

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

In the Matter of:
ATC Broadband LLC and Dixie Cable TV, Inc.
v.
Gray Television Licensee, Inc., licensee of
WSWG-DT, Valdosta, Georgia
Retransmission Consent Complaint
CSR-8010-C

MEMORANDUM OPINION AND ORDER

Adopted: February 18, 2009

Released: February 18, 2009

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. On August 15, 2008, ATC Broadband LLC and Dixie Cable TV, Inc. (collectively "ATC Broadband") filed a retransmission consent complaint and petition for declaratory ruling against Gray Television Licensee, Inc., licensee of television station WSWG-DT, Valdosta, Georgia ("WSWG") pursuant to Sections 76.7 and 76.65 of the Commission's Rules. WSWG is a CBS affiliate serving the Albany, Georgia Designated Market Area ("DMA"). ATC Broadband sought to retransmit WSWG outside the station's DMA on ATC Broadband's cable systems serving communities in the Savannah, Georgia and Jacksonville, Florida DMAs. ATC Broadband alleges WSWG failed to negotiate with it in good faith for retransmission consent by abruptly ending negotiations due to a prohibition on out-of-market carriage in WSWG's network affiliation agreement ("Affiliation Agreement"), by failing to seek a waiver of this prohibition from CBS, and by generally failing to communicate with ATC Broadband. Furthermore, ATC Broadband argues the Affiliation Agreement violates the network non-duplication rules. As relief, ATC Broadband requests the Commission to order WSWG to honor its retransmission consent offer in the form of a retransmission consent agreement, to provide retransmission consent through December 31, 2011, and to declare both the Affiliation Agreement and WSWG's actions to be in violation of the Commission's rules. ATC Broadband has filed an answer to which WSWG filed a reply. For the reasons stated below we find that WSWG did not fail to negotiate in good faith with ATC Broadband, and we deny WSWG's retransmission consent complaint and petition for declaratory ruling.

1 ATC Broadband Retransmission Consent Complaint, filed Aug. 15, 2008, at 1 ("Complaint").

2 47 C.F.R. §§ 76.7 and 76.64.

3 Complaint at 8-9.

4 WSWG Answer, filed Sep. 8, 2008 ("Answer").

5 ATC Broadband Reply, filed Sep. 22, 2008 ("Reply").

II. BACKGROUND

2. Section 325(b)(3)(C) of the Communications Act (the “Act”) obligates broadcasters and multichannel video programming distributors (“MVPDs”) to negotiate retransmission consent agreements in good faith.⁶ Specifically, Section 325(b)(3)(C)(ii) directs the Commission to establish regulations that:

[U]ntil January 1, 2010, 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 [MVPDs] if such different terms and conditions are based on competitive marketplace considerations.⁷

3. In its *SHVIA Good Faith Order*, the Commission adopted rules implementing good faith negotiation standards and the complaint procedures for alleged violations of these rules.⁸ The *SHVIA Good Faith Order* adopted a two-part test for good faith.⁹ The first part consists of a brief, objective list of negotiation standards.¹⁰ Engaging in any of the conduct proscribed by these objective standards constitutes a *per se* violation. Under the second part of the test, an MVPD may present facts to the Commission which, even though they do not allege a violation of the objective standards, given the totality of the circumstances, constitute a failure to negotiate in good faith.¹¹ However, failure to reach an agreement is not a violation of our rules.¹² Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”), the Commission has adopted rules to extend 47 U.S.C. § 325(b)(3)(C) until 2010 and to amend that section to impose a reciprocal good faith retransmission consent bargaining obligation on broadcasters and MVPDs.¹³ Either party to a retransmission consent

⁶ 47 U.S.C. § 325(b)(3)(C).

⁷ 47 U.S.C. § 325(b)(3)(C)(ii).

⁸ See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, 15 FCC Rcd 5445 (2000) (“*SHVIA Good Faith Order*”), recon. granted in part, 16 FCC Rcd 15599 (2001).

⁹ See *SHVIA Good Faith Order*, 15 FCC Rcd at 5457, ¶ 30.

¹⁰ See *id.* at 5462-64, ¶¶ 40-46.

