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FEDERAL COMMUNICATIONS COMMISSION
U.S. DEPARTMENT OF TRANSPORTATION

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

CS Docket No. 99-363

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5300

Henry L. Baumann
Benjamin F.P. Ivins

Mark R. Fratrick, Ph. D.
NAB Research and Planning

Counsel

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EXECUTIVE SUMMARY

The Comments filed by MVPDs reflect a simple theme: the Commission should use the modest “good faith” provision recently adopted by Congress as a back-door method to destroy the statutory right of retransmission consent under Section 325(b). Although most MVPDs are corporate giants (the CEO of one MVPD is worth nearly \$10 billion dollars), and although they have routinely made retransmission consent deals with stations for years, they propose that the Commission adopt a set of rules that would force every station to give away its consent for nothing to every MVPD – or face brutal procedural penalties at the Commission if it fails to do so.

For example, the MVPDs would have the Commission bar stations from seeking from MVPDs – much less insisting on – anything of any value to the stations. Shockingly, for example, the MVPDs would have the Commission flatly bar stations from ever asking to be paid for retransmission consent – *even though the statute specifically contemplates that agreements will have “price terms.”* The MVPDs would also bar stations from proposing package deals in which MVPDs carry other stations or channels in return for retransmission consent, even though they acknowledge that such “in kind” deals are routine. And they demand that the Commission order stations to enter into retransmission consent deals with MVPDs that are, *at that moment*, infringing the stations’ copyrights – and forbid the stations from asking to have the infringements stopped as part of the retransmission consent deal.

The MVPDs’ proposals are astonishingly one-sided and overreaching, and the Commission should reject them. Given the inherent business incentives that stations have to

negotiate for retransmission consent – namely every station’s desire to have the easiest possible access to the maximum number of viewers – there is no need for any intrusive regulation of the retransmission consent process, much less the draconian rules that the MVPDs demand. The Commission should instead adopt a short and simple set of objective procedural rules that would ensure that the two sides have the opportunity to confer about their respective positions to determine whether mutually agreeable terms can be reached. Any more onerous set of regulations would go far beyond the Commission’s authority under the Act, needlessly interject the Commission into the minutiae of thousands of retransmission consent negotiations, and add enormous transaction costs (and an atmosphere of justifiable paranoia) to a marketplace that is already functioning smoothly and well.

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REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (“NAB”)¹ hereby submits its reply comments in response to Part IV of the Commission’s Notice of Proposed Rulemaking (“NPRM”) in the above-captioned matter.

I. The MVPDs Do Not Dispute the Crucial Fact Here: That Both Local Stations and MVPDs Have Strong, Inherent Business Incentives to Make Retransmission Deals

The comments by cable systems, satellite carriers, and other multichannel video programming distributors (“MVPDs”) cannot and do not contest that both they and local stations have a strong self-interest in seeking to reach retransmission agreements. On the station side, retransmission agreements facilitate the ability to reach local viewers – and not just cable subscribers, but the more than 11 million households that have chosen to be served by DBS, many of which are high-income households that are particularly attractive to advertisers. On the MVPD side, offering local stations enhances the overall attractiveness of the MVPD’s

¹ NAB is a nonprofit incorporated association that serves and represents America’s radio and television broadcast stations and networks.

programming packages, and also provides a major profit opportunity: MVPDs enjoy a government-granted royalty-free copyright license for local stations, but can charge for them whatever price the market will bear, without any government regulation or constraint. And the market will evidently bear a very substantial price: DirecTV and EchoStar each charge about \$1.20 per month for each local station that they retransmit. Even charging that high price, DirecTV has, in just a month, achieved a “40% penetration rate in markets such as Washington, D.C., Denver, and San Francisco” for these apparently lucrative packages.²

In short, this is the prototypical scenario for an effective free market negotiation process; each side has something the other side wants. Of course, the parties may differ about how to quantify and share the gains, as buyers and sellers almost always do in free market negotiations. But such differences of view do not reflect any lack of good faith; they are a fundamental feature of a free marketplace.

These facts are profoundly important here, because they reflect the fact that the MVPDs are proposing draconian, artificial regulatory props and interventions, not to remedy any dysfunction in the marketplace, but to have the Commission provide MVPDs with an extraordinary set of unfair negotiating advantages. The MVPDs would accomplish this by effectively emasculating broadcasters' ability to negotiate for fair compensation for the exploitation of the broadcasters' signal – through imposition of every conceivable manner of restraint on the conditions broadcasters could request for the retransmission of their signals. Were the Commission to adopt the MVPDs' extraordinary list of *per se* violations, virtually the only "right" of broadcasters would be to give their signal away for free. According to the

² Paine Webber Research Note, Hughes Electronics (Jan. 20, 2000).

MVPDs, broadcasters could not demand payment (EchoStar), could not insist that their digital signal be carried, despite a clear FCC mandate that broadcasters must make a prompt transition to digital (DirecTV, EchoStar, American Cable Association), nor could they demand virtually any other concession. Moreover, were broadcasters ever to attempt to negotiate for any of these conditions, they would be subject to oppressive discovery, damages, and other punitive procedural devices.

