

56. We also believe that to arbitrarily limit the range or type of proposals that the parties may raise in the context of retransmission consent will make it more difficult for broadcasters and MVPDs to reach agreement. By allowing the greatest number of avenues to agreement, we give the parties latitude to craft solutions to the problem of reaching retransmission consent. The comments filed in this proceeding have called into question the legitimacy of a number of bargaining proposals as reflecting a failure of good faith or as presumptively not based on competitive marketplace considerations. As discussed, it is important that we provide the parties with as much initial guidance as possible. We believe that the following examples of bargaining proposals presumptively are consistent with competitive marketplace considerations and the good faith negotiation requirement:

1. Proposals for compensation above that agreed to with other MVPDs in the same market;
2. Proposals for compensation that are different from the compensation offered by other broadcasters in the same market;
3. Proposals for carriage conditioned on carriage of any other programming, such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market;
4. Proposals for carriage conditioned on a broadcaster obtaining channel positioning or tier placement rights;
5. Proposals for compensation in the form of commitments to purchase advertising on the broadcast station or broadcast-affiliated media; and
6. Proposals that allow termination of retransmission consent agreement based on the occurrence of a specific event, such as implementation of SHVIA's satellite must carry requirements.<sup>123</sup>

Each of the above proposals reflect presumptively legitimate terms and conditions or forms of consideration that broadcasters may find impart value in exchange for the grant of retransmission consent to an MVPD. We do not find anything to suggest that, for example, requesting an MVPD to carry an affiliated channel, another broadcast signal in the same or another market, or digital broadcast signals is impermissible or other than a competitive marketplace consideration. Prior to passage of the 1992 Cable Act, the compensation paid by MVPDs for broadcast signal programming carriage was established under the copyright laws through a governmental adjudicatory process.<sup>124</sup> After passage of the 1992 Cable Act, Congress left the negotiation of

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(...continued from previous page)

*Id.* at 6, n.1.

<sup>123</sup>These proposals are illustrative in nature and are not intended to represent a finite list of bargaining proposals that are consistent with competitive marketplace considerations and the good faith negotiation requirement.

<sup>124</sup>17 U.S.C. § 111.

retransmission consent to the give and take of the competitive marketplace. In SHVIA, absent conduct that is violative of national policies favoring competition, we believe Congress intended this same give and take to govern retransmission consent. In addition, we point out that these are bargaining proposals which an MVPD is free to accept, reject or counter with a proposal of its own.

57. We find it more difficult to develop a similar list of proposals that indicate an automatic absence of competitive marketplace considerations. Because the size and relative bargaining power of broadcasters and MVPDs range from satellite master antenna television ("SMATV") operators and low power television broadcast stations to national cable entities and major-market, network affiliate broadcast television stations, the dynamics of specific retransmission consent negotiations will span a considerable spectrum. In these instances, we will generally rely on the totality of the circumstances test to determine compliance with Section 325(b)(3)(C).

58. At the same time, it is implicit in Section 325(b)(3)(C) that any effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement. Considerations that are designed to frustrate the functioning of a competitive market are not "competitive marketplace considerations." Conduct that is violative of national policies favoring competition -- that is, for example, intended to gain or sustain a monopoly, is an agreement not to compete or to fix prices, or involves the exercise of market power in one market in order to foreclose competitors from participation in another market -- is not within the competitive marketplace considerations standard included in the statute. Following this reasoning, we believe that the following examples of bargaining proposals presumptively are not consistent with competitive marketplace considerations and the good faith negotiation requirement:

1. Proposals that specifically foreclose carriage of other programming services by the MVPD that do not substantially duplicate the proposing broadcaster's programming;
2. Proposals involving compensation or carriage terms that result from an exercise of market power by a broadcast station or that result from an exercise of market power by other participants in the market (*e.g.*, other MVPDs) the effect of which is to hinder significantly or foreclose MVPD competition;
3. Proposals that result from agreements not to compete or to fix prices; and
4. Proposals for contract terms that would foreclose the filing of complaints with the Commission.<sup>125</sup>

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<sup>125</sup> Again, these proposals are illustrative in nature and are not intended to represent a finite list of bargaining proposals that are not consistent with competitive marketplace considerations and the good faith negotiation requirement.

