

so specifically. For example, with respect to the program access rules, Congress specifically stated that the Commission should “provide for an expedited review of any complaints made pursuant to this section.”⁹⁹ Comparable language is noticeably absent from Section 325(b)(3)(C).

In addition, in Section 325(e), Congress specifically provided for expedited enforcement proceedings against satellite carriers for unauthorized retransmission of broadcast signals.¹⁰⁰ Under longstanding rules of statutory interpretation, it is presumed that Congress acts deliberately and that, where Congress includes a particular provision in one section of a statute, but omits it in another, Congress acted “intentionally and purposely in the disparate inclusion or exclusion.”¹⁰¹ Thus, the presence of expedited procedures with regard to unauthorized retransmissions and the absence of similar provisions with regard to “good faith” negotiation and “exclusivity” complaints clearly means that Congress intended that the latter should not be subject to expedited procedures.¹⁰²

B. Congress Did Not Provide A Burden-Shifting Mechanism

Several MVPDs urge the Commission to adopt a “burden-shifting” rule whereby once an MVPD “alleges” that a broadcast station has violated the good faith or exclusivity rules, the

⁹⁹ 47 U.S.C. § 548(f)(1).

¹⁰⁰ *See* 47 U.S.C. § 325(e).

¹⁰¹ *Russello v. United States*, 464 U.S. 16, 23 (1983).

¹⁰² *See, e.g., Bates v. United States*, 522 U.S. 23, 118 S. Ct. 285, 290 (1997).

station is then required to prove the absence of a violation.¹⁰³ Such a rule would be directly at odds with conventional notions of civil (and administrative) procedure.¹⁰⁴

SHVIA contains no authority for the Commission to abandon conventional procedural rules. If Congress had wanted to create a burden-shifting provision in SHVIA, it could and would have done so. In Section 325(e)(6), Congress specifically provided that a defendant satellite carrier has the burden of proving any defense to an allegation of illegal signal retransmission.¹⁰⁵ However, no such burden was placed on a defendant broadcaster in an action alleging breach of the “good faith” or “exclusivity” provisions. Once again, “[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.”¹⁰⁶

Moreover, a burden-shifting rule would be bad public policy. If the burden of proof were shifted, MVPDs would need only make a bare-bones—factually unsupported—allegation of violation and the broadcast station would be forced to expend its resources proving a negative—that is, that the violation did not occur. Such a policy would encourage the filing of frivolous complaints to intimidate broadcast stations during contract negotiations and would operate with

¹⁰³ See, e.g., Comments of LTVS at ¶ 24; Comments of DirecTV at 18-19; Comments of U.S. West at 9; Comments of BellSouth at 25-26; Comments of EchoStar at 21-23.

¹⁰⁴ See Comments of The Walt Disney Company at 16-17.

¹⁰⁵ See 47 U.S.C. §325(e)(6).

¹⁰⁶ *Russello*, 464 U.S. at 23.

an *in terrorem* effect.¹⁰⁷ The filing of a factually unsupported allegation would also ensnarl the Commission in countless frivolous adjudicatory proceedings. It is a fundamental principle of American jurisprudence that a plaintiff must *prove* its claim, and the Commission cannot and should not abandon that principle here.¹⁰⁸

C. There Is No Statutory Basis For Money Damages

EchoStar also proposes that the Commission impose monetary penalties on broadcast stations that violate the “good faith” negotiation or “exclusivity” provisions.¹⁰⁹ The Commission is without authority to do so. Had Congress intended to impose money damages for violations of the “good faith” negotiation or “exclusivity” provisions, it would have explicitly added a damages provision to Section 325(b)(3)(C). For example, Congress specifically included a statutory damages provision in Section 325(e)(10) regarding unlawful retransmission of local broadcast signals. That provision subjects violating satellite carriers to a penalty of \$25,000 per day per violation.¹¹⁰ When Congress includes a damages provision in one section of a statute, its

¹⁰⁷ Cf. Comments of ALTV at 13 & n.40.

¹⁰⁸ Cf. *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) (recognizing, in a case alleging a failure to negotiate in good faith, that the “principle is firmly established that the burden is on the General Counsel to prove the essential elements of the charged unfair labor practices”).