¹¹ See *id.* at 5458, ¶ 32. The Commission adopted the following standard at 47 C.F.R. § 76.65(b)(2):

(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).

¹² *SHVIA Good Faith Order*, 15 FCC Rcd at 5462, ¶ 40.

¹³ *In the Matter of: Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004: Reciprocal Bargaining Obligation*, 20 FCC Rcd 10339, 10342, ¶ 7, 10344, ¶ 13 (2005) (“*SHVERA Reciprocal Bargaining Order*”). The current version of the Commission’s adopted standards are found at Section 76.65(b)(1)(i)-(vii) of the Commission’s rules:

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
- (continued...)

negotiation, believing themselves aggrieved under the good faith rules, may file a complaint pursuant to Section 76.7 of the Commission's rules.¹⁴ The burden of proof in good faith complaints is on the complainant.¹⁵

4. ATC Broadband is a cable operator serving the communities of Alma, Blackshear, Baxley, and Patterson, which are located in the Savannah, Georgia and Jacksonville, Florida DMAs.¹⁶ To ensure that its customers receive at least one dependable CBS signal, ATC Broadband currently carries redundant CBS programming from Savannah CBS affiliate, WTOG-TV and Jacksonville CBS affiliate WTEV-TV.¹⁷ WSWG is a digital-only CBS-affiliate¹⁸ licensed to Valdosta, Georgia and serves the Albany, Georgia DMA.¹⁹ ATC Broadband asserts that out of the surrounding CBS affiliates, WSWG's transmitter is physically closest to its cable system headend and provides the most reliable signal – one that can be received by its cable communities over the air.²⁰ Accordingly, ATC Broadband wrote to the station on March 29, 2007 requesting retransmission consent to carry WSWG on its cable systems.²¹

5. WSWG proceeded to negotiate carriage terms with ATC Broadband.²² On April 12, 2007, WSWG offered an unexecuted retransmission consent agreement to ATC Broadband and requested that the latter complete, sign, and remit copies of the document for WSWG's final signature.²³ After

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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.

47 C.F.R. § 76.65(b)(1)(i)-(vii).

¹⁴ See 47 C.F.R. § 76.7.

¹⁵ See 47 C.F.R. § 76.65(d).

¹⁶ See Complaint at 2 and Exhibit A.

¹⁷ See *id.* at 2 & n.2.

¹⁸ Answer at n.1.

¹⁹ See Complaint at 2 and Exhibit A.

²⁰ See Complaint at 2; Reply at 3 & n.8 (citing Declaration of Paul D. Williams, President, Signal Associates, Inc., at ¶ 5 & Exhibit A (chart showing the distances between ATC Tower, Alma, Georgia and the transmitters of four CBS affiliates)).

²¹ See Complaint at 2 and Exhibit B, Mar. 29, 2007 e-mail from Greg Davis, President of ATC Broadband, to Nick Waller, President and General Manager of WSWG-DT).

²² See Complaint at 2.

²³ Complaint at 3 and Exhibit C, Apr. 12, 2007 e-mail from Nick Waller, President and General Manager of WSWG-DT to Greg Davis, President of ATC Broadband (Mr. Waller wrote: "If the attached agreement is acceptable, please complete Schedule B and fill in the other blanks and sign two originals. Mail them to me at 1801 Halstead Blvd., Tallahassee, FL 32309. I'll sign and return an original to you promptly.").

making this offer, WSWG contacted CBS to request permission to grant retransmission consent to ATC Broadband to carry the station's signal outside of its market.²⁴ WSWG's Affiliation Agreement (the "Affiliation Agreement") with CBS bars carriage of WSWG on cable systems located outside of the station's market.²⁵ CBS informed WSWG that their Affiliation Agreement would not permit carriage of WSWG outside its DMA unless ATC Broadband's cable systems were located in areas in which WSWG was significantly viewed or had been historically carried.²⁶ ATC Broadband does not dispute that neither of these conditions were met.²⁷ Accordingly, on April 17, 2007, WSWG informed ATC Broadband that it was retracting its retransmission consent offer, citing restrictions under the station's affiliation agreement with CBS.²⁸

