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

In the Matter of	)	
	)	
HITV License Subsidiary, Inc.	)	
	)	MB Docket No. 17-292
v.	)	
	)	CSR-8943-C
DIRECTV, LLC	)	
	)	
Good Faith Negotiation Complaint	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 5, 2018 **Released: February 5, 2018**

By the Chief, Media Bureau:

I. INTRODUCTION

1. On October 20, 2017, HITV License Subsidiary, Inc. (HITV) filed a Good Faith Negotiation Complaint (Complaint) against DIRECTV, LLC (DIRECTV) pursuant to Section 325(b)(3)(C) of the Communications Act of 1934, as amended (the Act), and Sections 76.7 and 76.65 of the Federal Communications Commission's (Commission) rules.[1] HITV alleges that DIRECTV failed to negotiate retransmission consent in good faith for carriage of HITV's broadcast television station KFVE, Honolulu, Hawaii, a MyNetworkTV affiliate (KFVE).[2] DIRECTV filed an Answer[3] to which HITV filed a Reply.[4] For the reasons set forth below, we deny HITV's Complaint.

II. BACKGROUND

2. Section 325(b)(3)(C) of the Act obligates broadcasters and multichannel video programming distributors (MVPDs) to negotiate retransmission consent in good faith.[5] Specifically, Section 325(b)(3)(C)(iii) of the Act directs the Commission to establish regulations that:

> 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

[1] 47 U.S.C. § 325(b)(3)(C); 47 CFR §§ 76.7, 76.65.

[2] Complaint at 1-2.

[3] DIRECTV, LLC, Answer (filed Nov. 9, 2017) (Answer).

[4] HITV License Subsidiary, Inc., Reply to Answer to Good Faith Negotiation Complaint (filed Nov. 24, 2017) (Reply).

[5] 47 U.S.C. § 325(b)(3)(C).

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.[6]

3. In its *Good Faith Order*, the Commission adopted rules implementing the good faith negotiation provisions and complaint procedures for alleged rule violations.[7] The *Good Faith Order* adopted a two-part test for good faith.[8] The first part of the test consists of an objective list of negotiation standards which, if violated, constitute a *per se* breach of the duty to negotiate in good faith.[9] The two *per se* standards directly at issue in this case are (1) refusal by a negotiating entity to put forth more than a single, unilateral proposal; and (2) 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.[10] Also of particular relevance to this case is the Commission's rule prohibiting certain broadcast stations from jointly negotiating with an MVPD for retransmission consent, which was adopted in 2015 to implement Section 103(a) of the STELA Reauthorization Act of 2014 (STELAR).[11] That rule specifies that it is a *per se* violation of the duty to negotiate retransmission consent in good faith for two or more stations in the same local market to coordinate retransmission consent negotiations or to negotiate jointly, unless the stations are under common control.[12]

4. The second part of the good faith test considers the totality of the circumstances. Under this standard, a broadcast television station or MVPD may present facts to the Commission which could constitute a failure to negotiate in good faith, even though they do not allege a violation of the objective standards.[13] A television broadcast station or MVPD believing itself aggrieved under the good faith rules

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[6] 47 U.S.C. § 325(b)(3)(C)(iii). The good faith negotiation requirement originally was imposed only on television broadcast stations, but a reciprocal obligation was imposed on MVPDs pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004. *See Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004: Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd 10339 (2005) (*Reciprocal Bargaining Order*).

[7] *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, First Report and Order, 15 FCC Rcd 5445 (2000) (*Good Faith Order*), *recon. granted in part*, 16 FCC Rcd 15599 (2001).

[8] *Good Faith Order*, 15 FCC Rcd at 5457, para. 30.

[9] *Id.* at 5462-64, paras. 40-46.

[10] 47 CFR § 76.65(b)(1)(iv)-(v).

[11] 47 U.S.C. § 325(b)(3)(C)(iv); *Implementation of Sections 101, 103 and 105 of the STELA Reauthorization Act of 2014*, Order, 30 FCC Rcd 2380 (2015). The Commission first adopted a *per se* rule addressing joint retransmission consent negotiations in 2014, based on its conclusion that "joint negotiation gives such stations both the incentive and the ability to impose on MVPDs higher fees for retransmission consent than they otherwise could impose if the stations conducted negotiations for carriage of their signals independently." *Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, 3358-59, para. 13 (2014). Before STELAR necessitated a revision to its rules, the Commission's initial joint negotiation prohibition was limited to same-market Top Four broadcast television stations.

[12] 47 CFR § 76.65(b)(1)(viii).

[13] *Good Faith Order*, 15 FCC Rcd at 5458, para. 32; 47 CFR § 76.65(b)(2).

