3)(C). Because we reach this conclusion, we need not examine DirecTV's ''agree with one, negotiate with all'' proposal.

27. The language adopted by Congress in section 325(b)(3)(C) of the SHVIA, as well the amendment adopted in the SHVERA, support the conclusion that the reciprocal bargaining obligation applies to all retransmission consent agreements. The text of the statute applies without qualification to ''television broadcast stations,'' ''multichannel video programming distributors'' and ''retransmission consent agreements;'' *see* 47 U.S.C. 325(b)(3)(C). Nor does the legislative history appear to contemplate a limitation on the reciprocal bargaining obligation such that it would apply to some, but not all, retransmission consent negotiations. Other than mandatory carriage pursuant to Section 614 and satellite carrier service to unserved households, all other lawful carriage of television broadcast stations is by retransmission consent. There is no statutory or regulatory distinction between in-market carriage and out-of-market carriage pursuant to retransmission consent. Here, we believe that the statute is clear on its face and we must give effect to its plain meaning; *see Chevron USA Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), *Qwest Corp.* v. *FCC*, 258 F.3d 1191, 1199 (10th Cir. 2001), *Bell Atlantic Tel. Cos.* v. *FCC*, 131 F.3d 1044, 1047 (DC Cir. 1997). Further, we believe that this is the best interpretation of the provision consistent with the SHVIA, the SHVERA and their respective legislative histories. This interpretation avoids the incongruous result of satellite carriers seeking to carry a broadcaster in significantly viewed communities facing outright refusal to negotiate carriage by such broadcaster even though cable operators in the same communities are actually carrying such programming through retransmission consent. In this regard, we agree with DirecTV that a contrary interpretation might conflict with the prohibition on exclusive retransmission consent agreements contained in section 325(b)(3)(C); *see* 47 U.S.C. 325(b)(3)(C). We fail to see how

an interpretation of section 325(b)(3)(C) that permits this result implements Congress's direction that ''MVPD good-faith obligations * * * be analogous to those that apply to broadcasters.'' Accordingly, we conclude that the reciprocal bargaining obligation of section 325(b)(3)(C) applies to the negotiation of all retransmission consent.

28. Some commenters argue that a separate provision of the SHVERA, new Section 340 of the Communications Act, indicates that the reciprocal bargaining provision applies solely to in-market retransmission consent negotiations. We disagree. Section 340(d) of the Communications Act, as enacted in the SHVERA, discusses the carriage rights of satellite carriers with respect to significantly viewed broadcast stations and states that ''[t]he eligibility of the signal of a station to be carried under this section does not affect any right of the licensee of such station to grant (or withhold) retransmission consent under section 325(b)(1); *see* 47 U.S.C. 340(d)(2). The legislative history of the provision provides that:

> Cable operators are under no obligation to carry in a local market a distant significantly viewed signal, and the Committee intends satellite carriage of such a distant signal in a local market to be similarly voluntary. * * * Cable operators must obtain retransmission consent to carry distant significantly viewed signals into a local market and the committee intends the same obligation to apply to satellite.

We interpret this provision, and its legislative history, merely to acknowledge that mandatory carriage operates only with regard to broadcasters and cable operators and satellite carriers operating in the same DMA. As discussed above, retransmission consent carriage of significantly viewed signals is permissive. We do not interpret this provision as limiting the geographic scope of section 325(b)(3)(C). Nor do we interpret as conflicting with this reading the fact that Congress, in section 340(d), referenced section 325(b)(1) of the Communications Act, rather than section 325(B)(3)(C), the reciprocal bargaining obligation; *see* 47 U.S.C. 325(b)(1). Section 325(b)(1) is the statutory provision that gives rise to the right of retransmission consent. It originates in the 1992 Cable Act and predates both the SHVIA and the SHVERA. The right of in-market broadcasters and out-of-market broadcasters alike to require retransmission consent arises from section 325(b)(1). The reciprocal bargaining provision of section 325(b)(3)(C) is an obligation that Congress deliberately overlay upon the substantive retransmission consent right created by section 325(b)(1).

