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January 21, 2000

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

**Re: Reply Comments of The Walt Disney Company
in CS Docket No. 99-363**

Dear Ms. Salas:

Enclosed for filing please find the original and nine (9) copies of the Reply Comments of The Walt Disney Company in the above-referenced docket.

Please stamp and return to this office with the courier the enclosed extra copy of this filing designated for that purpose. Please direct any questions that you may have to the undersigned.

Respectfully submitted,

Lawrence R. Sidman

Lawrence R. Sidman

Enclosures

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

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OFFICE OF THE SECRETARY

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

REPLY COMMENTS OF
THE WALT DISNEY COMPANY

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January 21, 2000

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EXECUTIVE SUMMARY

The Comments filed by DBS providers and other multichannel video programming distributors (“MVPDs”) are most remarkable for their level of overreaching. In essence, they urge the Commission to develop a regulatory regime based on a statutory scheme that Congress did not enact. Their Comments start from the mistaken premise that in SHVIA Congress enacted a replica of the program access rules that includes a nondiscrimination standard. From there, they reason that the Commission should adopt substantive *per se* rules relating to the terms of proposed transactions.¹ In sum, they want the Commission to dictate the prices, terms and conditions contained in retransmission consent agreements.

The principal problem with this fundamental position advocated by the MVPDs is that it bears no relationship to the legislation that Congress, in fact, enacted in SHVIA. Congress explicitly rejected the nondiscrimination standard incorporated in the program access rules and instead embraced the general, well-understood concept of good faith negotiations. Moreover, Congress explicitly permitted different prices, terms and conditions in retransmission consent agreements.

Tested against the text of SHVIA and its legislative history, rather than what DBS providers and other MVPDs wished Congress had done, their proposed wish list of substantive *per se* rules is a non-sequitur. The statutory scheme adopted by the Congress does not permit the Commission to promulgate a set of *per se* rules setting the substantive parameters for retransmission consent agreements. Congress only conferred upon the Commission the authority to ensure that the process of negotiation was fair and open, i.e., in good faith. The absurdity of the MVPDs’ contrary contention is evident from the lists of *per se* rules for which each contends. For example, EchoStar maintains that program carriage agreements are the norm while BellSouth would have the Commission deem them *per se* violations of the good faith obligation. At their core, the various lists of substantive *per se* rules reflect each commenting MVPD’s attempt to engraft its individual business plan into the retransmission consent regulations. The Commission should decline such an inappropriate, anticompetitive invitation.

The same flaws infect the MVPDs’ Comments regarding the procedures for resolving retransmission consent disputes. They again propose intrusive rules premised on a statutory scheme Congress did not enact in SHVIA. They urge the Commission to: create an expedited complaint process; provide a shifting burden of proof; provide a right to discovery; and impose damages for violations of the duty to negotiate in good faith. Regardless of whether such procedural rules might have been suitable for the nondiscrimination standard that Congress rejected, they are absolutely inappropriate to the good faith provision Congress actually adopted that confines the Commission’s actions to ensuring that the negotiating process for retransmission consent agreements is fundamentally fair and open. In determining good faith, a shifting burden of proof has no place because, unlike program access, there is not a series of justifications akin to affirmative defenses. Here, the complaining MVPD has the burden of proving lack of good faith. Such an inquiry does not involve the substance of the negotiations,

¹ See Comments of DIRECTV at 6-10; Comments of BellSouth at 6-18; and Comments of EchoStar at 11-13.

but only the process. Discovery certainly is not necessary to elucidate the relatively simple and straight-forward set of facts relevant to this inquiry. Indeed, even in the program access context, the Commission recognized that authorizing discovery is only an invitation to delay. In the end, the procedures the Commission adopts should be tailored to the limited task before it. The MVPDs' proposals should be rejected because the Commission must not promulgate "procedural" rules that have the effect of end-running Congress' clear intention that the Commission not involve itself in the substance of these business agreements.

This proceeding must not turn into a second bite at the SHVIA apple for MVPDs. The Commission has no power to reverse Congress' rejection of the nondiscrimination standard: its role is to implement what Congress decreed, not what commenting parties wanted Congress to decree. This proceeding is limited to promulgating rules that implement Congress' clear directive that retransmission consent agreements be negotiated in good faith – nothing more.