The rationales provided for imposing these extraordinary regulatory constraints are as breathtaking as the scope of the restraints themselves. The American Cable Association, for example, suggests that its laundry list of constraints on broadcasters' ability to negotiate for retransmission consent is required as a form of broadcaster subsidy to enable small cable systems -- and this does not appear to be a joke -- to do something entirely different, namely to provide "high-speed digital data and Internet services" to rural America. ACA Comments at 3-5.

Although replete with such grossly overreaching demands, the MVPDs' comments are utterly silent about the natural incentives for stations to make retransmission consent deals, because that single fact completely undercuts the entire premise of the highly intrusive regime they advocate. And those natural incentives are growing, not shrinking, as MVPDs control access to more and more viewers and as newer MVPDs (such as DBS) grow at disproportionately fast rates.

II. There Is No Need or Justification for the Commission to Intervene On Behalf of Vast and Powerful Businesses Such as the MVPDs

Even a cursory review of the companies engaged in the MVPD business reveals that they are more than capable of fending for themselves in retransmission consent negotiations, without

the need for Commission intervention on their behalf. Indeed, most of the MVPDs that have filed comments (and most MVPDs generally) are huge corporations with enormous resources.

EchoStar, which has experienced a 700% stock runup in just the past year,³ and whose chairman and CEO, Charles Ergen, is one of the richest individuals in the world with a personal net worth of nearly \$10 billion in EchoStar stock,⁴ is fully capable of engaging in routine marketplace negotiations with companies a fraction of its size. There is no need for the Commission to take the steps that EchoStar demands: (a) forbidding stations from asking for anything of value and (b) having the Commission babysit every step of the negotiation process.

Similarly, DirecTV, which has seen its stock nearly double in just the past six months, is owned by corporate behemoth General Motors (through Hughes Electronics). And AT&T (with annual sales of \$53 billion and \$59 billion in assets)⁵ and the Regional Bell Operating Companies such as Bell Atlantic (with annual sales of \$31 billion and \$55 billion in assets)⁶ and

³ *Dreyfus Launches Focus Fund*, Denver Post (Jan. 16, 2000), at L9.

⁴ Based on already-outdated numbers, Forbes reported Ergen's personal wealth at \$4.8 billion in October 1999. *See America's Richest People*, Forbes (Oct. 11, 1999) at 376. Since then, EchoStar's stock price has nearly doubled. *See Dreyfus Launches Focus Fund*, Denver Post (Jan. 16, 2000), at L9 (700% runup in past year); *compare Following Split, EchoStar continues heavenly climb*, CNET News.com (Oct. 26, 1999) ("1999 has been particularly good to [EchoStar] and its shareholders. In less than a year, EchoStar has boosted its subscriber base by 50 percent and its stock price by about 400 percent").

⁵ Fortune 500 Company Snapshot, <http://cgi.pathfinder.com/cgi-bin/fortune/fortune500/csnap.cgi?r96=10> (visited Jan. 21, 2000) (ranking AT&T 10th on list of 500 top companies).

⁶ Fortune 500 Company Snapshot, <http://cgi.pathfinder.com/cgi-bin/fortune/fortune500/csnap.cgi?r96=25> (visited Jan. 21, 2000) (ranking Bell Atlantic 25th on list of 500 top companies).

BellSouth (with annual sales of \$23 billion and \$39 billion in assets)⁷ are among the largest telecommunications companies in the world. In fact, in most cases, MVPDs have far *more* resources than the local stations with which they are bargaining for retransmission rights.

In short: even if the Commission had the power to impose substantive rules on the terms that broadcasters may seek to negotiate with these rich and powerful companies – which it emphatically does not -- it would be unfair and a waste of resources for the Commission to do so given the vast power and wealth of the MVPD industry.

III. As The Commission Has Found in its New Annual Competition Report, Satellite Carriers Are Doing Extraordinarily Well in Their Competition With Cable Without Any Interference by the FCC With Free Market Negotiations

Using the basic technique available to companies in a free marketplace -- seeking to offer an attractive product at an attractive price -- satellite carriers are doing extremely well in the marketplace against the cable industry, even without (until very recently) having any ability legally to offer local stations. Among the most notable findings of the Commission's new report on competition in the video marketplace, released just a few days ago, are the following:

- “DirecTV and EchoStar are among the ten largest providers of multichannel video programming service.” (¶ 15)
- “DirecTV and EchoStar offer up to 350 channels of video programming” (¶ 69)
- “DBS represented a 12.5% share of the national MVPD market in June 1999 and [C-band satellite dishes] represented another 2.2% of that market,” meaning that

⁷ Fortune 500 Company Snapshot, <http://cgi.pathfinder.com/cgi-bin/fortune/fortune500/csnap.cgi?r96=52> (visited Jan. 21, 2000) (ranking BellSouth 52nd on list of 500 top companies).

more than one out of seven MVPD subscribers receives programming by satellite.
(¶ 15)

