

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
JAN 12 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Satellite Home)
Viewer Improvement Act of 1999)
)
Retransmission Consent Issues)

CS Docket No. 99-363

COMMENTS OF DIRECTV, INC.

Gary M. Epstein
James H. Barker
Kimberly S. Reindl
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.,
Suite 1300
Washington, D.C. 20004-2505
(202) 637-2200

Attorneys for DIRECTV, Inc.

Dated: January 12, 2000

No. of Copies rec'd 0 + 1
List A B C D E

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION & SUMMARY.....	1
II. THE COMMISSION MUST IMPLEMENT THE GOOD FAITH NEGOTIATION OBLIGATION IN A MANNER THAT ENSURES THAT BROADCASTERS DO NOT IMPEDE COMPETITION IN THE MVPD MARKET.....	5
A. A Two-Tier Test Combining Specifically Identified Violations With A "Totality of the Circumstances" Approach Will Best Implement Broadcasters' Duty of Good Faith Negotiation.....	6
1. <i>Per se</i> Violations.....	6
2. "Totality of the Circumstances" Test.....	11
B. The Commission Should Adopt an Objective List of Legitimate "Competitive Marketplace Considerations".....	12
III. THE COMMISSION SHOULD STRICTLY ENFORCE SECTION 325(b)(3)(C)'S PROHIBITION ON BROADCAST STATION EXCLUSIVE CONTRACTS.....	15
IV. THE COMMISSION SHOULD ADOPT EFFICIENT PROCEDURES AND STRINGENT ENFORCEMENT MEASURES TO ENSURE SWIFT RESOLUTION OF DISPUTES ARISING UNDER THE GOOD FAITH NEGOTIATION AND EXCLUSIVITY PROVISIONS.....	16
A. Streamlined Complaint Procedures and Expedited Processing	16
B. Discovery	17
C. <i>Prima Facie</i> Showing and Shifting of Burden of Proof	18
V. CONCLUSION.....	20

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of the Satellite Home)	CS Docket No. 99-363
Viewer Improvement Act of 1999)	
)	
Retransmission Consent Issues)	

COMMENTS OF DIRECTV, INC.

DIRECTV, Inc. ("DIRECTV")¹ hereby submits the following comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.

I. INTRODUCTION & SUMMARY

DIRECTV is the nation's leading provider of Direct Broadcast Satellite ("DBS") services. As of the end of December 1999, DIRECTV had more than 8 million subscribers nationwide.²

When DIRECTV first launched its DBS-1 satellite five years ago – the culmination of ten years and \$750 million worth of effort and investment – DIRECTV was dedicated to providing consumers with a multichannel video programming distributor ("MVPD") alternative to incumbent cable television operators. One of the most significant factors that hindered DIRECTV from offering consumers a complete alternative to cable was that the Satellite Home

¹ DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, Inc., a licensee in the DBS service and a wholly-owned subsidiary of Hughes Electronics Corporation.

² This figure includes customers subscribing to the *PRIMESTAR by DIRECTV* medium-power service. As of the end of December 1999, *PRIMESTAR by DIRECTV* had approximately 1.4 million customers subscribing to its service.

Viewer Act³ only allowed DIRECTV and other DBS providers to provide local broadcast channels to "unserved households."⁴

The Satellite Home Viewer Improvement Act of 1999⁵ ("SHVIA") has diminished this impediment to competition by explicitly permitting DBS providers to offer consumers local broadcast channels. How that legislation is implemented will determine whether consumers' expectations with regard to the local broadcast channel offerings are met.

By removing the limitation on satellite carriers' ability to deliver local broadcast channels, Congress has taken a major step to promote competition in the MVPD marketplace. Helping to ensure that retransmission consent negotiations proceed between the broadcasting and satellite industries in a fair and equitable manner, such that satellite carriers are able to offer their subscribers local broadcast channels on reasonable terms, is critical to fulfilling this congressional mandate. DIRECTV therefore urges the Commission to adopt a framework to implement Section 325(b)(3)(C) that is consistent with the detailed proposals below.

First, in the context of the good faith negotiation obligation that the statute places on broadcasters negotiating retransmission consent agreements, DIRECTV proposes that the Commission adopt a two-tiered approach similar to those it has adopted both in the context of rules implementing the program access provisions of the Cable Television Consumer Protection

³ 17 U.S.C. § 119.