**Before the
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Washington, D.C. 20554**

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**REPLY COMMENTS OF
THE WALT DISNEY COMPANY**

The Walt Disney Company (“TWDC”) submits these Reply Comments in response to the Commission's December 22, 1999 Notice of Proposed Rulemaking (“the *NPRM*”) soliciting views on its implementation of certain aspects of the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”).

Before turning to specific arguments that have been made, TWDC notes that there is one overarching – and ultimately fatal – quality to the comments of the multichannel video programming distributors (“MVPD”). Rarely have advocates sought to import so much regulatory consequence into so benign a legislative directive. They find in Congress’ deliberately chosen phrase “good faith” a delegation for the Commission to create a new regulatory scheme that would intrude into the bargaining and dictate, in unprecedented ways, the substantive terms of arms-length transactions. These commenters, in effect, make arguments for a different legislative scheme, not arguments that are rooted in the statute that defines the scope of the Commission’s authority in this area. For this reason, their claims and proposals must be rejected.

I. IN IMPLEMENTING THE ACT, THE COMMISSION MUST ADHERE TO CONGRESS' DELIBERATE ADOPTION OF A STANDARD OF GOOD FAITH NEGOTIATION THAT HAS A WELL DEFINED MEANING.

Commenting MVPDs find in the use of the term “good faith” a Congressional directive to develop a wholly new regulatory regime that would intrude into the bargaining process by effectively prohibiting the proposal of certain substantive terms.² Their argument does not – because it cannot – rest on any previously established meaning of the term “good faith.” The bodies of law that have given meaning to this term all make quite clear that the concept is related to the process of making a deal, not the terms of the deal itself. To sustain their position, MVPDs would have to be able to establish a Congressional directive for the Commission to ignore this authority and establish on its own a wholly unprecedented concept of “good faith” negotiations that would encompass the specific, substantive terms and conditions of the deals themselves. But Congress did no such thing.

SHVIA provides, in pertinent part, that the Commission promulgate rules that shall

... until January 1, 2006, prohibit a television broadcast station that provides retransmission consent from failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.³

The Joint Explanatory Statement issued by the Conferees basically repeats the statutory formulation.⁴

² See Comments of DIRECTV at 6-10; Comments of BellSouth at 6-18; and Comments of EchoStar at 11-13.

³ See Communications Act § 325(b)(3)(C), 47 U.S.C. § 325(b)(3)(C)(ii).

⁴ “The regulations would, until January 1, 2006, prohibit a television broadcast station from ... refusing to negotiate in good faith regarding retransmission consent agreements. A television station may generally offer different retransmission consent terms or conditions, including price terms, to different distributors. The [Commission] may determine that such

In adopting a standard with a well understood meaning,⁵ Congress must be presumed to have intended that meaning. This is particularly so where, as here, there is nothing in the statute or the legislative history to suggest that Congress intended to authorize the Commission to invent its own definition of good faith, let alone one that would include authority over the substance of agreements. Implementation of the statute requires the Commission, therefore, to apply the recurring core principles that emerge from multiple areas of law to illuminate the meaning of good faith, not create new ones. In their Comments, TWDC and others delineated a number of these criteria.⁶ But none of these criteria involve injecting the government into the substance of the negotiations of the agreements themselves. In the labor law context, “it was recognized from the beginning that agreement might be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own

different terms represent a failure to negotiate in good faith only if they are not based on competitive marketplace considerations.” Joint Explanatory Statement at 13.

⁵ Good faith has a well understood and consistent meaning in common law, labor, UCC and bankruptcy contexts. *See* Comments of TWDC at 4-6 (discussing common law, labor law, UCC and bankruptcy law); Comments of National Association of Broadcasters at 8-10 (discussing labor law); Comments of Local TV on Satellite, LLC at 4-5 (discussing the commercially accepted definition of good faith in the UCC); and Comments of CBS Corporation at 10-14 (discussing labor law).