#### D. Carriage While a Complaint is Pending

59. Several MVPD commenters argue that where a MVPD shows a willingness to negotiate for continued carriage of a local broadcast station, the station should have an affirmative duty to negotiate terms for such carriage and should not be permitted to withhold retransmission consent while such negotiations are pending.<sup>126</sup> Other commenters assert that the Commission should prohibit a broadcaster from withdrawing existing retransmission consent given to an MVPD until an exclusivity or good faith complaint is denied by the Cable Services Bureau and, if reconsideration is requested, the full Commission.<sup>127</sup> These commenters note that local television stations enjoy similar protection when a cable operator seeks to drop the broadcaster via the Commission's market modification process.<sup>128</sup> NAB and Network Affiliates assert that Congress expressly rejected this approach in SHVIA by requiring that upon the expiration of the six-month grace period outlined in Section 325(b)(2)(E), satellite carriers must obtain consent prior to retransmitting any programming or face stiff penalties, including mandatory civil liability of \$25,000 per station, per day.<sup>129</sup>

60. Two equally unambiguous provisions of SHVIA foreclose the approach advanced by MVPD commenters. First, Section 325(b)(1) of the Communications Act provides that "No cable system or other multichannel video programming distributor shall retransmit the signal of the broadcasting station, or any part thereof, *except . . . with the express authority of the originating station. . .*"<sup>130</sup> This language clearly prohibits an MVPD, except during the six-month period allowed under Section 325(b)(2)(E), from retransmitting a broadcaster's signal if it has not obtained express retransmission consent. Second, Section 325(e) of the Communications Act establishes a streamlined complaint procedure through which broadcasters may seek redress for allegedly illegal retransmission of local broadcast signals by satellite carriers. The procedures established by Section 325(e) provide only four defenses that a satellite carrier may raise: (1) the satellite carrier did not retransmit the broadcaster's signal to any person in the local market of the broadcaster during the time period specified in the complaint; (2) the broadcaster had in writing expressly allowed the satellite carrier to retransmit the broadcaster's signal to the broadcaster's local market for the entire period specified in the complaint; (3) the retransmission was made after January 1, 2002 and the broadcaster elected to assert the right to sue against the satellite carrier under Section 338 for the entire period specified in the complaint; and (4) the station being retransmitted is a noncommercial television broadcast station.<sup>131</sup> Against the backdrop of the express language of these provisions, we see no latitude for the Commission to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission.

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<sup>126</sup>NCTA Comments at 4; Time Warner Reply at 14-15.

<sup>127</sup>U S West Comments at 8-9; BellSouth Comments at 24; WCA Comments at 17.

<sup>128</sup>U S West Comments at 8-9; BellSouth Comments at 24; WCA Comments at 17, each citing 47 C.F.R. § 76.59(c).

<sup>129</sup>NAB Reply at 21, citing 47 U.S.C. § 325(b)(3); Network Affiliates Reply at 40.

<sup>130</sup>47 U.S.C. § 325(b)(1) (emphasis added).

<sup>131</sup>47 U.S.C. § 325(e)(4).

61. Having reached this conclusion, we must also express our concern regarding the service disruptions and consumer outrage that will inevitably result should MVPDs that are entitled to retransmit local signals subsequently lose such authorization. Because the market has functioned adequately since the advent of retransmission consent in the early 1990's, we expect such instances to be the exception, rather than the norm. We are encouraged by the retransmission consent agreements that have been reached between broadcasters and satellite carriers prior to the enactment of our rules. In addition, we strongly encourage that broadcasters and MVPDs that are engaged in protracted retransmission consent negotiations agree to short-term retransmission consent extensions so that consumers' access to broadcast stations will not be interrupted while the parties continue their negotiations.