29. We emphasize that, although the reciprocal bargaining obligation applies without geographic limitation, that does not mean it will apply exactly the same way in all negotiations. Rather, we conclude that section 325(b)(3)(C) and the inherent nature of a good faith obligation permit the Commission to account for the distinction between in-market and out-of-market signals in determining compliance under the totality of the circumstances test. In other words, the determination of what conduct constitutes a breach of the duty of good faith is necessarily contextual. Congress created the mandatory carriage/retransmission consent framework as part of the 1992 Cable Act; *see Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965 (1993). Through this framework, a broadcaster has the option to elect mandatory carriage and forgo compensation for carriage of its signal or pursue retransmission consent and risk the failure to agree and non-carriage; *see Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965 (1993). The mandatory carriage/retransmission consent option applies only to carriage within a broadcaster's DMA. In contrast, the carriage of significantly viewed signals outside of a broadcaster's DMA has always been, and continues to be under the SHVERA, solely at the agreement of the broadcaster and the out-of-market MVPD. Notwithstanding the uncertain nature of retransmission consent, we believe that broadcasters generally have a greater expectation of carriage within their local market. Notwithstanding this expectation, it is also possible, subject to certain limitations (such as the invocation of network nonduplication and syndicated exclusivity rights of broadcasters in the MVPD's DMA), that a cable operator located in the New York DMA could through retransmission consent carry the signal of a broadcaster located in the San Diego DMA. We believe that a reasonable application of the statutory good faith standard permits variations in parties' reciprocal bargaining obligations in two such distinct situations.

30. With regard to significantly viewed signals and in-market signals, we believe that the reciprocal bargaining obligation should be essentially the same. In 1972, the Commission adopted the concept of significantly viewed signals to differentiate between out-of-market televisions stations ''that have sufficient audience to be considered local and those that do not;'' *see Cable Television Report and Order,* 36 FCC 2d 143, 174 (1972). The copyright provisions that apply to cable systems have recognized the Commission's designation of stations as significantly viewed and treated them, for copyright purposes, as ''local,'' and therefore subject to reduced copyright payment obligations; *see* 17 U.S.C. 111(a), (c) and (f). In the SHVERA, Congress extended to satellite carriers the right, already held by cable operators, to provide through retransmission consent out-of-market signals to the communities in which they are significantly viewed; *see* 47 U.S.C. 340. Given the proximity of broadcasters to the communities in which they are significantly viewed, we can discern no reason to differentiate these signals from in-market signals for reciprocal bargaining purposes. In either situation, failure to reach retransmission consent is not a violation of the reciprocal bargaining obligation provided the parties comply with our rules. Because satellite carriers' retransmission consent rights apply only to in-market and significantly viewed signals, their reciprocal bargaining obligation applies only to retransmission of these signals; *see* 47 U.S.C. 338, 339 & 340.

31. The situation for cable operators beyond in-market and significantly viewed signals, however, is more complex. As discussed above, different statutory provisions govern cable operators and permit pursuant to retransmission consent the carriage of distant signals originating far beyond the boundaries of the cable operator's DMA. In these cases, although the reciprocal bargaining obligation still applies, we believe that the Commission should apply a different calculus in evaluating complaints involving cable operators and distant broadcasters. As with all retransmission consent negotiations, the per se negotiating standards set forth in § 76.65 will still apply to such negotiations as will the requirement that both parties to the negotiation refrain from insisting on terms that are not consistent with competitive marketplace considerations. The main difference in these distant reciprocal bargaining negotiations should lie in either party's ability, after evaluating the prospect of distant carriage and giving full consideration to the proposals of the party requesting carriage, to reject the proposal and terminate further negotiation. We emphasize that until such negotiations

are formally terminated, either orally or, preferably, in writing, the reciprocal bargaining obligation must be observed.