⁴ *See* In the Matter of Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act, Part 73 Definition and Measurement of Signals of Grade B Intensity, 14 FCC Rcd 2654 (1999); Order on Reconsideration, CS Dkt. No. 98-201, FCC 99-278 (rel. Oct. 7, 1999).

⁵ Act of Nov. 29, 1999, PL 106-113, §1000(9), 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999, 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.).

and Competition Act of 1992⁶ and the interconnection provisions of the Telecommunications Act of 1996.⁷ Thus, viewed against the backdrop of the Congressional goal to promote increased MVPD competition by permitting consumers to receive satellite-delivered local broadcast channels, DIRECTV first proposes a list of specific acts or practices by broadcasters in retransmission consent negotiations, which, if proven, would constitute *per se* violations of the duty to negotiate in good faith. Under the second part of the proposed inquiry, the Commission would determine whether a broadcaster's conduct during the negotiations, based upon the "totality of the circumstances," violates the obligation (regardless of whether the conduct alleged is listed as a *per se* violation).

Second, with respect to the Commission's inquiry into the meaning of "competitive marketplace considerations"⁸ that could justify a broadcaster discriminating among various MVPDs or classes of MVPDs in retransmission consent negotiations, DIRECTV agrees with the Commission that the public interest will be better served by defining the term as specifically as possible, rather than by adopting a vague general standard whose content must be determined over time through piecemeal adjudications.⁹ DIRECTV proposes that the Commission adopt a set of objective factors that would allow a broadcaster legitimately to offer different prices,

⁶ 47 U.S.C. § 548; In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc., Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, 13 FCC Rcd 15822 (1998) ("Program Access Order"); Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage, 9 FCC Rcd 2642 (1993).

⁷ See 47 U.S.C. § 251; In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 15571 (1996) ("Interconnection First Report and Order").

⁸ Notice at ¶ 19.

⁹ *Id.*

terms, or conditions to different MVPDs only if based on criteria that have already been found by the Commission to serve the Congressional goal of promoting MVPD competition. Such factors should be sufficiently objective as to permit the Commission to determine, if necessary, whether a broadcaster has violated the duty of good faith by engaging in discriminatory conduct that is not based on "competitive marketplace considerations."

Third, DIRECTV urges the Commission to enforce strictly the SHVIA's prohibition on exclusive retransmission consent agreements between broadcasters and MVPDs. The Commission already has promulgated a regulation to this effect based upon the recognition that such agreements are not in the best interest of promoting MVPD competition, and Congress has underscored the point dramatically by incorporating the substance of the Commission's regulation into the text of the Communications Act.

Finally, DIRECTV proposes that the Commission model the procedural framework for good faith negotiation and exclusivity complaints on its current rules governing program access complaints. DIRECTV advocates streamlined pleading deadlines and expedited processing in order to ensure that complaints are resolved in a timely fashion and that delivery of desired programming to subscribers is not unduly delayed. DIRECTV requests that the Commission implement stronger measures for discovery than are currently employed in the program access context, given the difficulty of obtaining hard evidence of the existence of exclusive retransmission consent agreements or proving subjective acts breaching a broadcaster's good faith obligations in the negotiation context. For the same reasons, DIRECTV also proposes that the Commission use the shifting burden model from the program access context, which will allow a complainant to support allegations of specific violations with a signed affidavit. Once

the complaint is filed, the burden of proof should shift immediately to the broadcaster to show that the allegations in the complaint are untrue.

II. THE COMMISSION MUST IMPLEMENT THE GOOD FAITH NEGOTIATION OBLIGATION IN A MANNER THAT ENSURES THAT BROADCASTERS DO NOT IMPEDE COMPETITION IN THE MVPD MARKET

The plain language of Section 325(b)(3)(C) requires the Commission to adopt a procedural framework that ensures that a "television broadcast station" that opts for retransmission consent is prevented from hampering MVPD competition through the negotiation process. The legislative history of the SHVIA, and the experience of DIRECTV and other DBS operators, have made it abundantly clear that consumers consider the availability of local broadcast channels of great importance when selecting between cable operators and alternative providers of multichannel video programming. Because DBS providers, unlike cable operators, were prohibited under the copyright law from retransmitting local broadcast channels except in very limited circumstances, Congress enacted the SHVIA to promote MVPD competition.¹⁰

DIRECTV recognizes that its customers want to receive satellite-delivered local broadcast channels as soon as possible, and in the wake of the SHVIA's passage, has initiated an aggressive roll-out of "local-into-local" service. The broadcasters have recognized that the ability to provide local broadcast channels will make DBS a more attractive competitor to cable and this fact gives them great leverage in negotiations with providers of DBS service.