- “DBS appears to attract former cable subscribers and consumers not previously subscribing to an MVPD. Between June 1998 and June 1999, the number of DBS subscribers grew from 7.2 million households to 10.1 million households.” (¶ 8)
- “Between June 1998 and June 1999, DirecTV added 1,524,000 subscribers and EchoStar added 1,234,000 subscribers. DirecTV is the nation’s leading satellite television service with more than 7.6 million customers as of June 1999, and a 72% share of the domestic DBS market. EchoStar had almost 2.6 million subscribers and 28% DBS market share as of June 1999.” (¶ 70)
- “DBS subscribers continue to report higher levels of customer satisfaction over cable. For example, SBCA cites a DBS study that found “consumers who select DTH service find it superior to any other video service ... and for DBS subscribers, 90 percent rated the overall quality of their satellite system as excellent or good.” (¶ 71)
- “J.D. Power and Associates rated EchoStar’s DISH Network number one in customer satisfaction in the pay television industry in their 1999 Cable/Satellite TV Customer Satisfaction Study.” (¶ 71)
- “Analysts estimate that DBS will have nearly 21 million subscribers by 2007.”⁸

These statistics reflect a simple reality: that even *before* satellite companies obtained the legal right to retransmit local stations under the Copyright Act, they were enjoying stunning success in their competition with cable for subscribers. The picture that the DBS companies attempt to paint – that they are hapless underdogs who are unable to compete with cable in the

⁸ Sixth Annual Report, Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 99-230 (released Jan. 14, 2000), <http://www.fcc.gov/Bureaus/Cable/News_Releases/2000/nrcb0003.html (Jan. 14, 2000).

marketplace and cannot afford to provide fair remuneration to local stations in return for gaining retransmission rights – is simply false, as the Commission’s competition report (and the companies’ own booming financial performance) makes clear.

Even more recent data show that the same trends are continuing – and accelerating. Year-end reports show that both EchoStar and DirecTV had banner years in 1999, resulting in a combined record high of more than 11.4 million subscribers.⁹ Over the last three months of 1999, Hughes stock was up 55%, based largely on strong expectations for continued success by DirecTV.¹⁰ And this remarkable success story is projected to continue. DirecTV, for example, projects staggering sales in excess of \$5 billion for the year 2000 alone.¹¹

Put another way: the satellite industry is flourishing, and there is simply no justification for the proposed heavy-handed Commission intrusion into ordinary marketplace negotiations between stations and MVPDs.

⁹ See, e.g., DirecTV Press Release (Jan. 6, 2000), http://biz.yahoo.com/bw/000106/nv_directv_1.html (visited January 20, 2000) (“DIRECTV now has more than 8 million customers” representing a 39 percent increase in subscribership from 1998); EchoStar Press Release (January 5, 1999), http://biz.yahoo.com/bw/000105/co_echost_1.html (visited January 20, 2000) (EchoStar’s total customer base at 3,410,000 for “an increase of 63 percent over 1998”).

¹⁰ *Hughes Electronics Steals GM's Thunder*, The Wall Street Journal Europe (Jan. 14, 2000), at UK20.

¹¹ *Hughes Sees DirecTV Sales At \$5 Billion In 2000*, Reuters, January 19, 2000, <<http://biz.yahoo.com/rf/000119/bcg.html>> (visited January 20, 2000).

IV. The MVPD Proposals Would Effectively Repeal The Right of Retransmission Consent under Section 325(b)

The proposals by MVPDs for *per se* rules about the retransmission consent process are piggishly overreaching. These proposals represent an attempt to convert what Congress clearly intended to be a purely procedural obligation to negotiate in “good faith” into a (devastating) *substantive* constraint on a broadcaster’s negotiating positions.

The demands by EchoStar, DirecTV, small cable systems, and overbuilders to have the Commission tie the hands of stations in the negotiation process are particularly outrageous. Their positions add up to this: stations are not allowed to ask for *anything* in the negotiation process. To mention just a few of the most astonishing demands:

- Although they reap vast revenues from retransmitting local TV signals, and although the Act expressly contemplates differing “price terms,” MVPD’s seek to bar stations from seeking *any* monetary compensation for allowing retransmission of these valuable signals.
- Despite touting retransmission-for-carriage agreements between cable companies and broadcasters as a desirable “norm,” the MVPDs demand that broadcasters be barred from seeking carriage of other broadcast or nonbroadcast stations in exchange for retransmission consent.
- The MVPDs insist that broadcasters are powerless to ask MVPDs to stop infringing the station’s copyrights as a condition of granting fresh rights under retransmission consent.

This is not a prescription for “good faith” negotiation: it is a recipe for forced broadcaster capitulation. If Congress had wanted to mandate forced retransmission consent, it could have done so. Instead, it chose to leave it to the marketplace and to free negotiation, with only a minimal, procedural obligation to negotiate in good faith.

The positions of the MVPDs are absurd on their face, and would wipe out the entire benefit of retransmission consent for stations. As discussed further below, the statute does *not* give the Commission a charter to impose any such rules, much less to impose a combination of rules that completely vitiates the entire retransmission consent regime.