6. After the station's April 17th retraction, ATC Broadband asserts it attempted to contact WSWG several times but received no response.²⁹ On October 5, 2007, ATC Broadband warned WSWG that its failure to respond within 15 days would be construed as WSWG's refusal to negotiate in good faith.³⁰ ATC Broadband states that WSWG did not respond to this warning.³¹ However, WSWG asserts that on a second occasion, it did seek permission from CBS to grant retransmission consent to ATC Broadband,³² but was advised that CBS's position on such carriage had not changed.³³

III. DISCUSSION

A. Retransmission Consent

7. The Commission declines to find that WSWG's conduct during the course of retransmission consent negotiations with ATC Broadband violated the Commission's good faith

²⁴ Answer, Declaration of Nick Waller at ¶ 2 ("Waller Decl."). WSWG admits it extended the offer to ATC Broadband because it was unaware of the restrictions in its Affiliation Agreement at the time. *See* Answer at 2 ("Shortly [after sending its draft agreement to ATC Broadband], Mr. Waller *learned* that WSWG's affiliation agreement with the CBS Television Network precluded WSWG from granting retransmission consent on ATC's cable systems.") (emphasis added); *see also* note 28 *infra* (WSWG admitted it "misunderstood" the terms of its Affiliation Agreement.)

²⁵ In its Answer, WSWG states the Affiliation Agreement "permits WSWG to grant retransmission consent only on cable systems (1) located within the station's television market (as defined in Sections 76.55(e) and 76.59 of the FCC's Rules), (2) located in an area in which the station is "significantly viewed," or (3) on which the station had been carried on October 5, 1992 and does not receive the station's signal via satellite." Answer at 2 & n.2 (quoting Dec. 5, 2006 Affiliation Agreement between CBS Affiliate Relations and Gray Television Group, Inc., at Sec. 3(d)). WSWG did not provide a copy of the Affiliation Agreement with its Answer.

²⁶ Answer at 3 (citing Waller Decl. at ¶ 2).

²⁷ WSWG and ATC Broadband do not dispute that WSWG is neither significantly viewed nor historically carried in any area served by ATC Broadband in the Savannah or Jacksonville DMAs. Answer at Waller Decl. at ¶ 4.

²⁸ Complaint at 3 and Exhibit E, Apr. 17, 2007 E-mail from Nick Waller, President and General Manager of WSWG-DT to Greg Davis, President of ATC Broadband (Mr. Waller wrote: "I regret to inform you that we will be unable to permit retransmission of WSWG-DT's signal due to restrictions under our CBS affiliation agreement. I'm sorry for the misunderstanding which was entirely mine.")

²⁹ Complaint at 4.

³⁰ Complaint at 4 (citing Exhibit G, Oct. 5, 2007 Letter from Paul D. Williams, President, Signal Associates, Inc. on behalf of ATC Broadband, to Nick Waller, President and General Manager, WSWG-TV).

³¹ Complaint at 4.

³² Answer, Waller Decl. at ¶ 3.

³³ *Id.*

standards. ATC Broadband asserts that WSWG violated the sixth objective negotiation standard under the good faith test by executing an Affiliation Agreement with CBS that requires WSWG not to enter into a retransmission consent agreement with any cable system that is located outside of the Albany, Georgia DMA.³⁴ Section 76.65(b)(1)(vi) of the Commission's rules states that a television broadcast station's duty to negotiate retransmission consent agreements in good faith is violated when that station executes "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 ...multichannel video programming distributor."³⁵ However, as ATC Broadband itself concedes,³⁶ the term "any party" in this context refers to an "MVPD" as "this provision is intended to cover collusion between a broadcaster and an MVPD requiring non-carriage by another MVPD."³⁷

8. Nevertheless, under the Commission's rules, ATC Broadband may also "demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station... breached its duty to negotiate in good faith as set forth in § 76.65(a)."³⁸ By looking at the totality of circumstances, ATC Broadband argues that WSWG's abrupt retraction of its retransmission consent offer, its failure to seek a waiver from CBS to enable carriage by ATC Broadband, and its failure to communicate with ATC Broadband after its April 17th retraction, all evidence WSWG's failure to negotiate in good faith.³⁹ Furthermore, ATC Broadband asserts WSWG failed to act in good faith by not providing copies of its Affiliation Agreement or detailing its communications with CBS.⁴⁰ Without the Affiliation Agreement, ATC Broadband argues it cannot confirm the extent to which WSWG is barred from permitting carriage of its signal outside the Albany, Georgia. DMA.⁴¹