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]

5. HITV's station KFVE carries MyNetworkTV programming as well as "an extensive slate of locally-produced and focused programs, including local news and non-news programming."[16] DIRECTV is an MPVD that provides service throughout the U.S., including in the Honolulu designated market area (DMA) to which KFVE is licensed.[17] Both HITV and DIRECTV are "Negotiating Entities" for purposes of the Commission's retransmission consent rules.[18] HITV and DIRECTV were parties to a retransmission consent agreement that would have expired on August 31, 2017.[19] Raycom Media, Inc. negotiated that agreement on behalf of HITV, but as a result of the *per se* standard precluding joint negotiations described above, that arrangement is no longer permissible and instead HITV itself has engaged in negotiations with DIRECTV.[20] Although DIRECTV provided monetary compensation to HITV for carriage of KFVE under the previous agreement, it commenced retransmission consent negotiations with a carriage proposal pursuant to which instead it would carry KFVE as if it had elected mandatory carriage.[21] HITV responded that it would not go backwards and receive no monetary compensation for carriage of KFVE's signal.[22] The parties agreed to multiple extensions through 11:59 pm on October 19, 2017, but DIRECTV maintained its position that it would not offer monetary compensation and HITV did not provide a counter-offer.[23] Upon expiration of the extensions, KFVE's signal was removed from DIRECTV's service.[24]

6. On October 20, 2017, HITV filed the Complaint alleging that DIRECTV has failed to negotiate retransmission consent in good faith by: (1) putting forth a single unilateral proposal; (2) failing to justify its refusal to consider alternative carriage terms; and (3) violating the totality of the circumstances test.[25] HITV asks the Commission to order DIRECTV to negotiate retransmission consent for KFVE in good faith, and to impose forfeitures and other relief as the Commission deems appropriate.[26] DIRECTV responds that, among other things, the requested relief is moot because after HITV filed the Complaint, DIRECTV made another carriage proposal and explained that monetary compensation is not justified due to a lack of customer demand for KFVE.[27] DIRECTV also explains

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[14] 47 CFR §§ 76.65(c), 76.7.

[15] *Id.* § 76.65(d).

[16] Complaint at 2.

[17] *Id.*

[18] *Id.* at 2, 6.

[19] *Id.* at 3.

[20] *Id.*

[21] *Id.* at 3-4, 7, Ex. 10; Answer at 4.

[22] Complaint at 4.

[23] *Id.* at 3-6; Answer at 5.

[24] Complaint at 6.

[25] *Id.* at 1.

[26] *Id.* at 9.

[27] Answer at 3, 11.

that, even though it is unwilling to provide monetary compensation, KFVE would benefit from carriage as a result of "DIRECTV's valuable satellite capacity and the expanded reach the station would receive with carriage."[28] HITV asserts that DIRECTV's subsequent carriage proposals were not meaningfully different from its initial proposal.[29] On November 17, 2017, HITV for the first time provided a counterproposal, to which DIRECTV had not yet responded at the time HITV filed its Reply.[30]

III. DISCUSSION

7. At the outset, we emphasize our previous conclusion that absent other factors, disagreement over the rates, terms, and conditions of retransmission consent – even fundamental disagreement – is not indicative of a lack of good faith.[31] We agree with DIRECTV that nothing in the Act or our implementing rules requires that parties negotiating retransmission consent reach agreement.[32]

8. We disagree with HITV's allegation that DIRECTV has violated the *per se* good faith negotiation rules by refusing to "put forth more than a single, unilateral proposal."[33] Rather than provide a counter-offer to DIRECTV's initial proposal, HITV requested DIRECTV to provide another proposal that would be workable for HITV.[34] We agree with DIRECTV that it is not obligated to negotiate against itself.[35] After HITV filed the Complaint, DIRECTV made another, albeit similar, carriage proposal, and it explained why competitive marketplace considerations did not support an offer of monetary compensation to HITV.[36] Once DIRECTV put forth its initial proposal, however, it was not required to put forth a subsequent proposal in the absence of a responsive proposal from HITV.

9. We also find that DIRECTV did not violate the rule prohibiting a "single, unilateral proposal" simply because it consistently refused to offer monetary compensation in exchange for carriage of KFVE's signal. The parties reached a fundamental negotiating impasse, pursuant to which HITV maintained its position that it would require monetary compensation, and DIRECTV maintained its position that such compensation is inconsistent with competitive marketplace considerations. There is no

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[28] *Id.* at 3-4.

[29] Reply at 3.

[30] Reply at 3 n.5 and Ex. 1.

[31] *See Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 47, 50, para. 6 (MB, Jan. 4, 2007).