**E. Existing and Subsequent Retransmission Consent Agreements**

62. In the Notice, the Commission acknowledged the existence of retransmission consent agreements between satellite carriers and television broadcast stations that predate enactment of Section 325(b)(3)(C).<sup>132</sup> In addition, the Notice acknowledged that agreements have been executed since the enactment of SHVIA. The Notice sought comment on the impact of these agreements on the duty to negotiate in good faith.<sup>133</sup>

63. Network Affiliates state that the fact that broadcasters and satellite carriers have already reached arms length retransmission consent agreements is an indication that they were negotiated in good faith. Otherwise, in the face of impending legislation and Commission action, they assert the parties would not have finalized such agreements.<sup>134</sup> Another commenter argues that the rules adopted by the Commission should have prospective effect applying only to retransmission consent negotiations that occur after the effective date of the Commission's rules.<sup>135</sup> One commenter urges the Commission to give its rules retroactive application to preexisting retransmission consent agreements.<sup>136</sup>

64. We will not apply the rules adopted herein to retransmission consent agreements that predate the effective date of this Order. Section 325(b)(3)(C) provides that:

Within 45 days after the date of the enactment of [SHVIA], the Commission shall commence a rulemaking proceeding to revise the regulations governing the exercise by television broadcast stations of the right to grant retransmission consent under this subsection, and such other regulations as are necessary to administer the limitations contained in paragraph (2) . . . Such regulations shall . . . until January 1, 2006, prohibit a television broadcast station that provides retransmission

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<sup>132</sup>Notice at 20.

<sup>133</sup>*Id.*

<sup>134</sup>Network Affiliate Comments at 24.

<sup>135</sup>Fox Comments at 3.

<sup>136</sup>LTVS Reply at 9.

consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith . . .<sup>137</sup>

As the quoted language indicates, Section 325 is not a self-effectuating provision. It has substance and structure only after the Commission has concluded its rulemaking to implement the good faith and exclusivity limitations of Section 325(b)(3)(C). Moreover, we need not apply SHVIA retroactively to ensure that such preexisting agreements do not contain impermissible exclusivity provisions. Section 76.64(m) of the Commission's rules has been in effect since 1993 and expressly prohibits exclusive retransmission consent agreements.<sup>138</sup> If any MVPD believes that a broadcaster and an MVPD entered into a prohibited exclusive retransmission consent agreement prior to adoption of SHVIA, that party may file a petition for special relief alleging that a broadcaster and MVPD have violated Section 76.64(m).<sup>139</sup> Accordingly, the rules applicable to good faith and exclusivity adopted herein will apply only to retransmission consent agreements adopted after the effective date of this Order.

## V. EXCLUSIVE RETRANSMISSION CONSENT AGREEMENTS

65. SHVIA amends Section 325(b) of the Communications Act by directing the Commission to promulgate rules that would

until January 1, 2006, prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts. . . .<sup>140</sup>

The accompanying Joint Explanatory Statement of the Committee of Conference contains no language to clarify or explain the prohibition, stating only that:

The regulations would, until January 1, 2006, prohibit a television broadcast station from entering into an exclusive retransmission consent agreement with a multichannel video programming distributor . . .<sup>141</sup>

The Commission, by rule, established a similar prohibition following passage of the 1992 Cable Act. There, the Commission was directed by Congress to establish regulations governing the right of television broadcast stations to grant retransmission consent.<sup>142</sup> The Commission found that exclusive retransmission consent arrangements between a television broadcast station and

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<sup>137</sup>47 U.S.C. § 325(b)(3)(C).

<sup>138</sup>47 C.F.R. § 76.64(m) ("Exclusive retransmission consent agreements are prohibited. No television broadcast station shall make an agreement with one multichannel distributor for carriage, to the exclusion of other multichannel distributors).

<sup>139</sup>See 47 C.F.R. § 76.7 (special relief provisions).

<sup>140</sup>S. 1948, the Intellectual Property and Communications Omnibus Reform Act of 1999, Section 1009(a)(2)(C)(ii), p. 46.

<sup>141</sup>Joint Explanatory Statement of the Committee of Conference on the Intellectual Property and Communications Omnibus Reform Act of 1999, p. 13

<sup>142</sup>See *Broadcast Signal Carriage Order*, 8 FCC Rcd at 2996.

any multichannel video programming distributor were contrary to the intent of the 1992 Cable Act.<sup>143</sup>

66. In the Notice, we sought to determine what activities would constitute “engaging in exclusive contracts.”<sup>144</sup> We also sought to determine whether there was significance to the difference between the language in the statute (prohibiting “engaging in”) and the language in the Conference Report (prohibiting “entering into”).<sup>145</sup> We sought to determine whether parties were prohibited from negotiating exclusive contracts that would take effect after the date of January 1, 2006.<sup>146</sup> We also sought comment on whether any such contracts already existed, and if so, what effect the statute would have on such contracts.<sup>147</sup> Finally, we sought comment on how to effectively enforce such a prohibition, and how to determine whether such agreements existed.<sup>148</sup>