¹⁰ See 145 Cong. Rec. H11811-12 (daily ed. Nov. 9, 1999) (statement of Rep. Markey) ("This bill, for the first time, makes it possible for consumers in urban areas to really think seriously about getting a satellite dish, because for the first time they can get their local TV stations."); see also In the Matter of Assessment of the Status of Competition in Markets for the Delivery of Video Programming, 13 FCC Rcd 24284 ¶ 63 (1998) (noting that "as DBS equipment prices continue to drop and especially if DBS operators are able to offer local broadcast stations, DBS may become a closer substitute to cable for an increasing number of consumers.").

Thus, the Commission must develop and employ substantive rules and procedures to ensure that the broadcasters do not abuse this leverage. To do this, the *Notice* correctly observes that Congress, in enacting Section 325(b)(3)(C), "signaled its intention to impose some heightened duty on broadcasters in the retransmission consent process."¹¹ A proposed implementation of that obligation, in the form of a two-tiered inquiry, is presented below.

A. A Two-Tier Test Combining Specifically Identified Violations With A "Totality of the Circumstances" Approach Will Best Implement Broadcasters' Duty of Good Faith Negotiation

DIRECTV proposes a two-tier examination of conduct by broadcasters during the retransmission consent negotiation process that would subject broadcasters to penalties for non-compliance with the obligation to negotiate in good faith. Consistent with the Commission's proposals in the *Notice*, the first "objective" tier consists of a list of acts or practices which, if proven, would constitute a *per se* violation of the duty to negotiate in good faith. The second tier of the inquiry allows the Commission to determine whether the broadcaster's conduct, although not specifically enumerated as a *per se* violation, should nonetheless subject the broadcaster to penalties.

1. *Per se* Violations

It is clearly in the public interest for the Commission, wherever possible, to reduce areas of dispute between broadcasters and satellite carriers during retransmission consent negotiations, as well as to promote and expedite fair and successful negotiations. DIRECTV believes that the Commission can and should identify certain acts or practices by broadcasters during the

¹¹ *Notice* at ¶ 15. In response to the *Notice's* inquiry as to whether the heightened duty applies equally to an MVPD negotiating a retransmission consent agreement, *id.*, the answer is no. The text of new Section 325(b)(3)(C) is a prohibition that repeatedly and explicitly refers only to "television broadcast stations." 47 U.S.C. § 325(b)(3)(C)(ii). There is no statutory or policy basis for the Commission to find otherwise.

negotiation of a retransmission consent agreement with a satellite-based MVPD that would, if proven, constitute a violation of the good faith negotiation obligation imposed on the broadcaster by Section 325(b)(3)(C).

DIRECTV's proposed list of *per se* violations below is adapted from examples of labor law precedent, from the Commission's rules implementing the program access provisions of the Cable Television Consumer Protection Act of 1992 and the interconnection provisions of the Telecommunications Act of 1996, as well as the marketplace dynamics to date that have characterized cable operator and satellite carrier negotiation of retransmission agreements with broadcasters. Some of these are straightforward procedural rules designed to prevent unreasonable delay by broadcasters in reaching a retransmission consent agreement. Others are intended to prevent overreaching¹² or unreasonable "tying" by broadcasters of a grant of retransmission consent to unreasonable, unrelated demands.

For example, it is a clear breach of the good faith obligation for a broadcaster to demand that a satellite carrier retransmit other affiliated broadcast stations in the same or other geographic markets (which may not even be served with local broadcast channels by the satellite carrier) as a condition of granting retransmission consent.¹³ Similarly, it should be considered a breach of its duty of good faith if a broadcaster demands that a satellite carrier retransmit the

¹² For example, some of the proposed restrictions below, such as a prohibition on demanding the carriage of digital signals as part of the *quid pro quo* for retransmission consent, are intended to prevent broadcasters from demanding access to valuable and limited bandwidth in excess of that to which they would otherwise be entitled under their potential automatic carriage rights under a must carry regime.