¹⁰⁹ See Comments of EchoStar at 23-24.

¹¹⁰ See 47 U.S.C. § 325(e)(10).

failure to provide for damages in another section of the same statute is presumed to have been the result of a deliberate act.¹¹¹

Moreover, even if the Commission had authority to impose money damages, it should refrain from doing so here. SHVIA's "good faith" negotiation requirement and prohibition on exclusive contracts are new. The Commission in other contexts has refrained from imposing damages when a law is nascent and when both the Commission and the regulated industry are unfamiliar with the law and actions that may violate it.¹¹²

The only remedy that the Commission may impose when it finds a party has failed to negotiate in good faith is to order the recalcitrant party back to the negotiating table.¹¹³ Similarly, if an exclusive retransmission consent agreement is found, the Commission may only sever the offending contractual term and order the broadcaster to negotiate with other MVPDs.

D. The Statute Does Not Grant A "Right" To Intrusive Discovery

Several MVPDs propose that the Commission grant MVPDs the "right" to seek discovery in a retransmission consent complaint proceeding.¹¹⁴ For example, EchoStar proposes that the

¹¹¹ See, e.g., *Russello*, 464 U.S. at 23.

¹¹² See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order*, FCC 98-189, 12 FCC Rcd 15822 (1998), at ¶¶ 16-17.

¹¹³ See *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970) (holding that in the collective bargaining context the NLRB is limited to "requir[ing] employers and employees to negotiate").

¹¹⁴ See Comments of EchoStar at 23; Comments of DirecTV at 17-18; Comments of WCA at 16.

Commission allow “discovery as of right in a retransmission consent complaint proceeding.”¹¹⁵
The WCA asks the Commission to permit “limited mandatory discovery of [retransmission consent] agreements.”¹¹⁶

However, MVPDs do not point to any statutory language to support the claim that the Commission has the authority to require discovery. In fact, such authority is noticeably absent in Section 325(b)(3)(C). The only place in SHVIA where Congress authorized discovery is in Section 325(e)(7)(B)(ii) which states:

The Commission may direct the parties to exchange pertinent documents, and if necessary to take prehearing depositions, on such schedule as the Commission may approve, but only if the Commission first determines that such discovery is necessary to resolve a genuine dispute about material facts, consistent with the obligation to make a final determination with 45 days.¹¹⁷

This provision, however, is not applicable to “good faith” negotiation or “exclusivity” complaints. It is only applicable in enforcement proceedings against satellite carriers that have illegally retransmitted a broadcast station’s signal without its consent. It stands to reason that the scope of discovery in “good faith” and “exclusivity” disputes, where Congress did not specifically authorize discovery, cannot be broader than that in Section 325(e)(7)(B)(ii) where Congress did authorize it. A careful reading of the statute, moreover, confirms that since mandatory discovery is not allowed in unauthorized retransmission complaint proceedings, the

¹¹⁵ Comments of EchoStar at 23.

¹¹⁶ Comments of WCA at 16.

¹¹⁷ 47 U.S.C. § 325(e)(7)(B)(ii).

Commission is not authorized to require such discovery in the “good faith” negotiation and “exclusivity” complaint context.

The Commission is clearly without authority to establish discovery rules that “go beyond those employed in the adjudication of program access complaints” as suggested by DirecTV.¹¹⁸ When Congress instructed the Commission to create program access regulations, it specifically required the Commission to “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.”¹¹⁹ No such mandate appears in Section 325(b)(3)(C), and, without any such directive, the Commission cannot establish discovery requirements equivalent to, let alone in excess of, those set forth in the program access rules.¹²⁰ Furthermore, given the statutory directive to the Commission in 47 U.S.C. § 548 to establish discovery procedures for program access complaints, it is clear that Congress knows how to provide for them when it so desires, and, having failed to do so here, the Commission is now without authority to engraft them onto the statute.¹²¹

¹¹⁸ See Comments of DirecTV at 17.

¹¹⁹ 47 U.S.C. § 548(f)(2).

¹²⁰ See 47 C.F.R. § 76.1003.