67. SHVIA prohibits a television broadcast station that provides retransmission consent from “engaging in” exclusive contracts until January 1, 2006. The Conference Report refers to a prohibition on “entering into” exclusive retransmission consent agreements. Several commentators argue that the phrases “entering into” and “engaging in” are synonymous.<sup>149</sup> Representatives of the satellite industry argue that the Commission should rely on the broader language of the statute (“engaging in”) rather than the arguably narrower Conference Report language.<sup>150</sup> Commenters supporting this interpretation posit that the use of the language “engaging in” demonstrates an intent to prohibit a broad range of practices. SBCA believes that the use of the phrase “engaging in” prohibits “both express and implied, *de jure* and *de facto*, exclusionary conduct, including literal or effective refusals to deal with a particular MVPD distributor.”<sup>151</sup> Two other commenters argue that broadcasters can impose unaffordable demands on smaller MVPDs, and that these demands can result in prohibited *de facto* exclusivity.<sup>152</sup> Thus, according to this argument, the Commission should expand its prohibition to explicitly forbid these types of arrangements. LTVS supports an expansive definition of exclusive practices and argues that a broad range of actions should be prohibited.<sup>153</sup>

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<sup>143</sup> *Id.*, at 3006.

<sup>144</sup> Notice at ¶ 23.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Disney Comments at 14; NAB Comments at 33.

<sup>150</sup> SBCA Comments at 6; EchoStar Comments at 20; LTVS Comments at 10.

<sup>151</sup> SBCA Comments at 5. This position is supported by DIRECTV who urges the Commission to “attentively monitor the industry to ensure that broadcasters do not attempt in their retransmission negotiations to wield *de facto* exclusivity against DBS providers by virtue of the terms and conditions that are contained in deals with other MVPDs.” DIRECTV Comments at 16).

<sup>152</sup> ACA Comments at 14-15; EchoStar Reply at 21.

<sup>153</sup> LTVS Comments at 10-12.

68. While the satellite industry supports a broad reading of the statute, broadcast commenters argue that Congress intended to prohibit exclusive contracts, not “undefined ‘exclusive practices’ nor . . . the exercise of any *de facto* exclusivity.”<sup>154</sup> Network Affiliates assert that the use of the phrase “engaging in” does not demonstrate Congressional intent to “increase the number of prohibited activities.”<sup>155</sup> Indeed, these commenters argue that by using the phrase “engaging in” as opposed to the phrase “entering 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.”<sup>156</sup> Under this theory, the statute only prohibits “engaging in exclusive contracts.” Thus, according to broadcasting representatives, SHVIA does not prohibit undefined exclusive practices or the exercise of *de facto* exclusivity.

69. In determining the intended scope of the prohibition on exclusive retransmission consent agreements, we believe that Congress intended that all activity associated with exclusive retransmission consent agreements be prohibited until January 1, 2006.<sup>157</sup> Absent such a comprehensive prohibition, marketplace distortions could occur that would adversely influence the continuing development of a competitive marketplace for multichannel video programming services. For example, if an MVPD negotiates an exclusive retransmission consent agreement with a television broadcaster that will take effect after January 1, 2006, such MVPD undoubtedly would use that agreement in advertising or marketing strategies during the prohibition on exclusive retransmission consent agreements. The MVPD could market its services by stating that it will be the only MVPD providing a particular television broadcast station or stations after January 1, 2006. Given the overall pro-competitive mandate of SHVIA, we believe that Congress did not intend that we permit this type of market distortion while the Section 325(b)(3)(C) prohibitions are in effect. As such, we interpret the phrase “engaging in” to proscribe not only entering into exclusive agreements, but also negotiation and execution of agreements granting exclusive retransmission consent after the prohibition expires.

70. As for the exercise of *de facto* exclusivity, we believe that the statute’s good faith requirement sufficiently addresses concerns voiced by commenters. The good faith requirements of the statute and the Commission’s rules adopted in this Order should adequately address behavior that would lead to *de facto* exclusivity.