[32] Answer at 3. HITV argues that the Answer is subject to dismissal because it is more than 10 pages long and does not include a separate table of contents and summary, in violation of 47 CFR § 1.49(b) and (c). Reply at 1, n.1. Although HITV accurately describes this requirement, in the interest of a complete record we waive it here.

[33] Complaint at 6; 47 CFR § 76.65(b)(1)(iv). HITV states in a footnote that this behavior also may violate Section 76.65(b)(1)(i), which deems it a *per se* violation of the good faith negotiation rules if a Negotiating Entity refuses "to negotiate retransmission consent." Complaint at 7, n.25; 47 CFR § 76.65(b)(1)(i). We disagree. The record indicates that there were many back-and-forth communications between the parties, including multiple extension agreements to facilitate negotiations. *See supra* Section II. Such discussions clearly demonstrate that there was not a complete refusal to negotiate.

[34] Answer at 1-2.

[35] *Id.* at 6.

[36] *Id.* at 11-12.

requirement that DIRECTV provide compensation in exchange for retransmission consent,[37] and as DIRECTV states, its "decision not to offer to continue carrying KFVE on the same terms to which it agreed pursuant to a negotiating framework that now is unlawful cannot, on its own, constitute bad faith."[38] Although Raycom obtained retransmission consent fees for KFVE when it was negotiating on behalf of a larger number of stations, Congress has determined that such negotiations are inconsistent with competitive marketplace considerations through its decision to prohibit them.[39]

10. In addition, we disagree with HITV's allegation that DIRECTV has violated the *per se* good faith negotiation rules by failing to provide the reasons for its refusal to provide monetary compensation.[40] The applicable rule addresses the "[f]ailure 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."[41] Both parties agree that at the time the Complaint was filed, HITV had not made any counter-offer.[42] Accordingly, there was no proposal on the table for DIRECTV to reject, and thus no explanation of the rejection was required. Although it would have been more consistent with the spirit of the retransmission consent rules for DIRECTV initially to explain its decision not to provide any monetary compensation, even in the absence of a counter-offer from HITV, our rules require no such explanation, and ultimately DIRECTV conveyed its reasoning to HITV.[43]

11. Finally, we reject HITV's allegation that DIRECTV has violated the totality of the circumstances test for good faith retransmission consent negotiation.[44] Under the totality of the circumstances test, separate from the objective, *per se* good faith standards, "a Negotiating Entity may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station or [MVPD] breached its duty to negotiate in good faith."[45] In setting out this standard, the Commission explained that it "will entertain complaints under the totality of the circumstances test alleging that specific retransmission consent proposals are sufficiently outrageous, or evidence that differences among MVPD agreements are not based on competitive marketplace considerations, as to breach a broadcaster's good faith negotiation obligation. However, complaints which merely reflect commonplace disagreements encountered by negotiating parties in the everyday business world will be promptly dismissed by the Commission."[46] We agree with DIRECTV that HITV did not raise any arguments to support a finding of a violation pursuant to the totality of the circumstances

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[37] Answer at 2-3, 11. We reject's DIRECTV's claim that it is HITV, and not DIRECTV, that failed to negotiate retransmission consent. *See id.* at 1. There is no evidence in the record to support a claim that HITV refused to negotiate retransmission consent.

[38] Answer at 3.

[39] *Id.* at 10.

[40] Complaint at 7.

[41] 47 CFR § 76.65(b)(1)(v).

[42] Complaint at 7; Answer at 9.

[43] Answer at 11-12.

[44] Complaint at 8.

[45] 47 CFR § 76.65(b)(2).

[46] *Good Faith Order*, 15 FCC Rcd at 5458, para. 32.

test, and thus HITV's totality of the circumstances argument lacks merit.[47] For these reasons, we find no violation of the Commission's *per se* good faith standards, nor the totality of the circumstances test. Given the guidance provided herein, we urge the parties to return to the bargaining table and recommence negotiations "in an atmosphere of honesty, purpose and clarity of process."[48]

IV. ORDERING CLAUSE

12. Accordingly, **IT IS ORDERED** that HITV License Subsidiary, Inc.'s Good Faith Negotiation Complaint against DIRECTV, LLC, filed pursuant to Section 325(b)(3)(C) of the Act, 47 U.S.C. § 325(b)(3)(C), and Sections 76.7 and 76.65 of the Commission's rules, 47 CFR §§ 76.7 and 76.65, **IS DENIED**.

13. This action is taken pursuant to delegated authority under Section 0.283 of the Commission's rules.[49]

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey
Chief, Media Bureau

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[47] Answer at 9.

[48] *Good Faith Order*, 15 FCC Rcd at 5455, para. 24.

[49] 47 CFR § 0.283.