¹³ See *infra* at 9, requirement (g)1.

broadcaster's digital signals if and when the broadcaster begins digital signal transmission, potentially with multiple channels.¹⁴

Such demands are not directly related to the retransmission of the broadcast station's channel in the local market, and would have extremely negative consequences for DBS subscribers. They would in the first instance unnecessarily protract or possibly impede altogether the rapid execution of retransmission consent agreements. Moreover, if agreed to by DBS providers out of necessity in particular cases, a broadcaster's demands for such "tying" could result in inefficient use of the spectrum and a reduction in the DBS provider's ability to offer local channel service. For example, if a broadcaster insists as a condition of granting retransmission consent that a DBS provider carry four additional affiliated stations that the DBS provider would not otherwise elect to carry, the corresponding use of additional DBS channel capacity would by definition reduce the number of local markets that the DBS provider could serve. Such a reduction in local channel service as a condition of obtaining retransmission consent is directly contrary to what Congress intended in passing the SHVIA. Moreover, such demands may also conflict with other statutory or Commission goals or policies. For example, unilaterally requiring a DBS provider, as a condition of retransmission consent, to carry or not to carry any other broadcast station would clearly be in conflict with the carefully crafted phase-in of the SHVIA's must-carry provision.

Accordingly, DIRECTV proposes that, during the negotiation of a retransmission consent agreement with a satellite-based MVPD, a broadcaster may not:

¹⁴ See *infra* at 10, requirement (g)6.

- (a) intentionally seek to mislead or coerce the MVPD into reaching an agreement it would not otherwise have made;¹⁵
- (b) unreasonably obstruct or delay negotiations or resolutions of disputes;¹⁶
- (c) refuse to designate a representative with authority to make binding representations if such refusal significantly delays resolution of issues;¹⁷
- (d) refuse to negotiate in fact;¹⁸
- (e) refuse to provide the satellite carrier with a high-quality, direct feed of the broadcast signal;
- (f) engage in discrimination in the price, terms or conditions of retransmission consent afforded an MVPD relative to any other MVPD, unless such discrimination is related to "competitive marketplace conditions" as defined by the Commission (see below);
- (g) offer unreasonable positions,¹⁹ including, but not limited to:
 - 1. a unilateral requirement that retransmission consent for a given broadcast station be conditioned on carriage under retransmission consent²⁰ of another broadcast station, either in the same or a different geographic market;

¹⁵ Cf. 47 C.F.R. § 51.301(c)(5). For example, a broadcaster could not threaten the DBS provider with the prospect of running anti-DBS advertising if its demands in the retransmission consent negotiation were not met.

¹⁶ Cf. 47 C.F.R. § 51.301(c)(6).

¹⁷ Cf. 47 C.F.R. § 51.301(c)(7)

¹⁸ Cf. *NLRB v. Katz*, 369 U.S. 736 (1962).

¹⁹ Cf. *NLRB v. General Electric*, 150 N.L.R.B. 192 (1964).

²⁰ Obviously, an individual broadcaster's retransmission consent negotiations could not as a legal or policy matter be permitted to interfere with another broadcaster's right to be carried automatically under any must carry obligation ultimately imposed on satellite carriers.

2. a unilateral requirement that retransmission consent be conditioned on the exclusion of carriage under retransmission consent of other broadcast channels in a given market;
3. a unilateral requirement that retransmission consent be conditioned on the broadcaster obtaining channel positioning rights on the satellite carrier's system;
4. a unilateral requirement that the satellite carrier (i) commit to purchase advertising on the broadcast station or broadcaster affiliated media, or (ii) that a specified share of advertising dollars spent in the broadcaster's market be spent on that broadcaster;
5. a unilateral requirement that retransmission consent be conditioned on a satellite carrier not retransmitting distant network signals to qualified subscribers in the market, or a satellite carrier "capping" the number of qualified subscribers in the market who may receive distant network signals, thus depriving eligible subscribers of their statutory right to subscribe to distant network signals;²¹
6. a unilateral requirement that retransmission consent be conditioned on the satellite carrier's carriage of digital signals.