71. On its face, the prohibition on exclusive retransmission consent agreements appears to have immediate effect. The Commission sought comment on the existence of exclusive satellite carrier retransmission consent agreements that either predate the enactment of SHVIA or under the Commission’s rules implementing Section 325(b)(3)(C)(ii).<sup>158</sup> One commenter argues that the Commission should nullify any exclusive retransmission consent

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<sup>154</sup>Network Affiliates Reply at 42.

<sup>155</sup>*Id.*

<sup>156</sup>*Id.*

<sup>157</sup>See Appendix B, § 76.64(m).

<sup>158</sup>Notice at ¶ 24.

agreements that existed prior to SHVIA.<sup>159</sup> The commenter suggests that the Commission's authority to nullify any such agreements stems from the requirements of the Commission's rules.<sup>160</sup> Another commenter argues that the Commission should apply rules implementing the SHVIA prohibition on exclusive retransmission consent agreements retroactively.<sup>161</sup> Some commenters from the broadcasting industry argue that any such agreements that were in existence prior to the enactment of SHVIA should be grandfathered.<sup>162</sup>

72. Prior to the enactment of SHVIA, Section 76.64(m) of the Commission's rules prohibited all exclusive retransmission consent agreements.<sup>163</sup> After its enactment, SHVIA prohibits all exclusive retransmission consent agreements prior to January 1, 2006. Thus, to the extent that any prohibited exclusive retransmission consent agreements exist between television broadcast stations and MVPDs, such agreements are prohibited either by Commission rule prior to SHVIA, or by SHVIA's express terms thereafter.

## VI. RETRANSMISSION CONSENT AND EXCLUSIVITY COMPLAINT PROCEDURES

### A. Voluntary Mediation

73. The Notice sought comment on whether there are circumstances in which the use of alternative dispute resolution ("ADR") services would assist in determining whether a television broadcast station negotiated in good faith as defined by Section 325(b)(3)(C) and the Commission's rules adopted thereunder.<sup>164</sup> Several commenters argue that a dispute resolution mechanism is not necessary and contrary to the goal of swift resolution of such complaints. By contrast, Time Warner supports a mediation requirement that must be satisfied prior to the filing of a complaint with the Commission.<sup>165</sup> Under Time Warner's proposal, the parties would have 60 days to negotiate in good faith. If an agreement has not been reached 30 days or less prior to the termination of retransmission consent, either party can require that the matter be submitted to mediation.<sup>166</sup>

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<sup>159</sup>BellSouth Comments at 22.

<sup>160</sup>*Id.*, citing 47 C.F.R. § 76.64(m).

<sup>161</sup>LTVS Reply at 9.

<sup>162</sup>Network Affiliates Comments at 28.

<sup>163</sup>47 C.F.R. § 76.64(m).

<sup>164</sup>Notice at ¶ 26; see e.g., *Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, Second Report and Order, 13 FCC Rcd 17018, ¶¶ 14-15 (rel. July 14, 1998); *Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party*, Initial Policy Statement and Order, 6 FCC Rcd 5669 (1991); 47 C.F.R. § 1.18.

<sup>165</sup>Time Warner Reply at 14.

<sup>166</sup>*Id.*

74. We will not, at this time, adopt Time Warner's mandatory mediation proposal. There has not been a sufficient demonstration that such a measure is necessary to implement the good faith provision of Section 325(b)(3)(C). We believe, however, that voluntary mediation can play an important part in the facilitation of retransmission consent and encourage parties involved in protracted retransmission consent negotiations to pursue mediation on a voluntary basis. The Commission would favorably consider a broadcaster's willingness to participate in a mediation procedure in determining whether such broadcaster complied with its good faith negotiation obligations. We emphasize, however, that refusal to engage in voluntary mediation will not be considered probative of a failure to negotiate in good faith. We will revisit the issue of mandatory retransmission consent mediation if our experience in enforcing the good faith provision indicates that such a measure is necessary.