⁶ *See* Comments of TWDC at 6-8 (defining bypassing completely the negotiating process; refusing to confer at reasonable time; refusing to execute a written contract once an agreement has been met; and refusing to vest a representative with the authorization to enter into an agreement as per se violations of the duty to negotiate in good faith); *see also* Comments of the National Association of Broadcasters at 21 (offering the same basic process-oriented rules as TWDC: negotiator must have authority; party must offer to meet at reasonable times and convenient places and; party must be willing to execute a written contract once all terms have been agreed upon); Joint Comments of the ABC, CBS, Fox, and NBC Television Networks Affiliate Associations at 15-16 (stating that a failure to negotiate in good faith is simply a failure to meet at reasonable times and places and confer on the terms of an agreement); Comments of NBC at 8 (stating that “the obligation to negotiate in good faith requires that the parties meet and discuss potential terms and conditions of an agreement”); and Comments of CBS Corporation at 13 (suggesting that the Commission’s oversight be limited to instances where a persuasive showing is made that an “offer is so commercially indefensible as to amount to a refusal to deal”)

views of a desirable settlement.”⁷ As a result, the government should not and does not involve itself in “regulat[ing] the substantive terms governing wages, hours, and working conditions which are incorporated in an agreement.”⁸

There is no doubt that Congress wanted the Commission to follow this well-worn path and to resist the temptation of refereeing the substance of the deals. Indeed, Congress explicitly rejected a strict nondiscrimination standard and accompanying substantive *per se* rules for retransmission consent negotiations during the negotiations surrounding the passage of SHVIA. Although the House Bill contained a nondiscrimination provision, the Conferees quite deliberately went the opposite route – they adopted a good faith negotiation standard that has historically been related to the process of the bargaining, and they explicitly sanctioned the offering of different prices, terms and conditions based upon the existing marketplace conditions. The arguments in support of the creation of *per se* substantive rules governing the terms that might be sought in bargaining cannot be squared with this legislative history. Indeed, in instances when Congress has wanted the Commission to insert itself in oversight of substantive terms – such as the program access regime – it has said so expressly. And even in those instances the Commission has not promulgated as extensive a laundry list of *per se* violations as that urged by some commenters in this proceeding.⁹ There is no comparable Congressional directive for the FCC to engage in any level of substantive micromanagement here. To the

⁷ *H. K. Porter v. NLRB*, 397 U.S. 99, 103-104 (1970).

⁸ *NLRB v. American Nat’l Ins. Co.*, 343 U.S. 395 (1970).

⁹ See Comments of EchoStar at 11, n.28 and surrounding text (urging the adoption of 9 *per se* rules in addition to the numerous *per se* rules in the Section 251 context); and Comments of DIRECTV at 6-10 (urging the adoption of 12 *per se* rules).

contrary, Congress' clear intent is to limit the Commission's involvement to ensuring only that the *process* for reaching retransmission consent agreements is fair and open.

To cite just a few of the unsupportable calls for micromanagement of substantive terms: first, EchoStar urges the Commission to promulgate rules in which "insisting on unreasonably short agreement terms" would be deemed a *per se* violation of the duty to negotiate in good faith.¹⁰ But this very suggestion proves the folly of the micromanagement approach. There simply cannot be a *per se* approach to contract lengths. The agreed upon length of a contract is almost always a function of compromises that have been reached over other terms. In effect, therefore, the EchoStar notion would put the Commission in the impossible position of determining what would constitute "an unreasonably short agreement term" given all the trade-offs inherently involved in other proposals that had been put on the table in a particular negotiation.

Another of EchoStar's proposals exposes similar flaws. EchoStar argues that a breach of the good faith negotiating requirement should be presumed whenever a broadcaster attempts to propose an exchange of consideration that is different from that contained in a preexisting retransmission consent agreement. In essence, EchoStar would have the Commission freeze the marketplace to prevent any exchanges of value other than one offered in the past – something the express language of the Act, which allows for differential terms, would not permit.¹¹ EchoStar bases its argument on the obligation of incumbent local exchange carriers of telephone service to offer the same terms and conditions in interconnection agreements to competitive local exchange carriers.¹² But the legislative scheme that created that obligation is radically different from the

¹⁰ See Comments of EchoStar at 13.

¹¹ *Id.* at 17. EchoStar also argues that the same presumption be applied to broadcaster requests for cash in exchange for retransmission.

¹² See 47 U.S.C. § 251.

one at issue here. With respect to retransmission consent agreements, Congress specifically blessed the offering of different terms and conditions in Section 325(b).