V. The MVPDs Do Not Dispute that Retransmission Deals are Routinely Made Throughout the Country Through Normal Marketplace Negotiations

The lack of necessity for the Commission's intervention in the bargaining process is demonstrated by the experience of both cable systems and of DirecTV and EchoStar themselves in freely negotiating retransmission consent agreements. Without any regulation at all, other than the longstanding prohibition on exclusive retransmission consent agreements, the cable and broadcast industries have reached countless agreements authorizing retransmission after negotiations in which both sides participated in the give-and-take that is the essence of business bargaining. Similarly, neither EchoStar nor DirecTV deny – nor could they -- that they have reached retransmission consent agreements with several of the networks for retransmission of network owned-and-operated stations *without any assistance from the Commission in the bargaining process*. Contrary to what the MVPDs would have the Commission believe, those agreements are not all cookie cutter versions of each other. Instead, each is tailored through negotiation to the specific conditions of the relevant market. The MVPDs can provide no explanation for why the Commission should insert itself into these routine, everyday marketplace negotiations.

VI. The MVPDs Ignore the Fundamental Differences Between Section 251 of the Communications Act and Retransmission Consent

Several MVPDs assert -- without providing any rationale -- that the highly intrusive and interventionist procedures relating to negotiations between incumbent local exchange carriers (“ILEC’s”) and new entrants in the telecommunications industry should be adopted for purposes of the SHVIA. *E.g.*, EchoStar Comments at 10-11; DirecTV Comments at 6-12; ACA Comments at 16-17. Those procedures include, for example, both *per se* rules forbidding certain conduct and a complex and burdensome two-stage process for reviewing complaints.

The “shotgun wedding” relationship between ILECs and new entrants is entirely different from the relationship between broadcast stations and satellite carriers, and there is no justification at all for imposing the ILEC model on retransmission consent negotiations. *See* NAB Comments at 11-15. ILECs stand only to lose by cooperating with new entrants and providing access to their facilities because providing interconnection “*reduce[s] the [ILEC’s] subscribership and . . . weaken[s] the [ILEC’s] dominant position in the market.*” First Report & Order on Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 F.C.C.Rcd. 15499, ¶ 141 (emphasis added). Because of this lack of any mutual incentive to enter into agreements, Congress found it necessary to *force* ILECs to enter agreements with new entrants.

By contrast, Congress decided *not* to require broadcast stations to enter into retransmission consent agreements with satellite carriers. Congress made that sensible decision because there is obviously no need to coerce transactions when the transactions are happening without any governmental interference in the marketplace.

This difference is of fundamental importance. The ILEC regulations are the *only* ones cited by any party in which a mere duty to negotiate in good faith has been construed to permit a government body to impose specific terms on an unwilling party. And the only reason the Commission engaged in such heavy-handed regulation in that context is that ILECs *have no choice but to enter into deals that they find distasteful*: they are *required by statute* to do so. There is *no* such requirement here, and it would be completely inappropriate for the Commission to adopt the ILEC regulatory regime as a model in this completely different context.

VII. A Mere Obligation to Negotiate In Good Faith Does *Not* Restrict the Positions a Party May Take or Require the Party to Enter Into An Agreement

Even in the NLRB context, in which companies and unions are often in a much more adversarial posture than stations and MVPDs, the law is absolutely clear that a party may not be forced to accept any particular terms or to enter into a deal that it considers unacceptable. *See* NAB Comments at 8-10. The MVPD commenters ignore this clear and settled body of law, and their many proposals to bar certain substantive terms (or to require other substantive terms) fly in the face of these basic principles. For the Commission to expand the minimal obligation to negotiate in good faith into a substantive charter to dictate terms to either side of a free market negotiation would be unfair, unwise, and beyond its statutory mandate.

VIII. The MVPDs Would Have the Commission Adopt a Regime that Congress Expressly Rejected

Congress considered, and rejected, imposing “nondiscrimination” rules on TV stations in the retransmission consent process: the House bill passed on April 27, 1999 included just such a requirement, but *the final bill rejected that requirement and instead imposed only an obligation to negotiate in good faith*. It would be a clear violation of congressional intent for the

Commission to read the very different language actually passed by Congress – merely requiring “good faith” – to mean the same thing as the language Congress considered and rejected. Yet that is precisely what the MVPD commentators urge the Commission to do. *See, e.g.*, BellSouth Comments at 6-18; WCAI Comments at 11-15; US West Comments at 4-6.

Strikingly, before this proceeding, the satellite industry candidly admitted that the SHVIA does *not* impose any nondiscrimination requirement on broadcasters.¹² Instead, Congress clearly envisioned that broadcasters and the satellite industry would come to the bargaining table and would engage in an unfettered negotiation process that would include all the hallmarks of negotiation -- tough bargaining, positions taken out of a party’s own economic self-interest (and not out of charity), and attention to the particular circumstances of the party across the table and its economic position. *See, e.g.*, Communications Act § 325(b)(3)(C), 47 U.S.C. § 325 (b)(3)(C)(ii) (“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.”).