The above factors, if implemented, will greatly assist the Commission in fulfilling its statutory mandate under the SHVIA. The list is targeted towards achieving a reasonable balance of satellite carrier and broadcaster interests in retransmission consent negotiations, as well as an

²¹ Broadcasters simply cannot be in the position of forcing DBS providers to disenfranchise otherwise eligible subscribers from receiving broadcast network signals. Congress expressly considered and addressed the distant network signal issue in enacting the SHVIA, and the broadcasters cannot be permitted to achieve contractually what they were not able to achieve legislatively; it is quite clear that DBS subscribers residing in "unserved households," as defined under the compulsory licensing statute, 17 U.S.C. § 119, as amended by the SHVIA, are permitted to receive distant network signals.

expedited path towards agreement. DIRECTV urges the Commission to adopt this list of *per se* acts or practices in its entirety.

2. "Totality of the Circumstances" Test

As numerous courts have recognized in the context of labor law litigation under Section 8(d) of the Taft-Hartley Act,²² and as the Commission itself has recognized in its implementation of the interconnection provisions of the Telecommunications Act of 1996,²³ a "totality of circumstances" approach is a useful enforcement mechanism to ensure that bad faith conduct is penalized, whether or not such conduct is listed as a violation *per se*.²⁴ Naturally, such determinations will depend heavily on the facts of the particular case. Labor law precedent applying a "totality of circumstances" approach has allowed the NLRB to penalize a variety of unreasonable or bad faith conduct specific to the context of labor negotiations.²⁵ The Commission has been accorded a similar degree of discretion here to determine whether

²² See *General Electric Co.*, 150 N.L.R.B. 192 (1964), *enforced*, 418 F.2d 736, 758 (2d Cir. 1969) (finding that management offered "untenable and unreasonable positions"); *NLRB v. Reed & Prince Manufacturing Co.*, 205 F.2d 131, 139-40 (1st Cir. 1953) (finding that company failed to bargain in good faith based on "circumstantial evidence"); *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943) (finding that "a sincere effort must be made to reach a common ground").

²³ *Interconnection First Report and Order*, 11 FCC Rcd at ¶¶ 138-56.

²⁴ *Id.* at ¶ 150 ("We believe that determining whether a party has acted in good faith often will need to be decided on a case-by-case basis by state commissions or, in some instances the FCC, in light of all the facts and circumstances underlying the negotiations.").

²⁵ In *NLRB v. General Electric*, the court found a violation of the good faith negotiation obligation in the company's refusal to make any concessions, and the company's publicity campaign through which it hoped to bypass union negotiators to communicate directly to workers, even though none of these actions taken by itself was a violation. *General Electric*, 418 F.2d at 762. In *Reed & Prince*, the court found a wide range of factors to violate the company's obligation to negotiate in good faith, including: the company's refusal to include language from the Taft-Hartley Act in the contract, the company's rejection of the union's request to use the company bulletin board, and the company's refusal to supply the union negotiators with relevant information as to employees' wages,

broadcasters have breached the heightened duty of good faith negotiation that Section 325(b)(3)(C) imposes. DIRECTV thus urges the Commission to adopt a "totality of the circumstances" test as a second tier of inquiry in order to address broadcaster conduct that may not comprise a *per se* violation.²⁶

B. The Commission Should Adopt an Objective List of Legitimate "Competitive Marketplace Considerations"

As part of the SHVIA's articulation of the broadcaster's duty to negotiate in good faith with satellite providers for retransmission consent, Congress provided that a broadcaster may engage in a limited but justified amount of discrimination among MVPDs in the prices, terms and conditions governing its grant of retransmission consent. However, such discrimination is permissible under the statute *only* if it is grounded on "competitive marketplace considerations."²⁷

The SHVIA thus places a clear restriction on a broadcaster's ability to negotiate retransmission consent agreements containing different terms and conditions among different MVPDs. DIRECTV strongly agrees with the Commission that the term "competitive

classifications and ages. *Reed & Prince*, 205 F.2d at 135-139. In *Montgomery Ward*, the Ninth Circuit found several reasons to conclude that the company had not met its obligation to negotiate in good faith, including the management's refusal to offer a single counterproposal to several union proposals. *Montgomery Ward*, 133 F.2d at 687. The court also found that "throughout the conferences there is apparent a studied design of aloofness, of disinterestedness, of unwillingness to go forward on the part of Wards." *Id.*

²⁶ The second tier of review would function much as the general prohibition on unfair acts or practices found in Section 628(b), 47 U.S.C. § 548(b), functions in the program access context (or should function, given the Commission's reluctance to date to decide program access complaints by invoking this provision). The program access law also contains a listing of *per se* violations, *see* 47 U.S.C. § 548(c), that lends further persuasive support to adopting a similar approach here.