In short, a number of the commenting MVPDs are urging the Commission to turn SHVIA on its head. The Commission must decline such an inappropriate invitation. The fact is that the statute employs a good faith standard and explicitly sanctions agreements with varying prices, terms and conditions. Marketplace forces have been the cornerstones of retransmission consent agreements since 1993. Congress did not direct any departure from that fundamental tenet in SHVIA; rather, Congress reaffirmed it. Consistent with that legislative judgment, the implementing rules should maintain the Commission's historic distance from the substance of retransmission consent agreements. Congress directed the Commission to ensure that the negotiating process is a fundamentally fair one – one in which both parties come to the table with a sincere intent to reach an agreement. By crafting implementing rules that define good faith to ensure a fair and open process within which retransmission consent agreements are negotiated, the Commission will carry out the clear intent of Congress.

An equally unsupportable *per se* substantive proposal is that the Commission should preclude broadcasters from seeking carriage of programming services as compensation for retransmission consent.¹³ In effect, these commenters ask the Commission to define in advance the nature of the consideration that broadcasters may seek. But this suggestion runs contrary to established and accepted practice and has no basis in underlying legislation.

The notion that seeking carriage of programming services would somehow constitute “bad faith” bargaining simply cannot be squared with marketplace realities. Seeking such carriage in exchange for retransmission consent would hardly be a new practice. To the

¹³ See Comments of The American Cable Association at 10; Comments of BellSouth at 13; and Comments of U S WEST at 5-6.

contrary, it is well established. Even EchoStar has characterized the practice as an “unmistakable norm.”¹⁴ During the initial phase of retransmission consent negotiations following the 1992 Cable Act, broadcasters typically sought cash-for-carriage agreements. When MVPDs uniformly refused to consider such deals, broadcasters were forced to explore options that would allow for a fair exchange of value for their signals.¹⁵ As a result, broadcasters often were able to reach agreements with MVPDs for the carriage of a package of programming.¹⁶ And, as EchoStar notes, “[e]ver since the formative years of retransmission negotiations, the retransmission for carriage formula has withstood the test of time.”¹⁷

Nor is there any legal basis to question the *bona fides* of a request for cable programming carriage in exchange for retransmission consent. To the contrary, the 1992 Cable Act specifically contemplated and endorsed this exchange of value. As the Senate Commerce Committee’s Report states:

many broadcasters may determine that the benefits of carriage are themselves sufficient compensation for the use of their signal by a cable system. Other broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system. It is the Committee’s intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is

¹⁴ See Comments of EchoStar at 2-9 and 17 (extensively detailing the market-based development of retransmission consent from 1992 to present).

¹⁵ See Joe Flint, *For Broadcasters It’s Retrans Free; Broadcast Stations Have Weak Bargaining Position In Retransmission Consent Negotiations With Cable Systems*, BRDCST. & CABLE, Aug. 23, 1993, at 10 (“Broadcasters’ long-held dream of a second revenue stream of retransmission fees appears to be just that – a dream.”).

¹⁶ *Id.*; see also *Applications of Capital Cities/ABC, Inc., Memorandum Opinion and Order*, 11 FCC Rcd 5841, ¶ 26 (1996) (Agreements for the carriage of additional packaged channels “was common during the initial implementation phase of the retransmission consent process and, it is worth noting, appear[s] to have been widely utilized by the cable television industry instead of cash payments.”)

¹⁷ Comments of EchoStar at 6.

not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations.¹⁸ (emphasis added)

And indeed, the Commission has subsequently endorsed such agreements as well within broadcasters' retransmission consent "rights" under the 1992 Cable Act.¹⁹

Having specifically authorized the practice in the first instance, in enacting SHVIA Congress was certainly cognizant that programming carriage was regularly sought by, and granted to, broadcasters as part of their retransmission consent agreements in the existing competitive marketplace. Had Congress wished to prohibit the practice, it certainly knew how to do so. For example, the tier buy-through prohibition of the 1992 Cable Act prohibits cable operators from requiring subscribers to purchase a particular service tier, other than the basic service tier, in order to obtain access to video programming offered on a per-channel or per-program basis.²⁰ Congress clearly could have prohibited broadcasters from seeking carriage of cable programming or other broadcast services in SHVIA; it chose not to do so. There is absolutely no statutory warrant for the Commission to reach a different conclusion in its implementing rules.