As Congress made clear when it created the right of retransmission consent in the first place, its intention was to “establish a marketplace for the disposition of the rights to retransmit

¹² *See* EchoStar Press Release, “Satellite TV Bill Fails to Protect Consumers” (“*The bill provides no language for broadcasters to deal fairly with satellite providers in negotiating the rights or fees to retransmit their signals.*”) (emphasis added); Satellite Broadcasting & Cable Association press release, “Draft Satellite TV Legislation Offers Consumers Little Relief, Fails To Provide Competition To Cable” (“*language that might prevent price and carriage discrimination by networks in negotiations with satellite carriers has been so weakened that local-into-local service via satellite is in jeopardy*”) (emphasis added). *See* <http://www.dishnetwork.com/profile/press/press/press258.htm> (Nov. 8, 1999) (EchoStar press release), <<http://www.sbca.org/press/Nov01-99.htm>> (Nov. 1, 1999) (SBCA press release).

broadcast signals,” *without* “dictat[ing] the outcome of the ensuing marketplace negotiations.” *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 2965, ¶ 178 (1993) (quoting Senate Report on 1992 Cable Act) (emphasis added). Nothing in the SHVA changes that fundamental policy decision. If an MVPD does not offer terms acceptable to a local station, Congress did *not* intend that broadcasters be forced to enter into agreements that they deem unfavorable. Indeed, even the much more aggressive regulatory regime passed by the House did not force any station to grant retransmission consent against its will. *See* 145 Cong. Rec. H2320 (daily ed. April 27, 1999) (“As long as a station does not refuse to deal with any particular distributor, a station’s insistence on different terms and conditions for retransmission agreements based on marketplace considerations is not intended to be prohibited by this bill”). Yet the multiple *per se* rules demanded by the MVPDs would do just that: they would, as a practical matter, dictate both the terms and the outcome of the “marketplace” negotiation.

IX. The *Per Se* Rules Proposed By MVPDs Have No Basis in Law or Fact

The MVPD commenters propose a raft of *per se* rules that would make it impossible for stations to obtain anything of value in exchange for their retransmission consent rights. Whether considered collectively (as discussed above) or individually (as discussed here), the Commission has no authority to create such an abusive and one-sided legal regime.

A. The Commission May Not Bar Stations From Seeking Monetary Payments

Incredibly, EchoStar asks the Commission to condemn as *per se* bad faith any attempt by a broadcaster to receive payment in exchange for the valuable rights to retransmit network programming. EchoStar Comments at 3. Yet, the SHVIA itself *expressly contemplates not only the existence of price terms for retransmission but also the likelihood that different MVPDs may be charged different prices for this valuable right based on marketplace conditions*. See Communications Act § 325(b)(3)(C), 47 U.S.C. § 325 (b)(3)(C)(ii) (authorizing broadcasters to pursue “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”) (emphasis added).

The logic and propriety for seeking compensation for retransmission rights is obvious. Satellite carriers benefit from local-into-local satellite transmission not only by using local stations to increase the attractiveness of their overall product, but also by selling the stations to viewers at substantial prices that often far exceed the prices they charge for other channels. See NAB Comments at 13-14. There is simply no basis in law or logic to deny broadcasters – who have invested substantial time and resources in developing, promoting, and transmitting their product -- the right to seek a share of the apparent windfall that MVPDs are enjoying through use of the station’s signal. Put another way, it is ludicrous to suggest that a statute that validates different “*price terms*” should be read to mandate that *every price must be zero*.

EchoStar cites its own selection of retransmission deals between TV stations and cable systems and then makes the ludicrous claim that these deals somehow represent a “norm” in which broadcasters have supposedly granted retransmission rights for “little or no cost” -- and

are required to do so in perpetuity. As an initial matter, EchoStar's attempt to shackle broadcasters to some supposed "norm" based on past negotiations must fail even if its factual premise were correct – which it is not. *First*, the "competitive marketplace" for sale of retransmission rights has changed greatly over the past few years, precisely because new types of MVPDs – principally satellite carriers – are now bidding, along with cable systems, for the right to retransmit local station signals in at least some markets. One obviously cannot take a supposed "norm" (even if there were such a norm, which there is not) from a monopsonistic environment and apply it to a marketplace in which several bidders are interested in acquiring retransmission rights. *Second*, each negotiation presents "competitive marketplace" considerations that are unique to the particular parties involved – including the size, pricing, carriage practices, infringement history, and other circumstances of the MVPD in question. Because there is no restriction whatsoever on a station negotiating different price and other terms based on such "competitive marketplace considerations," there cannot possibly be any single "norm" that is imposed like a straitjacket on stations bargaining with particular MVPDs.