32. We believe that, in many cases, distance will play a critical factor in determining whether a party complied with its reciprocal bargaining obligation. In the example discussed above, if a San Diego broadcaster offered retransmission consent to a New York cable operator in exchange for a monthly consideration per subscriber, the cable operator after permitting the broadcaster to fully present its proposal and giving such proposal due consideration, would not violate its reciprocal bargaining obligation by concluding that the distance between the broadcaster and cable operator is simply too great to make retransmission consent worthwhile to the cable operator. After so advising the broadcaster, the cable operator would have satisfied its reciprocal bargaining obligation. As the distances involved lessen, we would expect the party requested to engage in retransmission consent negotiations to be more willing to engage in extended negotiations to comply with the reciprocal bargaining requirement. In addressing reciprocal bargaining complaints involving distant carriage negotiations, the Commission will evaluate whether the party against whom the complaint is filed complied with the per se standards during the course of the negotiations. The length of the negotiation, the decision to terminate further negotiation and the distance between the broadcaster and the cable operator will be considered as part of the totality of the circumstances test. We believe that further guidance on this issue is best provided by the Commission through the resolution of actual disputes. At bottom, we do not believe that the reciprocal bargaining obligation should be used to engage distant entities and require protracted good faith negotiation for signals that have no logical or local relation to the MVPD's service area.

33. Certain commenters ask that the Commission declare a per se violation of a broadcaster's reciprocal bargaining obligation a contractual provision, such as one contained in a network affiliation agreement, that restricts a broadcaster's ability to negotiate retransmission consent in good faith. These commenters assert that some networks, through their affiliation agreements, restrict a broadcaster's ability to grant retransmission consent outside of a specified geographic area, often the broadcaster's DMA. NBC and the Network Affiliates assert that Congress has consistently acknowledged and preserved the network-affiliate system. As the record indicates, Congress in the 1992 Cable Act, the SHVIA and the SHVERA stressed the importance of this system. We agree with NBC and the Network Affiliates that neither the text nor the legislative history of the SHVIA or the SHVERA indicate a congressional intent to restrict the rights of networks and their affiliates through the good faith or reciprocal bargaining obligation to agree to limit an affiliate's right to redistribute affiliated programming. This is reflected in the *Notice* in this proceeding which did not raise for comment the issue of the reciprocal bargaining obligation and its relation to the preclusion of retransmission consent through network-affiliate agreements. Because we perceive no intent on the part of Congress that the reciprocal bargaining obligation interfere with the network-affiliate relationship or to preclude specific terms contained in network-affiliate agreements, we decline to take action on these issues in this proceeding. We note that the issue of retransmission consent generally, and the impact of network affiliation agreements on retransmission consent specifically, is more squarely raised in a petition for rulemaking pending before the Commission; *see Petition for Rulemaking to Amend 47 CFR 76.64, 76.93, and 76.103: Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity,* RM 11203 (filed March 2, 2005). In addition section 208 of the SHVERA requires the Commission to complete an inquiry and report to Congress regarding how the retransmission consent, network non-duplication, syndicated exclusivity and sports blackout rules impact MVPD competition, including the ability of rural cable operators to compete with satellite carriers in providing digital broadcast signals. SHVERA, Public Law 108–447, section 208. The Commission is currently preparing this report. Even were we so inclined, we are concerned that the *Notice* in this proceeding may not have given interested parties appropriate notice that the Commission was contemplating action in this regard; *see* 5 U.S.C. 553(b)(1)–(3) (Administrative Procedure Act notice requirements), *Omnipoint Corp.* v. *FCC,* 78 F.3d 620, 631 (D.C. Cir. 1996) (''a final rule is not a logical outgrowth of a proposed rule 'when the changes are so major that the original notice did not adequately frame the subjects for discussion.' ''), quoting *Connecticut Light and Power Co.* v. *NRC,* 673 F.2d 525, 533 (DC Cir.), *cert. denied,* 459 U.S. 835 (1982). However, because we decline to take action for the reasons described above, we need not reach the issue of the sufficiency of our *Notice.*