Notwithstanding the marketplace acceptance of such agreements in the past and prior Congressional endorsements of them, some MVPD commenters invoke the antitrust concept of

¹⁸ S. Rep. No. 102-92, 102nd Cong., at 35-36 (1991).

¹⁹ *Applications of Capital Cities/ABC, Inc., Memorandum Opinion and Order*, 11 FCC Rcd at ¶ 27. The Commission sanctioned broadcasters' right to package cable programming services after finding no "basis for limiting the ability of [Capital Cities/ABC]'s owned stations to exercise their retransmission consent rights under the 1992 Cable Act."

²⁰ 47 U.S.C. § 543(b)(8); see also, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Buy-through Prohibition, Report and Order*, 8 FCC Rcd 2274 (1993).

“tying”²¹ and darkly suggest that any proposal that could be characterized as a tie should be considered bad faith bargaining and hence *per se* improper. But not a single commenter offers a sustainable legal basis for presuming on a blanket basis that a request for additional programming carriage as consideration for retransmission consent would be illegal under current law or anticompetitive.²²

Finally, the extent of overreaching in the MVPDs’ Comments is most graphically illustrated by EchoStar’s contention that there is little or no value to a local broadcast signal.²³ It premises its argument on a recent Copyright Arbitration Royalty Panel (“CARP”) rate adjustment proceeding that determined the cost of providing signals to unserved households.²⁴ In that proceeding, the CARP refused to consider the issue of local retransmission of network signals to served households, but only because such retransmission was not permitted by law at that time and hence there was no need to set a royalty rate for that market. The CARP most certainly did not conclude that local stations have no value. Indeed, EchoStar’s assertion is silly.

²¹ A tying agreement may be a *per se* violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act only if the complainant proves a series of fact-intensive elements. Many courts also require a complainant to demonstrate an anticompetitive effect in the tied-product market, and establish damages. JULIAN O. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION, § 22.02 (2d ed. 1999).

²² *Id.* § 22.01[2]. The Supreme Court has stated that “tying may make the provision of packages of goods and services more efficient” and that “a tie-in should be condemned only when its anticompetitive impact outweighs its contribution to efficiency.” *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 42 (1984). Robert Bork has written that “[t]he law’s theory of tying arrangements is merely another example of the discredited transfer-of-power theory, and perhaps no other variety of that theory has been so thoroughly and repeatedly demolished in legal and economic literature.” ROBERT H. BORK, THE ANTITRUST PARADOX 372 (1978).

²³ See Comments of EchoStar at 15.

²⁴ *In the Matter of Rate Adjustment for the Satellite Carrier Compulsory License*, Final Rule and Order, 62 FR 55742, 55752 (1997).

If a local station had no value, why did the DBS industry work tirelessly to urge Congress to enact SHVIA, providing them with the right to carry local broadcast signals?

II. MVPDs ARE URGING THE COMMISSION TO ENGRAFT A PROGRAM ACCESS-LIKE COMPLAINT PROCESS ONTO RETRANSMISSION CONSENT DISPUTE RESOLUTION WITHOUT ANY STATUTORY BASIS FOR DOING SO.

Many commenters are beseeching the Commission to replicate, and in many ways augment, the detailed program access complaint resolution process in the retransmission consent context.²⁵ Specifically, they urge the Commission: to create a new expedited process by which allegations of a violation of the duty to negotiate in good faith are to be resolved; to provide a shifting burden of proof; to provide a right to discovery; and to impose damages. Regardless of whether such detailed “program access plus” procedures might have been useful if Congress had directed the Commission to fashion such a new regulatory regime, the procedures proffered by these MVPDs are completely inappropriate here because Congress did not give the Commission authority to wade into the substance of retransmission consent agreements. In essence, these commenters urge adoption of complaint procedures based on what they wanted Congress to do – impose program access-like rules onto retransmission consent negotiations – and not what Congress actually did in enacting SHVIA – impose a broad good faith duty to ensure that the process by which retransmission consent agreements are negotiated is fundamentally fair and open.