¹²¹ See *AT&T Wireless PCS, Inc. v. City Council*, 155 F.3d 423, 430 (4th Cir. 1998); see also *United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999); *Russello v. United States*, 464 U.S. 16, 23 (1983).

**1. Retransmission Consent
Agreements Constitute
Confidential Business Information**

The information sought in a “good faith” negotiation or “exclusivity” complaint proceeding will almost certainly be proprietary. MVPDs would likely seek discovery, if only for purposes of harassment, of (1) all of the station’s other retransmission consent agreements; (2) information about other pending negotiations; and (3) all notes, memoranda, and documents related thereto. Retransmission consent agreements and negotiations surrounding other agreements contain confidential business information. The terms of a retransmission consent negotiation and agreement are arrived at through a process of mutual compromise and reflect the interests and objectives of the parties. Allowing discovery of other retransmission consent negotiations and agreements would transform these private negotiations and private contracts into public information. If an MVPD learns to what extent a broadcast station may have compromised on a particular negotiating point with a competitor MVPD, it will insist that the broadcast station make equivalent compromises. The resulting distortion of the negotiation process would skew the negotiations in favor of MVPDs—a result plainly not contemplated by the statute.

It is not surprising that MVPDs seek mandatory discovery. If MVPDs are allowed to invade a broadcast station’s confidential files during retransmission consent negotiations, the filing of a “good faith” or “exclusivity” complaint becomes a no-lose proposition. Even if the MVPD should lose at the Commission, it still would have been able to examine all of the broadcast station’s other retransmission consent negotiations and agreements and other confidential documents and thereby gain valuable knowledge that it can use—unfairly—in negotiations with *all* broadcast stations. As a result, MVPDs would be encouraged to file

frivolous and unsupported complaints—and they would. Plainly, Congress did not intend for the negotiating table to be so tilted in favor of MVPDs or for the Commission’s procedural processes to be manipulated and exploited for the financial self-interest of MVPDs.

2. Any Discovery Must Be Specifically Ordered By The Commission And Subject To Strict Limitations

SHVIA does not authorize discovery as of right in a “good faith” negotiation or “exclusivity” complaint proceeding. Accordingly, discovery may be conducted only pursuant to a Commission order. The Commission must ensure that the discovery process is not abused by MVPDs seeking to harass or intimidate broadcasters during negotiations or used by them as an excuse to snoop around in a station’s confidential files. To that end, the Commission should impose three limitations on any discovery that it deems necessary.

First, discovery should only be permitted in those cases where the complainant can make a *prima facie* showing of evidence supporting its claim that a violation has taken place. Any claim failing to meet this *prima facie* standard should be dismissed prior to an authorization of discovery. The level of proof required to establish a *prima facie* showing must be high to eliminate frivolous and unsupported complaints. Circumstantial evidence and unsupported charges are insufficient to establish a *prima facie* case. Thus, a claim alleging a failure to negotiate in “good faith” should be dismissed if it does not contain an allegation documented by specific facts in an affidavit that a party failed to meet at a reasonable time or place or failed to confer on the terms of an agreement. The complainant must come forward with specific allegations that go beyond mere complaints about “different terms and conditions, including

price terms”¹²² since, by law, these cannot serve as a basis for finding a failure to negotiate in good faith. Similarly, an “exclusivity” complaint should be dismissed unless the complainant alleges specific knowledge of a contract containing an exclusivity provision. Unsupported allegations that broadcaster “X” and MVPD “Y” have entered into an exclusive agreement should be discouraged and summarily dismissed.

Second, the Commission’s discovery orders must be narrowly tailored so that the complaint process is not used for fishing expeditions. The Commission only should permit discovery of the minimum number of documents necessary to resolve a dispute. In addition, the Commission should require, as DirecTV and others suggested,¹²³ any discovery to be conducted pursuant to highly restrictive protective orders which will prevent unnecessary disclosure of confidential business information—and even those will not protect against fishing expeditions to gain access to competitive market factors.

Finally, the Commission’s orders should permit mutual discovery. There is no statutory basis nor any legitimate policy rationale for limiting discovery only to the complaining party. A complainant may seek discovery of specific, limited documents to prove its claim, and, obviously, a defendant should be permitted to seek information necessary for its defense.