#### B. Commission Procedures

75. The Notice sought comment on what procedures the Commission should employ to enforce the provisions adopted pursuant to Section 325(b)(3)(C).<sup>167</sup> We asked commenters to state whether the same set of enforcement procedures should apply to both the exclusivity prohibition and the good faith negotiation requirement, or whether the Commission should adopt different procedures tailored to each prohibition.<sup>168</sup> Specifically, we sought comment regarding whether special relief procedures of the type found in Section 76.7 of the Commission's rules provide an appropriate framework for addressing issues arising under Section 325(b)(3)(C).<sup>169</sup>

76. There is general consensus among the commenters that the general pleading provisions of Section 76.7 provide appropriate procedural rules for good faith and exclusivity complaints.<sup>170</sup> No commenters justified a departure from the Commission's general pleading rules for matters filed with the Cable Services Bureau. We agree with these commenters urging the use of the Section 76.7 provisions and direct complainants to follow these provisions in filing retransmission consent complaints.<sup>171</sup> Consistent with the requirements of Section 76.7 of the Commission's rules, complaints alleging violations of the prohibition on exclusive retransmission consent agreements should: (1) identify the broadcaster and MVPD alleged to be parties to the prohibited exclusive agreement; (2) provide evidence that the complainant can or does serve the area of availability, or portions thereof, of the signal of the broadcaster named in the complaint; and (3) provide evidence that the complainant has requested retransmission consent to which the

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<sup>167</sup>Notice at ¶ 26.

<sup>168</sup>*Id.*

<sup>169</sup>*Id.*; see 47 C.F.R. § 76.7.

<sup>170</sup> Disney Comments at 17; Network Affiliate Comments at 28; LTVS Comments at 12; U S West Comments at 8; WCA Comments at 16; NAB Reply at 22; BellSouth Comments at 22. BellSouth asserts that the Commission should require good faith complaint defendants to attach a copy of any retransmission consent agreements with any MVPDs with whom the complainant competes. BellSouth Reply at 18. ACA argues that the Commission should give all MVPDs standing to challenge alleged retransmission consent violations, rather than standing to challenge only those to which they are a party. ACA Comments at 21-22.

<sup>171</sup>See Appendix B, § 76.65(c).

broadcaster has refused or failed to respond.<sup>172</sup> Following the filing of a complaint, the defendant broadcaster must file an answer that specifically admits or denies the complainants allegation of the existence of an exclusive retransmission consent agreement.<sup>173</sup>

77. We agree with those commenters who argue that some aspects of the program access procedural rules would assist the Commission in effectively processing and resolving retransmission consent complaints.<sup>174</sup> We believe that it is necessary to impose a limitations period on the filing of retransmission consent complaints. In the program access, program carriage and open video system contexts, the Commission has established a one-year limitations period within which an aggrieved party must file a complaint with the Commission.<sup>175</sup> Given that retransmission consent complaints are likely to be highly fact-specific and dependent on individual recollection, a similar limitations period is fair and appropriate with regard to retransmission consent complaints. Moreover, a limitations period lends finality and certainty to retransmission consent agreements after affording MVPDs an appropriate interval to challenge alleged violations of Section 325(b)(3)(C). Accordingly, a complaint filed pursuant to Section 325(b)(3)(C) must be filed within one year of the date any of the following occur: (a) a complainant MVPD enters into a retransmission consent agreement with a broadcaster that the complainant MVPD alleges violate one or more of the rules adopted herein; or (b) a broadcaster engages in retransmission consent negotiations with a complainant MVPD that the complainant MVPD alleges violate one or more of the rules adopted herein, and such negotiation is unrelated to any existing contract between the complainant MVPD and the broadcaster; or (c) the complainant MVPD has notified the broadcaster that it intends to file a complaint with the Commission based on a request to negotiate retransmission consent that has been denied, unreasonably delayed, or unacknowledged in violation of one or more of the rules adopted herein.<sup>176</sup>

### C. Discovery

78. Several commenters urge the Commission to provide discovery as-of-right in retransmission consent complaint proceedings.<sup>177</sup> Disney observes that since there is no automatic right to discovery in the more procedurally complex program access regime – *a fortiori* there should be no discovery in the context of retransmission consent proceedings.<sup>178</sup> One commenter asserts that retransmission consent agreements and the negotiations surrounding them constitute confidential business information that must be protected by strong nondisclosure

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<sup>172</sup>See 47 C.F.R. § 76.7(a)(4) (Complaint shall state fully and precisely all pertinent facts and considerations relied on to demonstrate the need for the relief requested.).

<sup>173</sup>47 C.F.R. § 76.7(b)(2).