²⁷ *See* 47 U.S.C. § 325(b)(3)(C)(ii).

marketplace considerations" must be defined as specifically as possible in this rulemaking in order to provide as much clarity and certainty as possible to satellite providers and broadcasters engaging in retransmission consent negotiations.²⁸ The Congressional objective of fostering competition to cable also dictates that the phrase be tailored as narrowly as possible to avoid rendering the good faith mandate meaningless.

As the Commission notes, the legislative history discussing the meaning of "competitive marketplace considerations" is scant,²⁹ but the term clearly was intended to provide some of the "teeth" attending the broadcaster's duty to negotiate in good faith.³⁰ Congress recognized that local broadcast channels are so crucial to satellite-based MVPD competitors that broadcasters must be subject to a "heightened duty of negotiation" during the process of reaching retransmission consent agreements with satellite carriers.³¹ Moreover, the Commission's recent relaxation of its rules governing broadcast ownership³² is likely to increase concentration in the market, giving certain broadcasters the ability and incentive to attempt to extract unreasonable or anticompetitive concessions from satellite MVPDs.

DIRECTV believes that the congressional purposes in enacting the SHVIA are consistent with a definition of "competitive marketplace considerations" that would permit broadcaster discrimination only in scenarios where Congress and the Commission have recognized that certain variances in price, terms or conditions correspond to "legitimate business behavior that

²⁸ *Notice* at ¶ 19.

²⁹ *Id.* at ¶ 14.

³⁰ *See* 145 Cong. Rec. S15017 (daily ed. Nov. 19, 1999) (statement of Sen. Kohl).

³¹ *See Notice* at ¶ 15.

³² *Id.* at ¶ 19; *see Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket No. 87-8, FCC 99-209 (rel. Aug. 6, 1999).

may occur in the marketplace for video programming."³³ DIRECTV therefore proposes that the Commission define the term as a list of objective "competitive marketplace considerations" to guide broadcasters and satellite carriers during negotiations for retransmission consent agreements, which will offer a safe harbor for legitimate "competitive marketplace considerations" that do not frustrate the procompetitive objectives of the statute.

For this purpose, the non-discrimination provisions contained in the Commission's program access and open video system rules provide an ideal model. The Commission should rule that the following acts or practices, and *only* the following acts or practices, constitute "competitive marketplace considerations," such that a broadcaster in retransmission consent negotiations would be permitted to:

- impose reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality; and
- establish different prices, terms, and conditions to take into account actual, verifiable differences in the costs of delivering the programming.

These factors, variations of which have worked well for the Commission in the context of program access and open video systems,³⁴ will guide the conduct of broadcasters in their negotiation of retransmission consent agreements much more effectively than will a general standard. Consequently, the proposed factors, if adopted, will significantly decrease the need for subsequent adjudication of the standard. In the event that cases must be adjudicated, it will also allow the Commission to draw upon any relevant precedents decided in the context of its

³³ In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 3359 ¶ 83 (1993).

³⁴ See 47 C.F.R. §§ 76.1002(b) (program access standard); 76.1503(a) (open video system standard).

program access and open video system rules, which, consistent with the SHVIA, are also intended to promote MVPD competition.

III. THE COMMISSION SHOULD STRICTLY ENFORCE SECTION 325(b)(3)(C)'S PROHIBITION ON BROADCAST STATION EXCLUSIVE CONTRACTS

Revised Section 325(b)(3)(C) directs the Commission to promulgate rules that “until January 1, 2006, prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts.”³⁵ The *Notice* recognizes that the substance of this restriction is identical to a rule promulgated by the Commission during its implementation of the 1992 Cable Act.³⁶

Congress clearly intended to incorporate the previous Commission rule into the SHVIA. Under the prior rule, a television station was forbidden “from making an agreement with one MVPD for carriage exclusive of other MVPDs.”³⁷ Likewise, the new statutory requirement “prohibits a television broadcast station from entering into an exclusive retransmission consent agreement with a multichannel video programming distributor.”³⁸

DIRECTV urges the Commission to strictly enforce this prohibition on exclusivity. Even before the SHVIA was enacted, the Commission recognized that the policy concerns that led Congress to regulate program access and signal carriage agreements militated against allowing exclusive retransmission consent agreements, at least until the MVPD market had reached a

³⁵ S. 1948, the Intellectual Property and Communications Omnibus Reform Act of 1999, Section 1009(a)(2)(C)(ii), p. 46.