¹²² 47 U.S.C. § 325(b)(3)(C)(ii).

¹²³ See Comments of DirecTV at 18; Comments of BellSouth at 25; Comments of U.S. West at 9.

**E. The Commission Cannot Engage In A Post-Hoc
“Good Faith” Analysis Of Existing Agreements**

In its comments, DirecTV asked the Commission to create a rule allowing MVPDs that have already entered into retransmission consent agreements to effectively re-open those negotiations by bringing complaints alleging that during the already-concluded negotiation process, a broadcaster did not act in “good faith.”¹²⁴ As discussed previously, the requirement of “good faith” means only that broadcasters must agree to meet at reasonable times and places and confer on the terms of an agreement. Therefore, if a broadcaster has concluded negotiations and has entered into an agreement, it has, by definition, acted in “good faith.”

Moreover, the Commission should recognize this request for what it is—a ploy by DirecTV to exploit the Commission’s processes to renegotiate existing retransmission consent contracts in the hopes of improving each deal it has already done in an arm’s length negotiation. Congress enacted SHVIA on November 29, 1999.¹²⁵ On December 6, 1999, DirecTV issued a press release reporting that it had entered into multi-year retransmission consent agreements with ABC, Fox and NBC for their owned-and-operated stations.¹²⁶ Other broadcast stations have negotiated, and dozens of stations are currently negotiating, retransmission consent agreements with DirecTV and EchoStar. Many of these pending negotiations will be completed before the

¹²⁴ See Comments of DirecTV at 20.

¹²⁵ Act of Nov. 29, 1999, Pub. L. No. 106-113, §1000(a)(9), 113 Stat. 1501 (1999).

¹²⁶ See, e.g., *DIRECTV Reaches Agreement with NBC for Retransmission of Network-Owned Stations* (visited Jan. 7, 2000) <<http://www.directv.com/press/pressdel/0,1112,252,00.html>> (press release dated Dec. 6, 1999, stating that DirecTV has signed retransmission consent agreements with ABC, Fox, and NBC).

Commission's order in this proceeding is released. The agreements—which have been or will have been arrived at in arm's length negotiations without intrusion by the Commission—should be left alone. Congress did not intend for the Commission to rewrite contracts voluntarily entered into by the parties.

No MVPD has been forced by anyone to enter into any retransmission consent agreement. The fact that an MVPD has voluntarily chosen to do so is dispositive of the “good faith” issue. The existence of these contracts is, also, the best evidence that substantive regulation by the Commission of other retransmission consent negotiations is totally unnecessary.

F. It Is Illegal For An MVPD To Retransmit A Broadcast Signal Without Consent In All Circumstances

Some MVPDs have suggested that the Commission create rules allowing MVPDs to continue to retransmit a local station's signal after the station has revoked its retransmission consent, provided the MVPD has filed an “exclusivity” or “good faith” negotiation complaint against the station.¹²⁷ These commenters note that the Commission does not allow a cable operator to drop a local broadcast station during the pendency of a market modification petition.¹²⁸ That rule, however, is not relevant here. A broadcast station has a statutory right to be carried on cable systems operating within its local market area.¹²⁹ Therefore, dropping a

¹²⁷ See Comments of BellSouth at 24; Comments of WCA at 17; Comments of U.S. West at 9.

¹²⁸ See *Dynamic Cablevision of Florida, Ltd.*, 12 FCC Rcd 9952, 9960 (1997).

¹²⁹ See 47 U.S.C. § 534(a).

broadcast signal while a market modification petition is pending violates that station's statutory right to be carried if the modification petition is subsequently denied. Accordingly, in drafting the Communications Act, Congress specifically provided that "a cable operator shall not delete from carriage a signal of a commercial television station during the pendency of any proceeding pursuant to this subparagraph" (i.e., the market redefinition section).¹³⁰

By contrast, an MVPD has no statutory right to retransmit a broadcast station's signal. In fact, the whole purpose of the retransmission consent negotiation process is to require MVPDs to seek consent from a station prior to retransmitting its signal. Thus, the only right an MVPD has to retransmit a broadcast station's signal flows from the broadcaster's contractual consent to do so, not from any statute or regulation. Once the terms of a retransmission consent agreement have expired, an MVPD no longer has any authority to retransmit a station's signal.