Commenting MVPDs are urging the Commission to overlay the expedited program access complaint process onto the process by which the Commission will review allegations of a violation of the duty to negotiate retransmission consent agreements in good faith. There is no basis in SHVIA for the Commission to do this. In the 1992 Cable Act, Congress specifically

²⁵ See Comments of Wireless Communications Association International, Inc. at 16; Comments of Local TV on Satellite, LLC at 12; and Comments of EchoStar at 21.

directed the Commission to promulgate program access regulations that “provide for an expedited review of any complaints made pursuant to this section...”²⁶ Clearly, the program access complaint process reflects a much more intrusive level of government involvement than what is called for in the retransmission consent context. In stark contrast to the expedited process explicitly called for in the program access provisions of the Communications Act of 1934, as amended, Congress in no way called for an expedited review process for retransmission consent complaints in SHVIA.

There is simply no need – or call – for the creation of the elaborate complaint procedures urged by MVPD commenters. The sole issue that would properly be brought before the Commission is review of the fairness of the bargaining process, which lends itself to a swift resolution of a retransmission consent complaint, without the need to create an expedited review procedure. Indeed, had Congress intended for the Commission to delve beyond the mere process of arriving at these agreements into their actual substance, it would have directed the Commission to create an expedited review process, just as it did in the program access context. However, Congress declined this approach in SHVIA. In the absence of a directive from Congress, the Commission should continue to use normal Commission processes in resolving retransmission consent complaints. The Commission expects purely contractual retransmission consent disputes to be resolved in the courts, but broadcast stations and, in certain circumstances, television networks, may file complaints with the Commission regarding alleged violations of Section 325(b).²⁷ Given the limited scope of the issue involved, there is no reason why any such

²⁶ 47 U.S.C. § 628(f)(1).

²⁷ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, *Report and Order* in MM Docket No. 92-259 (1993).

complaint could not be handled efficiently and expeditiously under the Commission's standard procedures.

In the *NPRM*, the Commission raises the possibility of borrowing the concept of a shifting burden of proof from the program access regime,²⁸ which the commenting MVPDs support. TWDC believes that it would be inappropriate to borrow that concept here. Use of a shifting burden of proof in the program access complaint process made sense in that context because the statute at issue there delineates a series of justifications – comparable to affirmative defenses²⁹ – which permit otherwise prohibited differences in prices, terms, or conditions in satellite delivered cable programming agreements.³⁰ However, the program access regime's shifting burden of proof is unsuitable for allegations of a violation of the basic duty to negotiate in good faith in SHVIA. Proof of a violation of the good faith obligation involves only one basic mixed question of law and fact: did the party's conduct amount to a lack of good faith? There is absolutely no warrant to shift the burden of proof during the pendency of the proceeding, given that limited scope of inquiry. Hence, the Commission should adopt a traditional apportioning of the burdens of proof which requires a complaining party (whether an MVPD or a broadcaster) to: (1) plead a violation of good faith; (2) produce evidence of that violation; and (3) persuade the Commission that a violation has occurred.³¹ These three burdens should remain squarely with the complaining party at all times. A shifting burden of proof would only allow a complaining party to circumvent impermissibly the burden of proof it should be required to sustain.

²⁸ *NPRM* ¶ 27.

²⁹ The affirmative defense is a tool of procedure, where a defendant asserting an affirmative defense typically assumes certain burdens and must prove specific elements of the defense. *See MCCORMICK ON EVIDENCE* § 346 (John W. Strong ed., 4th ed. 1992).

³⁰ 47 U.S.C § 548(c)(2)(B)(i)-(iv).

³¹ *See MCCORMICK ON EVIDENCE* § 337.

Commenting MPVDs urge the Commission to create a retransmission consent agreement complaint process that provides parties with a right to discovery. As an initial matter, such a right is completely inconsistent with the swift resolution of retransmission consent disputes advocated by myriad commenters. In denying either a right to discovery or expanded discovery in the program access context, the Commission noted that such a right “would be more likely to encumber and prolong resolution times for proceedings.”³²

Moreover, SHVIA does not call for any collection of data, let alone contemplate a right to discovery. By contrast, the program access provisions of the 1992 Cable Act direct the Commission to promulgate rules that shall “establish procedures for the Commission to collect such data, including the right to obtain copies of all contracts and documents reflecting arrangements and understandings alleged to violate this section, as the Commission requires to carry out this section....”³³ Notwithstanding that provision of Section 628, the Commission ruled that even this specific statutory directive did not mean that the Commission should provide complainants with an automatic right to discovery.³⁴ If there is no automatic right to discovery in the program access regime – *a fortiori* there should be no discovery in the context of retransmission consent dispute proceedings.