9. We find that under the totality of the circumstances test, WSWG did not fail to negotiate for retransmission consent in good faith. WSWG's community of license and ATC Broadband's cable systems are located in different DMAs and WSWG is not significantly viewed or historically carried in the communities served by ATC Broadband. And, although reciprocal bargaining obligations still apply to carriage negotiations between parties in different markets, a "different calculus" applies.⁴² The Commission has stated that "negotiations involving truly distant broadcasters and MVPDs and negotiations for which a broadcaster is contractually precluded from reaching consent may be truncated, [and therefore,] MVPDs and broadcasters alike will not be required to engage in an unending procession of extended negotiations."⁴³ Either party in such retransmission consent negotiations for out-of-market carriage has the right, "after evaluating the prospect of distant signal carriage, to reject the proposal and terminate further negotiation."⁴⁴

³⁴ *Id.* at 5-6.

³⁵ 47 C.F.R. § 76.65(b)(1)(vi).

³⁶ Complaint at 6 & n.19.

³⁷ *SHVERA Reciprocal Bargaining Order*, 20 FCC Rcd at 10355, ¶ 34.

³⁸ 47 C.F.R. § 76.65(b)(2).

³⁹ Complaint at 6.

⁴⁰ Reply at 2.

⁴¹ *Id.*

⁴² *SHVERA Reciprocal Bargaining Order*, 20 FCC Rcd at 10353, ¶ 31.

⁴³ *Id.* at 10345, ¶ 14.

⁴⁴ *Id.* at 10353, ¶ 31; *but cf. id.* at 10354, ¶ 32 (the Commission concedes that "[a]s the distances involved [between a cable operator's systems and a distant station] lessen, we would expect the party requested to engage in retransmission consent negotiations to be more willing to engage in extended negotiations.").

10. Although the parties are in different DMAs, WSWG appears to have commenced carriage negotiations with ATC Broadband in earnest and even offered retransmission consent terms for further approval. WSWG's abrupt retraction of its retransmission consent offer and its failure to thereafter correspond with ATC Broadband, given the circumstances presented in this negotiation, do not evidence lack of good faith. Once WSWG had fully evaluated the prospect of out-of-market carriage and formally terminated the negotiations with ATC Broadband, it had no further obligation to engage in extended negotiations.

11. Furthermore, while a broadcaster must provide reasons for rejecting any aspect of an MVPD's offer, and a blanket rejection without explanation does not constitute good faith, broadcasters are also not required to justify their explanations by document or evidence.⁴⁵ WSWG's citation to "restrictions under [WSWG's] CBS affiliation agreement" provided sufficient justification for WSWG's retraction of its retransmission consent offer without WSWG having to provide a copy of its Affiliation Agreement.

12. Finally, WSWG did not fail to seek a waiver of the prohibition on out-of-market carriage contained in its Affiliation Agreement. ATC Broadband argues reciprocal bargaining obligations still subject broadcasters to a "heightened duty of negotiation," such that it is "incumbent upon 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."⁴⁶ WSWG asserts that it asked CBS Affiliate Relations if "CBS' policy would permit WSWG to grant retransmission consent for carriage... by cable systems located outside the Albany, Georgia DMA."⁴⁷ Whether or not we are provided with a full copy of the Affiliation Agreement, it is clear that WSWG would not have been seeking permission to be carried outside its market unless such carriage was prohibited. We find that WSWG's two requests for permission to be carried by ATC Broadband sufficiently evidence that it sought a waiver of the out-of-market carriage prohibition. Accordingly, we do not find, and decline to issue a declaration, that WSWG violated its obligations to negotiate for retransmission consent in good faith.