This conclusion is buttressed by the plain language of SHVIA which provides that

No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except—

- A. with the express authority of the originating station¹³¹

Once a broadcast station has withdrawn its "express authority," the MVPD must cease retransmitting the station's signal or it will be in violation of the statute. The distinction between the two cases is further underscored by the fact that, as noted earlier, Congress imposed substantial penalties on MVPDs for unlawful retransmission of a station's signal without its

¹³⁰ *Id.* at § 534(h)(1)(C)(iii).

¹³¹ 47 U.S.C. § 325(b)(1).

consent.¹³² Any rule allowing MVPDs to carry a station's signal over the objection of the station would be contrary to the express language and purpose of SHVIA.

**VII. The Exclusivity Prohibition Prohibits “Exclusive Contracts”
Only And Sunsets On January 1, 2006**

SHVIA clearly states that broadcasters are prohibited from “engaging in exclusive contracts for carriage.” This proscription is clear on its face and requires no administrative interpretation or rulemaking to clarify it. An “exclusive contract” is a commonly-understood term. In this context, it means a retransmission consent agreement between a broadcast station and an MVPD that prohibits or precludes the station from entering into a retransmission consent arrangement with any other MVPD serving the same area. In fact, the amendment merely codifies the Commission's existing exclusivity prohibition in Section 76.64(m). Despite this clear statutory language, the Commission asks in the *Notice* for comment on “what activities would constitute ‘engaging in’ exclusive retransmission agreements.”¹³³

Satellite carriers urge the Commission to interpret this provision broadly¹³⁴ and to enforce the provision “strictly.”¹³⁵ For example, EchoStar claims that the Commission should “adopt a broad interpretation of this provision which prevents broadcast stations from effectively engaging in exclusive contracts by refusing to deal with competing satellite distributors.”¹³⁶ As

¹³² *See id.* at § 325(e)(10).

¹³³ *Notice* at ¶ 23.

¹³⁴ *See Comments of EchoStar* at 20.

¹³⁵ *Comments of DirecTV* at 15; *see also Comments of LTVS* at ¶¶ 21-23.

¹³⁶ *Comments of EchoStar* at 20.

support for this statement, EchoStar notes that Congress chose to prohibit parties from “engaging in” exclusive contracts and argues that this choice of language “suggests Congress’ intent to prohibit, not just exclusive agreements, but also exclusive practices.”¹³⁷ Similarly, DirecTV argues that SHVIA prohibits broadcasters from “wield[ing] *de facto* exclusivity against DBS providers”¹³⁸ These arguments are incorrect; they ignore the statute. The statute is clear: It prohibits broadcast stations only from “engaging in exclusive contracts.” It does not prohibit any undefined “exclusive practices” nor does it prohibit the exercise of any *de facto* exclusivity. The Commission cannot read into the statute what is not there. “If the intent of Congress is clear, that is the end of the matter.”¹³⁹

Moreover, choosing the language “engaging in exclusive contracts” rather than the language “entering into exclusive contracts” set forth in the Conference Report is of no meaningful consequence. It is certainly not evidence that Congress intended to increase the number of prohibited activities. If there is to be any import given to the difference, it seems more likely that by switching to “engaging in” Congress intended to allow parties to negotiate and enter into exclusive retransmission consent agreements as long as those agreements are not effective until after the sunset of this prohibition on January 1, 2006.

And, plainly, the prohibition on “exclusive contracts” does sunset on January 1, 2006. Indeed, as the Commission recognized in the *Notice*, it is clear on the face of Section

¹³⁷ *Id.*

¹³⁸ Comments of DirecTV at 16.

¹³⁹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984).

325(b)(3)(c)(ii) that this provision sunsets on January 1, 2006.¹⁴⁰ The statute provides that exclusive contracts are prohibited “until January 1, 2006.” Despite this clear mandate from Congress, several MVPDs argue that the Commission has the discretion to determine whether to continue to prohibit exclusive retransmission consent agreements after the sunset date.¹⁴¹ These MVPDs make four arguments in support of their untenable position.