Based upon the less intrusive statutory scheme in SHVIA, the Commission should not weave a right of discovery into the retransmission consent rules. An unbridled right to discovery likely would trigger a fishing expedition fraught with potential for abuse. Illustratively,

³² *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, ¶ 54, *Report and Order* in MM Docket No. 92-259 (1993).

³³ 47 U.S.C. § 548(f)(2).

³⁴ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order* in CS Docket 97-248, 13 FCC Rcd 15822 (1998).

complaining MVPDs would seek to obtain access to other retransmission consent contracts during discovery, notwithstanding the fact that the provisions in those contracts are not relevant to an allegation of breach of the duty to negotiate in good faith because SHVIA explicitly permits different prices, terms and conditions.

Finally, the Commission should not craft rules that enable it to award damages for violations of a duty to negotiate in good faith. The Commission has no authority to award damages in the context of retransmission consent negotiations. Congress is capable of articulating its intent to give this authority to the Commission, and has done so in other instances. The program access provisions of the Cable Act of 1992 provide the Commission with the authority to order appropriate remedies, which the Commission has interpreted to include damages.³⁵ By contrast, SHVIA does not provide the Commission with any authority to fashion specific remedies, including the award of damages. The Commission's mission is to ensure that parties negotiate in good faith – its recourse is limited to bringing parties back to the negotiating table.

III. THE COMMISSION SHOULD NOT PROMULGATE RULES THAT FLY IN THE FACE OF THE EXPLICIT STATUTORY DIRECTIVE TO SUNSET THE PROHIBITION ON EXCLUSIVE RETRANSMISSION CONSENT AGREEMENTS BY JANUARY 1, 2006.

Some commenters urge the Commission to read ambiguity into the statute's explicit order to sunset the Commission's rules prohibiting exclusive retransmission consent agreements.³⁶ TWDC, however, urges the Commission to craft rules consistent with its conclusion contained in the *NPRM*, namely that "on its face, this provision would seem to sunset any prohibition on

³⁵ 47 U.S.C. § 548(e); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order* in CS Docket 97-248, 13 FCC Rcd 15822 (1998).

³⁶ See Comments of DIRECTV at 15; Comments of Wireless Communications Association International, Inc. at 5-11; and Comments of Local TV on Satellite, LLC at 6-9.

exclusive retransmission consent contracts for all multichannel video programming distributors.”³⁷

SHVIA directs the Commission to commence a rulemaking proceeding that shall: “until January 1, 2006, prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts...”³⁸ The goal in analyzing the meaning of any statute is to “give effect to the will of Congress.”³⁹ That mandate has been interpreted to mean that where a statute is clear on its face, its words are given literal effect.⁴⁰ Moreover, it is a cardinal principle of construction that when a statute is unambiguous, there is no need to look at the legislative history.⁴¹ As the Commission tentatively concluded, SHVIA is clear on its face. A plain reading of the statute requires that the Commission’s rules prohibiting exclusive retransmission consent agreements sunset on January 1, 2006. This is a logical reading and gives meaning to every word in the statute. The contrary interpretation advanced by some MVPDs is not tenable because it would render the statute’s inclusion of the sunset date superfluous.⁴² Therefore, the Commission should promulgate rules that sunset the prohibition on exclusive retransmission consent agreements on January 1, 2006.

³⁷ *NPRM* ¶ 24.

³⁸ S. 1948, Intellectual Property and Communications Omnibus Reform Act of 1999, Section 1009(a)(2)(C)(ii).

³⁹ *Griffin v. Oceanic Contractors, Inc.* 458 U.S. 564, 570 (1982); *U.S. v. Nichols*, 184 F.3d 1169 (1999).

⁴⁰ *See Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1460 (10th Cir. 1997).

⁴¹ *See Ex Parte Collett*, 337 U.S. 55, 61 (1949).

⁴² Statutory words are presumed to be used in their ordinary sense. The legislature is presumed to have used no superfluous words, and every word in a statute must be accorded a meaning. *Handy & Harman v. Burnet*, 284 U.S. 136 (1931).

IV. CONCLUSION.

For the foregoing reasons, the Commission should implement SHVIA as intended by Congress by promulgating rules that provide for a general, mutual duty to negotiate retransmission consent agreements between broadcasters and satellite carriers in good faith.

Respectfully submitted,

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