34. Nor do we agree that restrictions in existing network-affiliate agreements are prohibited by § 76.65 of the Commission's rules. Section 76.65 provides that it is a per se violation of the good faith negotiation provision for a television broadcast station to execute ''an agreement with any party, a term or condition of which, requires that such television broadcast station not enter into a retransmission consent agreement with any multichannel video programming distributor. * * *;'' *see* 47 CFR 76.65(b)(1)(vi). As is evidenced by the discussion in the *Good Faith Order,* that provision is intended to cover collusion between a broadcaster and an MVPD requiring non-carriage by another MVPD, ''[f]or example, Broadcaster A is prohibited from agreeing with MVPD B that it will not reach retransmission consent with MVPD C;'' *see Good Faith Order,* 15 FCC Rcd at 5464. In adopting § 76.65(b)(1)(iv), the Commission did not intend to affect the ability of a network affiliate agreement to limit redistribution of network programming; *see Monroe,* 19 FCC Rcd at 13997 n.24 (''To the extent, however, that Monroe Utilities is arguing that the existence of an underlying agreement between Morris and NBC is itself a violation of the good faith negotiation requirement, we agree with Morris that the good faith requirement applies to negotiations between MVPDs and broadcast stations, and not between a network and an affiliate.'').

35. The question arises, however, what is a broadcaster's reciprocal bargaining obligation with regard to MVPDs which it is precluded from granting retransmission consent by its network affiliation agreement. As discussed above, the reciprocal bargaining obligation imposes a ''heightened duty of negotiation'' on broadcasters and MVPDs involved in retransmission consent negotiations. We believe that it is incumbent on broadcasters subject to such contractual limitations that have been engaged by an out-of-market MVPD to negotiate retransmission consent of its signal to at least inquire with its network whether the network would waive the limitation with regard to the MVPD in question. We believe that in many situations retransmission of the broadcaster's signal by a distant MVPD would be deemed advantageous to the network as well as the broadcaster and MVPD. In such situations, we believe that a network that has otherwise restricted a broadcaster's redistribution rights might be amenable to a limited waiver of the restriction.

36. With respect to EchoStar's contention that local broadcasters are beginning to demand that MVPDs contract away their right to import significantly viewed out-of-DMA stations as part of retransmission consent negotiations, we reiterate our conclusion in the *Good Faith Order* that ''[p]roposals that specifically foreclose carriage of other programming services by the MVPD that do not substantially duplicate the proposing broadcaster's programming'' are ''not consistent with competitive marketplace considerations and the good faith negotiation requirement. * * *;'' *see Good Faith Order,* 15 FCC Rcd at 5470. If complaints are filed on this issue, we will evaluate as part of the totality of the circumstances whether or not the programming sought to be foreclosed actually substantially duplicates the programming of the broadcaster negotiating retransmission consent.

IV. Procedural Matters

A. Congressional Review Act

37. The Commission will send a copy of this *Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

V. Ordering Clauses

38. Accordingly, *it is ordered* that pursuant to Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, and sections 1, 4(i) and (j), and 325 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i) and (j), and 325, the Commission's rules are hereby amended.

39. *It is further ordered* that the rule amendments will become effective 30 days after publication in the **Federal Register.**

40. *It is further ordered* that the Reference Information Center, Consumer and Governmental Affairs Bureau, shall send a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 76

Cable television, Television.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Proposed Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 76 as follows:

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

■ 1. The authority citation for 47 CFR part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

■ 2. Section 76.64(l) is revised to read as follows:

§ 76.64 Retransmission consent.