B. Network Non-Duplication

13. We find ATC Broadband's network non-duplication arguments are also without merit. ATC Broadband argues that the Affiliation Agreement between WSWG and CBS violates the Commission's network non-duplication rules. It argues network non-duplication protection only extends to cable community units located within the 35-mile "geographic zone" of large network affiliates such as Savannah CBS affiliate WTOG-TV and Jacksonville CBS affiliate WTEV-TV, and that by Commission rule, such affiliates are prohibited from contracting for broadcast territorial exclusivity rights which exceed this geographic zone.⁴⁸ ATC Broadband argues the Affiliation Agreement between WSWG and CBS, by barring carriage of WSWG in the Savannah and Jacksonville CBS affiliates' DMAs, specifically grants these affiliates network non-duplication protection that *de facto* extends well beyond their 35-mile

⁴⁵ See *Mediacom Comm. Corp. v. Sinclair Broadcast Group*, 22 FCC Rcd 35, 41, ¶ 15 (2007).

⁴⁶ Complaint at 6 (citing *SHVERA Reciprocal Bargaining Order*, 20 FCC Rcd at 10355, ¶ 35).

⁴⁷ Answer, Waller Decl. at ¶ 2.

⁴⁸ See Complaint at 7-8 (citing 47 C.F.R. § 76.92(a), Note to § 76.92, and § 76.658(m)). Pursuant to the Note to Section 76.92, "[w]ith respect to network programming, the geographic zone within which the television station is entitled to enforce network non-duplication protection and priority of shall be that geographic area agreed upon between the network and the television station. In no event shall such rights exceed the area within which the television station may acquire broadcast territorial exclusivity rights as defined in § 73.658(m) of this Chapter..." Section 76.658(m) specifically prohibits any contract that extends network non-duplication protection beyond a 35-mile zone.

geographic zones of protection and up to the limits of their markets.⁴⁹

14. However, as a factual matter, WSWG's Affiliation Agreement allows carriage of WSWG in the Savannah and Jacksonville DMAs if WSWG is significantly viewed or historically carried in those areas. Therefore, WSWG is not barred from being carried in the Savannah and Jacksonville affiliates' DMAs and ATC Broadband's network non-duplication argument fails.

15. Furthermore, the Commission stated in the *SHVERA Reciprocal Bargaining Order* 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 good faith or reciprocal bargaining obligation to agree to limit an affiliate's right to redistribute affiliated programming... [to] interfere with the network-affiliate relationship or to preclude specific terms in network-affiliate agreements."⁵⁰ As the Commission reaffirmed in its *2005 Report to Congress*, "cable operators' ability to retransmit duplicative distant broadcast signals is governed in the first instance by the contract rights negotiated between broadcasters and their programming suppliers."⁵¹ In that *Report*, the Commission declined to endorse or recommend modifications to the network non-duplication rules that would have superseded "contract arrangements between broadcasters and their program suppliers that are permitted by the rules."⁵² Accordingly, we do not find that WSWG's Affiliation Agreement with CBS violates our network non-duplication rules.

IV. CONCLUSION

16. We do not find that WSWG violated the Commission's objective good faith standards, or given the totality of the circumstances, failed to negotiate with ATC Broadband in good faith. We further decline to find that the Affiliation Agreement between WSWG and CBS violated the network nonduplication provisions of our rules.

V. ORDERING CLAUSES

17. Accordingly, **IT IS ORDERED** that the retransmission consent complaint and petition for declaratory ruling pursuant to Sections 76.7 and 76.65 of the Commission's Rules, 47 C.F.R. §§ 76.7 and 76.64, filed by ATC Broadband LLC and Dixie Cable TV, Inc. against Gray Television Licensee, Inc., licensee of WSWG-DT, Valdosta, Georgia **IS DENIED**.

18. This action is taken under authority delegated by Section 0.283 of the Commission's rules, 47 C.F. R § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker
Senior Deputy Chief, Policy Division
Media Bureau

⁴⁹ Complaint at 8.

⁵⁰ *SHVERA Reciprocal Bargaining Order*, 20 FCC Rcd at 10354, ¶ 33

⁵¹ *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 2005 WL 2206070, ¶ 49 (Sept. 8, 2005).

⁵² *Id.* at ¶ 50.