Third, EchoStar is simply wrong in claiming that MVPDs have not paid money in connection with retransmission consent negotiations. In fact, many cable-broadcast retransmission agreements involved cash payments. While EchoStar acknowledges that cable companies often entered retransmission-for-carriage agreements (while insisting that *it* should not be asked to carry other channels), it conveniently overlooks the payments that the cable systems were required to make in exchange for carriage of those cable networks. Parent corporations that owned both local television stations and cable networks routinely required cable operators that wanted retransmission rights for the broadcast station to not only carry the cable networks as well, but also to pay for that carriage. Whether or not characterized as

payment for retransmission consent, the fact that dollars changed hands as part of an overall package is the crucial point, since the payment-for-carriage-of-nonbroadcast-channels deals might well not have occurred but for the inclusion of retransmission consent in the package.¹³

A prominent example is Lin Television, which negotiated deals in their markets to broadcast local weather channels. As described in an article in *Broadcasting & Cable*: “Lin’s retransmission consent deals give the company’s stations a cut of the ad revenue from weather channels plus a license fee for each of the 1 million subscribers.” *Retransmission Channels Prove Broadcaster Boon*, *Broadcasting & Cable*, March 27, 1995, at 18. Another example is Post-Newsweek’s retransmission deals that “varied according to the different markets where its stations are located” but resulted in a “bottom line . . . *that the group is earning over \$1 million more annually as a result of those deals.*” *Id.* (emphasis added). Even the TCI example cited by EchoStar involved the exchange of cash. Although EchoStar cites TCI as saying that they would not pay for retransmission (EchoStar Comments at 3), its deal with Fox in 1993 for carriage of a second channel clearly led to payments to local Fox affiliates: “Under the Fox Inc. plan, TCI is paying Fox 25 cents a month per subscriber for a second cable channel. Affiliates will receive 7 1/2 cents or 5 cents plus an equity share in the channel.” *Affiliates Question ABC Deal*, *Electronic Media*, July 19, 1993, at 1.

¹³ EchoStar’s claim that a Copyright Royalty Arbitration Panel found that retransmission rights are of no value is totally wrong. First, the CARP was not considering retransmission consent rights under the Copyright Act at all, but was solely considering copyright payments. Second, it is foolish to suggest that an arbitration panel’s views about what might happen in a hypothetical marketplace are somehow more relevant than what actual *participants* in the marketplace have done. And it is clear from the marketplace evidence – even EchoStar’s biased presentation of the evidence – that MVPDs are prepared to provide substantial consideration in return for a grant of retransmission consent.

Again, all of these examples are from the *first* round of retransmission consent agreements, at a time when cable was usually the only game in town. Given the higher level of competition in the marketplace for the acquisition of retransmission consent rights – principally because of the emergence of lucrative DBS companies as a powerful new form of MVPD – it is entirely appropriate for stations to insist on monetary payments in return for retransmission consent. That is, when an MVPD is using a station’s signal to enhance the MVPD’s own product offerings, and is reselling both the station’s signal (and its packages as a whole) at high prices, there is nothing remotely unusual – much less beyond the bounds of “good faith” – for the station to insist on receiving what it deems to be fair consideration for the use of its signal.

B. Deals Involving Carriage of Other Broadcast or Nonbroadcast Channels Cannot Be Prohibited

As evidenced by the cable-broadcast retransmission agreements, concessions by MVPDs regarding carriage of other stations are not evidence of bad faith, but rather are normal conditions that broadcasters may seek in the negotiation process. Nothing in the SHVIA prohibits a company from negotiating a joint retransmission agreement with respect to all the stations it owns (in a single market or otherwise), from requiring an MVPD to carry two commonly-owned stations in a single market, or from seeking carriage of a nonbroadcast channel as part of a deal. To bar stations from seeking this type of “in kind” compensation – which is commonplace in the “competitive marketplace” (as the MVPDs concede) and which some MVPDs may find to be more attractive economically than monetary payments – would go vastly beyond any possible authority the Commission may have to direct stations to negotiate in good faith

C. The Commission May Not Preclude Stations from Requesting (and Insisting On) Carriage of Their Own Digital Signals

It is particularly galling that several MVPDs ask the Commission to bar stations from requesting that MVPDs carry a station's digital signals as a condition of obtaining retransmission consent for the station's analog signals. Congress and the Commission have mandated that stations make a transition to digital broadcasting, and to make enormous expenditures to achieve that goal. Yet that mandate, and the huge costs that stations are incurring and will incur in making that transition, will be for naught if viewers are unable to view stations' digital signals. While the Commission has not yet ruled on a general must-carry mandate for digital signals, it would be absurd for the Commission to bar stations from using their own statutorily-granted right to retransmission consent as an incentive to encourage MVPDs to make the station's digital signals available to the maximum number of local viewers.

A number of MVPDs protest that they lack the capacity to carry stations' digital signals. This hackneyed excuse has a familiar ring: it is the same mantra cable systems have cited for decades against must-carry and program exclusivity rules such as syndicated exclusivity and network non-duplication. The Commission has consistently rejected this "lack of capacity" argument, whereupon cable systems have just as consistently found ways to expand their capacity and to continue to thrive. The Commission should give these tired arguments no more weight here, particularly in the context of *voluntary* marketplace negotiations, in which no MVPD is being required by the Government to carry any channel.