* * * * *

(l) Exclusive retransmission consent agreements are prohibited. No television broadcast station shall make or negotiate any agreement with one multichannel video programming distributor for carriage to the exclusion of other multichannel video programming distributors. This paragraph shall terminate at midnight on December 31, 2009.

* * * * *

■ 3. Section 76.65 is revised to read as follows:

§ 76.65 Good faith and exclusive retransmission consent complaints.

(a) *Duty to negotiate in good faith.* Television broadcast stations and multichannel video programming distributors shall negotiate in good faith the terms and conditions of retransmission consent agreements to fulfill the duties established by section 325(b)(3)(C) of the Act; provided, however, that it shall not be a failure to negotiate in good faith if:

(1) The television broadcast station proposes or enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations; or

(2) The multichannel video programming distributor enters into retransmission consent agreements containing different terms and conditions, including price terms, with different broadcast stations if such different terms and conditions are based on competitive marketplace considerations. If a television broadcast station or multichannel video programming distributor negotiates in accordance with the rules and procedures set forth in this section, failure to reach an agreement is not an indication of a failure to negotiate in good faith.

(b) *Good faith negotiation.*

(1) *Standards.* The following actions or practices violate a broadcast television station's or multichannel video programming distributor's (the ''Negotiating Entity'') duty to negotiate retransmission consent agreements in good faith:

(i) Refusal by a Negotiating Entity to negotiate retransmission consent;

(ii) Refusal by a Negotiating Entity to designate a representative with authority to make binding representations on retransmission consent;

(iii) Refusal by a Negotiating Entity to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations;

(iv) Refusal by a Negotiating Entity to put forth more than a single, unilateral proposal;

(v) Failure of a Negotiating Entity to respond to a retransmission consent proposal of the other party, including the reasons for the rejection of any such proposal;

(vi) Execution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programming distributor; and

(vii) Refusal by a Negotiating Entity to execute a written retransmission consent agreement that sets forth the full understanding of the television broadcast station and the multichannel video programming distributor.

(2) *Totality of the circumstances.* In addition to the standards set forth in § 76.65(b)(1), a Negotiating Entity may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station or multichannel video programming distributor breached its duty to negotiate in good faith as set forth in § 76.65(a).

(c) *Good faith negotiation and exclusivity complaints.* Any television broadcast station or multichannel video programming distributor aggrieved by conduct that it believes constitutes a violation of the regulations set forth in this section or § 76.64(l) may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in § 76.7.

(d) *Burden of proof.* In any complaint proceeding brought under this section, the burden of proof as to the existence of a violation shall be on the complainant.

(e) *Time limit on filing of complaints.* Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:

(1) A complainant enters into a retransmission consent agreement with a television broadcast station or multichannel video programming distributor that the complainant alleges to violate one or more of the rules contained in this subpart; or

(2) A television broadcast station or multichannel video programming distributor engages in retransmission consent negotiations with a complainant that the complainant alleges to violate one or more of the rules contained in this subpart, and such negotiation is unrelated to any existing contract between the complainant and the television broadcast station or multichannel video programming distributor; or

(3) The complainant has notified the television broadcast station or multichannel video programming distributor that it intends to file a complaint with the Commission based on a request to negotiate retransmission consent that has been denied, unreasonably delayed, or unacknowledged in violation of one or more of the rules contained in this subpart.

(f) *Termination of rules.* This section shall terminate at midnight on December 31, 2009.

[FR Doc. 05–13739 Filed 7–12–05; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 041029298–5168–03; I.D. 052004A]

RIN 0648–AS38

Magnuson-Stevens Act Provisions; Fishing Capacity Reduction Program; Pacific Coast Groundfish Fishery; California, Washington, and Oregon Fisheries for Coastal Dungeness Crab and Pink Shrimp; Industry Fee System for Fishing Capacity Reduction Loan

AGENCY: National Marine Fisheries Service (NMFS), NationalOceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS establishes regulations to implement an industry fee system for repaying a $35,662,471 Federal loan. The loan financed most of the cost of a fishing capacity reduction program in the Pacific Coast groundfish fishery. The industry fee system imposes fees on the value of future groundfish landed in the trawl portion (excluding whiting catcher-processors) of the Pacific Coast groundfish fishery. It also imposes fees on coastal Dungeness crab and pink shrimp landed in the California, Washington, and Oregon fisheries for coastal Dungeness crab and pink shrimp. This action's intent is to implement the industry fee system.