³⁶ *Notice* at ¶ 22; see 47 C.F.R. § 76.74(m).

³⁷ In the Matter of Carriage of the Transmissions of Digital Television Broadcast Stations; Amendments to Part 76 of the Commission's Rules, 13 FCC Rcd 15092 ¶ 38 (1998).

³⁸ Joint Explanatory Statement of the Committee of Conference on the Intellectual Property and Communications Omnibus Reform Act of 1999, p. 13.

mature state of competition.³⁹ Congress clearly still believes this prohibition is necessary. Therefore, DIRECTV urges the Commission to attentively monitor the industry to ensure that broadcasters do not attempt in their retransmission negotiations to wield *de facto* exclusivity against DBS providers by virtue of the terms and conditions that are contained in deals with other MVPDs. Strict enforcement of the provision is necessary to ensure the most expeditious roll out of satellite-based local broadcast channel service to the public, and the corresponding benefits to MVPD competition.

IV. THE COMMISSION SHOULD ADOPT EFFICIENT PROCEDURES AND STRINGENT ENFORCEMENT MEASURES TO ENSURE SWIFT RESOLUTION OF DISPUTES ARISING UNDER THE GOOD FAITH NEGOTIATION AND EXCLUSIVITY PROVISIONS

DIRECTV supports the adoption of a procedural framework to govern both the good faith negotiation and exclusivity limitations embodied in Section 325(b)(3)(C). In particular, DIRECTV urges the Commission to draw from its current rules governing program access disputes⁴⁰ in order to strike the appropriate balance between broadcasters and DBS providers negotiating for retransmission consent. This approach will allow swift and effective implementation of the law consistent with Congress' intent to ensure that satellite-based MVPDs are protected from exclusionary and bad faith conduct by broadcasters. It will also allow the Commission to draw from its considerable experience with the program access procedures and to take advantage of the refinements that have shaped the current procedures over the past several years.⁴¹

A. Streamlined Complaint Procedures and Expedited Processing

³⁹ See Notice at ¶ 22.

⁴⁰ 47 C.F.R. § 76.1003.

⁴¹ Program Access Order, 13 FCC Rcd at ¶¶ 2-4.

DIRECTV urges the Commission to adopt strict time limits for the resolution of disputes under the good faith negotiation and exclusivity provisions of Section 325(b)(3)(C), and proposes that the Commission resolve all complaints relating to good faith negotiation or the existence of exclusive agreements within five months. As in the adjudication procedures for program access complaints, DIRECTV recognizes that the need for expedition of Commission action in such matters will necessitate a streamlined complaint procedure for the parties.⁴²

Indeed, expedited processing is particularly necessary in the context of retransmission consent negotiations because delay will allow broadcasters to extract inappropriate concessions from satellite-based MVPDs. Such delay ultimately could deprive DBS customers of the local broadcast programming, which the SHVIA was enacted to provide, and, at a minimum, distorts the bargaining positions of the parties. In the context of exclusive agreements, expedited processing is necessary to prevent broadcasters from profiting from conduct that could distort the development of the still-nascent MVPD market and that could severely diminish consumer choice.

B. Discovery

In the retransmission consent context, DIRECTV urges the Commission to adopt discovery procedures that go beyond those employed in the adjudication of program access complaints. Under Section 76.1003(g)(1), discovery is permitted only at the discretion of Commission staff, and the approval of such requests has been rare.⁴³ DIRECTV urges

⁴² *Id.* at ¶ 46.

⁴³ To date, Commission staff appears to have ordered discovery in only two cases. See *NRTC v. EMI*, 10 FCC Rcd 9785 (1995); *Consumer Satellite Systems v. CNN*, CSR 4676-P, CSR 4677-P, CSR 4678-P (consolidated 1996).

the Commission to provide for discovery as a matter of right in retransmission consent negotiations to ensure that a full evidentiary record is developed that will allow for adequate review of disputes concerning good faith negotiation and the existence of exclusive agreements prohibited by Section 325(b)(3)(C). DIRECTV recognizes that such a discovery rule will necessitate the use of protective orders to facilitate the review of documents containing trade secrets and commercial or financial information.⁴⁴

As the Commission recognized in the *Notice*, it will be difficult for an aggrieved party to obtain hard evidence of prohibited conduct by a broadcaster, particularly in the context of an exclusivity dispute.⁴⁵ Clearly, the inability to access critical documentation needed to support a complaint would place an aggrieved party at a severe disadvantage. Providing for discovery as a matter of right will help to alleviate this problem. Equally important, the production of relevant documentation will ensure that Commission staff reaches the most fair and factually accurate resolution of the dispute.