D. The Commission May Not Bar Stations from Insisting On Compliance with Their Intellectual Property Rights

A broadcaster must obviously be permitted to insist, as a condition for permission to retransmit the station's signal, that satellite carriers not infringe its copyrights by delivering distant network stations to ineligible subscribers in that market. That the MVPDs would contest this basic principle is evidence of *their* bad faith in breaking the law for so many years and, in the case of EchoStar, in attempting to extend its ongoing lawless behavior.

Indeed, the case law recognizes that a party, acting in good faith, could go much further, and decline to enter into deals with a party that had engaged in *lawful* business conduct that the party considered inconsistent with the party's own philosophy of doing business. *See Candid Productions*, 530 F. Supp. 1330, 1337 (S.D.N.Y. 1982) (determining which parties one will contract with is a fundamental part of freedom of contract). Even aside from that broader principle, however, it manifestly does not reflect "bad faith" for a station to insist that an MVPD stop infringing its copyrights before the station enters into a new license with the MVPD.¹⁴

E. The Commission Should Not Bar Either Side From Going to "the Court of Public Opinion"

Contrary to the suggestion made by some MVPDs, *see, e.g.*, EchoStar Comments at 13, there is no basis for the Commission to prevent broadcasters from voicing concerns in the media, or through their own editorials or otherwise, about the status of retransmission consent negotiations. The motivation behind the MVPDs' suggestion is obvious and completely cynical:

¹⁴ *Cf. EchoStar Communications Corp.*, CSR-5364-P, DA 99-1148, 1999 WL 381800 (F.C.C. June 10, 1999) (even program access rules, which impose significantly greater restrictions on program suppliers, are "[not] designed to force a programming vendor to continue to provide its programming to a distributor during the pendency of a non-frivolous breach of contract action on an underlying programming contract.")

to leave *themselves* free to incite public opinion on their side, while leaving stations helpless to defend themselves by presenting a different perspective. Free discourse is one of the cardinal tenets of this country, and the Commission is simply not empowered to silence the airing of competing viewpoints, much less force one side to sit silent while the other side saturates the media (including the Internet) with its own views.

Nor would it make sense for the Commission to muzzle both sides, even if it had the power to do so (which it does not). As the recent Fox/Cox battle illustrates, in those rare instances in which parties to retransmission consent negotiations reach an impasse, healthy public debate can lead to a prompt consensual resolution. Given the satellite industry's tactic of using inflammatory rhetoric with its subscribers during court proceedings and during the debate over passage of the SHVIA, it is extraordinarily hypocritical for them now to suggest that appeals to the public would evidence bad faith if used by broadcasters.

X. The Commission Should Not Accept Any Complaint Relating to an Agreement that Has Actually Been Reached Between a Station and an MVPD

In another example of gross overreaching, DirecTV demands that the Commission allow it to have its cake and eat it too. Specifically, DirecTV asks the Commission to allow it to enter into a retransmission agreement with a station -- *and then challenge that same agreement* as the product of a violation of the "good faith" negotiation requirement (all the while benefiting from the retransmission rights and the revenue derived from those rights). DirecTV Comments at 20. This suggestion would make a mockery of the bargaining process and would deprive contracting parties of the security necessary to provide an incentive to enter binding agreements.

The Commission should not disturb contracts that have been freely entered into by the parties, nor should it be in the business of *post hoc* delving into the minutiae of consummated agreements. MVPDs can accept or reject retransmission consent proposals, but once they have accepted, they should be bound by the terms to which they have agreed.

**XI. The Commission Lacks Power to Override Congress’
Express Determination that MVPDs May Not Carry Stations Unless
They Have Actually Obtained Retransmission Consent From the Station**

Several MVPDs, including the Wireless Communications Association International, claim that “the Commission should require a defendant broadcaster to extend any existing retransmission consent it already has with an MVPD complainant, such that the *status quo* as to carriage of the broadcaster’s signal is maintained until the MVPD’s complaint is denied . . .” WCAI Comments at 17; *see also* ACA Comments at 21; US West Comments at 8-9. Far from merely preserving the status quo, this breathtaking position would allow satellite carriers to secure retransmission privileges against a station’s wishes simply by filing a complaint, no matter how unmeritorious, against a station. Clearly, the Commission lacks the authority to rewrite the statute in this startling way.

Section 325(b) unequivocally says that MVPDs may not carry stations without their consent. And as to satellite carriers in particular, the SHVIA boldly underscores the point: on expiration of the 6-month grace period, satellite carriers must obtain consent prior to transmitting any programming or face stiff penalties including mandatory civil liability of \$25,000 per station per day. 47 U.S.C. § 325(b)(3). Congress provided only a few “exclusive defenses” to a station’s charge that a satellite carrier is carrying the station without the station’s consent – and the pendency of a “good faith” complaint is pointedly **not** on that list. Thus, Congress expressly

considered whether a satellite carrier could use a good faith complaint as a “back door” method to obtain retransmission consent, and absolutely rejected that notion.