DATES: This final rule is effective August 12, 2005.

ADDRESSES: Copies of the Environmental Assessment, Regulatory Impact Review (EA/RIR) and Final Regulatory Flexibility Analysis (FRFA) for the fee collection system may be obtained from Michael L. Grable, Chief, Financial Services Division, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3282.

Written comments involving the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule should be submitted in writing to Michael L. Grable, at the above address, and to David Rostker, Office of Management and Budget (OMB), by e-mail at *David_Rostker@omb.eop.gov* or by fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Michael L. Grable, (301) 713–2390.

SUPPLEMENTARY INFORMATION:

I. Background

Section 312(b)-(e) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1861a(b) through (e)) (Magnuson-Stevens Act) generally authorized fishing capacity reduction programs. In particular, Magnuson-Stevens Act section 312(d) authorized industry fee systems for repaying fishing capacity reduction loans which finance program costs.

Subpart L of 50 CFR part 600 contains the framework regulations (framework) generally implementing Magnuson-Stevens Act sections 312(b)-(e).

Sections 1111 and 1112 of the Merchant Marine Act, 1936 (46 App. U.S.C. 1279f and 1279g), generally authorized fishing capacity reduction loans.

Section 212 of Division B, Title II, of Public Law 108–7 (section 212) specifically authorized a $46 million program (groundfish program) for that portion of the limited entry trawl fishery under the Pacific Coast Groundfish Fishery Management Plan whose permits, excluding those registered to whiting catcher-processors, were endorsed for trawl gear operation (reduction fishery). Section 212 also authorized a fee system for repaying the reduction loan partially financing the groundfish program's cost. The fee system includes both the reduction fishery and the fisheries for California, Washington, and Oregon coastal Dungeness crab and pink shrimp (fee-share fisheries).

Section 501(c) of Division N, Title V, of Public Law 108–7 (section 501(c)) appropriated $10 million to partially fund the groundfish program's cost.

Public Law 107–206 authorized a reduction loan with a ceiling of $36 million to finance the groundfish program's cost.

Section 212 required NMFS to implement the groundfish program by a public notice in the **Federal Register**. NMFS published the groundfish program's initial public notice on May 28, 2003 (68 FR 31653) and final notice on July 18, 2003 (68 FR 42613).

The groundfish program's maximum cost was $46 million, of which an appropriation funded $10 million and a reduction loan financed $36 million. Voluntary participants in the groundfish program relinquished, among other things, their fishing permits in the reduction fishery, their fishing permits or licenses in the fee-share fisheries, their fishing histories in both the reduction and fee-share fisheries, and their vessels' worldwide fishing privileges. These relinquishments were in return for reduction payments whose amounts the participants' reduction bids determined.

On July 18, 2003, NMFS invited reduction bids from the reduction fishery's permit holders. The bidding period opened on August 4, 2003, and closed on August 29, 2003. NMFS scored each bid's amount against the bidder's past ex-vessel revenues and, in a reverse auction, accepted the bids whose amounts were the lowest percentages of the revenues. This created reduction contracts whose performance was subject only to a successful referendum about the fee system.

Bid offers totaled $59,786,471. NMFS accepted bids totaling $45,662,471. The next lowest scoring bid would have exceeded the groundfish program's maximum cost. The accepted bids involved 91 fishing vessels as well as 239 fishing permits and licenses (91 in the reduction fishery, 121 in the fee-share fisheries, and 27 other Federal permits).