C. *Prima Facie* Showing and Shifting of Burden of Proof

DIRECTV strongly supports the Commission's proposal to adopt a shifting burden approach to retransmission consent disputes, similar to the one it employs in the program access context.⁴⁶ A shifting burden approach is particularly appropriate in the context of a dispute concerning the existence of a prohibited exclusive agreement because of the difficulty an aggrieved party may have in obtaining hard evidence of the existence of such an agreement. In

⁴⁴ See *Program Access Order*, 13 FCC Rcd at Appendix B.

⁴⁵ *Notice* at ¶ 25.

⁴⁶ *Id.* at ¶ 28, *citing* Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order, 8 FCC Rcd 3359, 3416-22 (1993).

the context of a dispute concerning good faith negotiation, the shifting burden of proof should complement the list of *per se* violations DIRECTV has proposed. As in the case of exclusive agreements, it may be difficult to obtain written documentation that a broadcaster unilaterally has refused to negotiate on certain points.

For this reason, the threshold for establishing a *prima facie* case must take into account the possible unavailability of supporting information to complainants prior to the invocation of the discovery procedures proposed above. A complainant should be required only to provide affidavits or other documentary evidence to support its belief that a prohibited exclusive contract exists, and the burden of proof should then shift to the defendant to refute the existence of such an agreement.

Consistent with the shifting burden approach, the *prima facie* showing to support a complaint against a broadcaster alleging the existence of an exclusive retransmission consent agreement should entail no more than a statement that the complaining party has attempted to obtain a retransmission consent agreement with a broadcaster, but such efforts have been refused or unanswered. The *prima facie* showing to support a complaint against a broadcaster alleging that the broadcaster is not negotiating in good faith should entail no more than an description of the conduct complained of, including conduct that comports with any appropriate *per se* factors. The complaint should be supported either by documentary evidence of the violation, or by an affidavit (signed by an officer of the complaining MVPD) setting forth the basis for the complainant's allegations. This approach has served the Commission well in its enforcement of the program access laws, and is appropriate for the enforcement of the good faith negotiation and exclusivity provisions of Section 325(b)(3)(C).

Finally, the Commission's rules implementing the framework for adjudication of claims under Section 325(b)(3)(C) should provide that a broadcaster may not refute the complaining MVPD's *prima facie* case by showing merely that the complaining MVPD has entered into a retransmission consent agreement with the broadcaster.⁴⁷ Such *post hoc* rationale would allow bad faith conduct to go unpunished and would defeat the procompetitive purposes of the SHVIA.

V. CONCLUSION

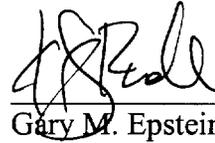
Recognizing that the ability to offer local broadcast channels to subscribers is of critical importance to providers of DBS services, Congress has enacted procompetitive legislation that allows consumers nationwide to receive local broadcast channels from their chosen DBS provider. The short deadlines Congress placed on the Commission's implementation of the legislation illustrate the importance it placed on rules that will facilitate the swift negotiation and execution of fair, pro-competitive retransmission consent agreements. To fulfill this intent, the Commission can and should draw upon many of its existing procedures, particularly those governing program access, to guide the behavior of broadcasters negotiating retransmission consent agreements with DBS providers. DIRECTV therefore urges the Commission to adopt rules to implement Section 325(b)(3)(C) that are consistent with the proposals set forth above.

⁴⁷ Neither should the existence of a retransmission consent agreement in effect between the complaining MVPD and the broadcaster operate as a bar to a complaint.

Respectfully submitted,

DIRECTV, INC.

By:



Gary M. Epstein
James H. Barker
Kimberly S. Reindl
LATHAM & WATKINS
1001 Pennsylvania Ave. N.W.,
Suite 1300
Washington, D.C., 20004-2505
(202) 637-2200

January 12, 2000