Moreover, as to all types of MVPDs, it is well-established that even in the unlikely event that an MVPD were to *prevail* on a good faith claim, *the only remedy would be to order further bargaining, not to impose an “agreement” on the parties.* See NAB Comments at 31-32. It would turn the Act upside down to permit an MVPD to obtain, by merely *filing* a complaint, relief (namely coerced “consent”) that would not be available even if the MVPD were to prevail on the merits.

XII. THE COMMISSION SHOULD REJECT THE EXTRAORDINARY, ONE-SIDED PROCEDURES DEMANDED BY THE MVPDs

The MVPD commenters propose inflicting onerous procedures on broadcasters -- including expedited review, mandatory discovery, burden-shifting, and an automatic monetary remedy -- in proceedings under Section 325(b). However, the Commission lacks statutory authorization to impose any of these punitive procedures on broadcasters. Unlike in situations where Congress desired to create special procedural rules (such as in section 325(e) of the SHVIA), the “good faith” and exclusivity provisions under Section 325(b) are noticeably silent with regard to the procedures for purposes of adjudicating complaints. The default assumption, then, is that the Commission’s standard rules should be followed, not that unprecedented new procedures should be created. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (“[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.”).

If the Commission *were* to adopt any special procedures in connection with good faith complaints, they should presumably be *less* onerous than those it has adopted in connection with the much more rigorous substantive standards contained in the program access rules. Yet several MVPDs would turn this logic on its head and have the Commission impose *even more burdensome* provisions than those established under the Commission's specific program access rules. *See, e.g.*, DirecTV Comments at 17 (urging the Commission to adopt discovery procedures "that go beyond those employed in the adjudication of program access complaints"); EchoStar Comments at 23-24 (seeking discovery as of right and mandatory damages in a retransmission consent complaint proceeding). Yet they cannot justify application of the program access procedures to the SHVIA, much less the shockingly punitive and one-sided procedures they now demand. Specifically:

- Many MVPDs advocate for the creation of a system in which they can launch a complaint simply by alleging unlawful behavior, without any proof, and then shift the burden to the broadcast station to prove the negative -- *i.e.* that there was no "bad faith" in the negotiation or that the agreement does not violate the exclusivity rules.¹⁵ Yet no commenter can provide any persuasive reason for deviating from the standard practice in American jurisprudence that a complaining party must establish its own case. *See, e.g., North Cambria Fuel Co. v. NLRB*, 645 F.2d 177, 182 (3d Cir. 1981) ("It is settled that the burden of proving a violation of the National Labor Relations Act is on the General Counsel."); *NLRB v. St. Louis Cordage Mills*, 424 F.2d 976, 979 (8th Cir. 1970) ("The principle is firmly established that the burden is upon the General Counsel to prove the essential elements of the charged unfair labor practices" -- in that case an alleged failure to negotiate in good faith.). A great potential for abuse and harassment exists if MVPDs can enmesh broadcast stations in costly and burdensome adjudications merely by filing conclusory and unsubstantiated complaints.

¹⁵ *See* DirecTV Comments at 18-19; EchoStar Comments at 21-22; BellSouth Comments at 25; U.S. West Comments at 9.

- Several MVPDs claim that discovery should be mandatory -- but provide no reason why broadcasters should be forced to abide by such an intrusion where the standard Commission presumption is that discovery is unnecessary to resolve a complaint.¹⁶ Indeed even under the program access rules which specifically permit a complainant to seek discovery, discovery is practically never granted. DirecTV admits that the Commission staff has only rarely approved such discretionary requests for discovery, and that it was able to identify only two cases in which discovery was deemed necessary by the Commission. *See* DirecTV Comments at 17.
- In another example of overreaching, EchoStar claims that monetary penalties should be assessed against broadcasters for violations of Section 325(b). EchoStar at 23-24. As explained in the NAB's opening comments, under settled principles, the remedy for an alleged failure to bargain in good faith is simply a directive to engage in further bargaining.

The burden-shifting, unprecedented discovery rights, and damages remedy advocated by the MVPDs are all parts of a transparent ploy: to allow MVPDs to extort retransmission consent from broadcasters who fear being bogged down in a burdensome complaint process. Under the suggested procedure, an MVPD could trigger the onerous burden-shifting and discovery provisions simply by filing an unsubstantiated affidavit alleging a violation of the "good faith" or exclusivity requirements. This would then open the door for the MVPD to demand mandatory access to sensitive and confidential documents and information regarding the broadcaster's business. The Commission should not create the potential for such mischief. Instead of the cumbersome, unwarranted, and unauthorized procedures advocated by the MVPDs, the Commission should follow its standard procedures for the processing of complaints.

¹⁶ *See* DirecTV Comments at 17-18; EchoStar Comments at 23; Wireless Communications International Comments at 16; BellSouth Comments at 25; U.S. West Comments at 9.

Conclusion

The Commission should reject the MVPD proposals to destroy the right of retransmission consent through implementation of the modest “good faith” language adopted by Congress, and instead the simple set of objective procedural rules described in NAB’s Comments.

Respectfully submitted,

Henry L. Baumann

NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5300

Henry L. Baumann
Benjamin F.P. Ivins

Counsel

Mark R. Fratrick, Ph. D.
NAB Research and Planning