First, they argue that the Commission can use its general powers, derived from Title I of the Communications Act, to extend the exclusivity provision beyond January 1, 2006.¹⁴² Regardless of any general powers the Commission may have, it cannot ignore a clear congressional directive. The statute clearly mandates a sunset, and this specified directive supersedes any general authority granted to the Commission. It is well established that an agency “must give effect to the unambiguously expressed intent of Congress.”¹⁴³

Second, the MVPDs assert that the language in SHVIA is not explicit enough to repeal the Commission’s existing rule.¹⁴⁴ The language in SHVIA is more than explicit enough to create a sunset. Congress is not required to use the word “sunset” in order to create a sunset provision. Stating “until January 1, 2006” is an unambiguous statement that the prohibition on exclusive contracts ends as of that date.

¹⁴⁰ See Notice at ¶ 24.

¹⁴¹ See Comments of LTVS at ¶¶ 12-14; Comments of WCA at 5-11; Comments of U.S. West at 9.

¹⁴² See, e.g., Comments of LTVS at ¶ 12.

¹⁴³ *Chevron*, 467 U.S. at 843.

¹⁴⁴ See Comments of LTVS at ¶ 13.

Third, the MVPDs claim that Congress cannot repeal an administrative rule by implication. As support for this argument the MVPDs cite to cases stating that statutory repeal by implication is not favored.¹⁴⁵ However, these cases address the issue of whether Congress can repeal an earlier act of Congress by implication.¹⁴⁶ Thus, this case law is inapplicable to Congress's implied repeal of an administrative regulation. Moreover, it is presumed that Congress acts with knowledge of existing regulations.¹⁴⁷ Because Congress was aware of the Commission's existing rule and because it passed a statute clearly sunseting that regulation, the regulation is effectively repealed.

Finally, the MVPDs argue that a mandatory sunset date should not be created because it would be inconsistent with the purposes of SHVIA.¹⁴⁸ Contrary to this assertion, inserting a sunset provision in Section 325(b)(3)(C) furthers the goals of SHVIA. A sunset provision is logical because the statute's prohibition on exclusive contracts is in derogation of the common law right of freedom of contract. By establishing a sunset date, Congress has recognized that the ban on exclusive retransmission consent agreements is merely a temporary solution and that, ultimately, total freedom of contract should prevail in the marketplace. Sunseting the ban on exclusive contracts is in the public interest because it will spur the development of new programming. Competition among MVPDs for programming will result in more programming

¹⁴⁵ See Comments of WCA at 7.

¹⁴⁶ See generally *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

¹⁴⁷ See *Dantran, Inc. v. United States Dep't of Labor*, 171 F.3d 58, 70 (1st Cir. 1999).

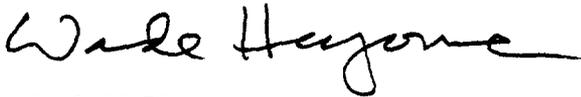
¹⁴⁸ See Comments of U.S. West at 7.

choices, thereby benefiting consumers. In any event, whether a sunset on the exclusive contracts ban is beneficial for the public is an issue for Congress, not the Commission, to decide. Congress has clearly spoken on this issue and has created a sunset date, and the Commission should not and cannot usurp this congressional mandate.¹⁴⁹

¹⁴⁹ See *Chevron*, 467 U.S. at 842-43.

WHEREFORE, it is respectfully requested that the Commission reject the proposals submitted by the MVPDs and adopt the proposed rule amendment attached hereto in the Appendix.

Respectfully submitted,

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Appendix

Proposed Amendment to 47 C.F.R. § 76.64

Network Affiliates recommend that Section 76.64 be amended as follows in connection with Section IV of the *Notice of Proposed Rule Making*, FCC 99-406, released December 22, 1999, in CS Docket No. 99-363:

(o) All parties to a retransmission consent negotiation shall bargain in good faith. This obligation shall be satisfied so long as (i) each party to the negotiation agrees to meet at reasonable times and locations, (ii) each party agrees to confer on the terms of an agreement, and (iii) no party refuses to deal. It shall not be a failure to negotiate in good faith if a television broadcast station that provides retransmission consent 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.

(p) Subsections (m) and (o) above shall expire at midnight on December 31, 2005.