<sup>174</sup>DIRECTV Comments at 16; EchoStar Comments at 21.

<sup>175</sup>See 47 C.F.R. § 76.1003(g) (program access); 47 C.F.R. § 76.1302(f) (program carriage); 47 C.F.R. § 76.1513(t) (open video systems).

<sup>176</sup>See Appendix B, § 76.65(e).

<sup>177</sup>DIRECTV Comments at 17-18; EchoStar Comments at 23; RCN Reply at 6. WCA supports limited mandatory discovery. WCA Comments at 16.

<sup>178</sup>Disney Reply at 13.

agreements if subject to Commission-directed discovery procedures.<sup>179</sup> This commenter offers three limitations on Commission-directed discovery: (1) the complainant must have made a *prima facie* showing of evidence supporting its claim that a violation has taken place; (2) the Commission's discovery order must be narrowly-tailored to avoid fishing expeditions; and (3) the Commission must permit mutual discovery.<sup>180</sup>

79. We decline the invitation of several commenters to apply discovery as-of-right to the retransmission complaint procedures. Interested parties should not interpret our decision as meaning that discovery will play no part in the Section 325 complaint process. Because MVPDs will be present at negotiations, we generally anticipate that evidence of a violation of the good faith standard will be accessible by the MVPD complainant. Where complainants can demonstrate that such information is not available (*e.g.*, agreements entered into with other MVPDs) and that discovery is necessary to the proper conduct and resolution of a proceeding, the Commission will consider, where necessary, the imposition of discovery to develop a more complete record and resolve complaints. In this regard, parties are free to raise appropriate discovery requests in their pleadings. We will protect proprietary information, where necessary, pursuant to Section 76.9 of our rules.<sup>181</sup> Accordingly, we will employ Commission-controlled discovery as contemplated in the Section 76.7 procedures.<sup>182</sup>

#### D. Remedies

80. With regard to the appropriate measures for the Commission to take after a finding that a broadcaster has violated the good faith negotiation requirement, several commenters argue that the sole remedy is a Commission directive to engage in further negotiation consistent with the Commission's decision.<sup>183</sup> In this regard, other commenters note that, in the labor law context, the Supreme Court has determined that the NLRB has no power to order parties to enter into a particular agreement, or even agree to individual terms.<sup>184</sup> EchoStar argues that this is not the limit of the Commission's remedial authority and that the Commission should order a broadcaster that has been found to violate the Commission's prohibitions to conclude a retransmission consent agreement that "does not include any discriminatory terms not based on

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<sup>179</sup>Network Affiliates Reply at 35-36.

<sup>180</sup>Network Affiliate Reply at 36-38.

<sup>181</sup>47 C.F.R. § 76.9.

<sup>182</sup>47 C.F.R. § 76.7(f).

<sup>183</sup>NAB Comments at 21; Network Affiliate Comments at 19; ALTV Comments at 17.

<sup>184</sup>Disney Reply at 3-4, quoting *H.K. Porter v. NLRB*, 397 U.S. 99, 103-104 (1970) ("[I]t 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 views of a desirable settlement."); NAB Comments at 21, Network Affiliates Reply at 32 & CBS Comments at 12, citing *H.K. Porter Co.*, 397 U.S. 99, 108 (1970); Network Affiliate Comments at 18, quoting *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952) (NLRB "may not, either directly or indirectly, compel concessions or otherwise sit in judgement upon the substantive terms of collective bargaining agreements."); Network Affiliates Reply, citing *NLRB v. Wooster Div. Of Borg-Warner Corp.*, 365 U.S. 342, 349 (1958).

competitive marketplace considerations.”<sup>185</sup> Other commenters argue that the Commission should adopt a liberal policy of allowing damages, both as a deterrent to unlawful conduct and as compensation to injured parties.<sup>186</sup> Commenters opposing the imposition of damages note that, while Congress granted the Commission express authority to order appropriate remedies in the program access context, Congress did not grant such express authority in the context of the good faith negotiation requirement.<sup>187</sup>

81. Congress did not empower the Commission to sit in judgement of the substantive terms and conditions of retransmission consent agreements. Therefore, in situations in which a broadcaster is determined to have failed to negotiate in good faith, the Commission will instruct the parties to renegotiate the agreement in accordance with the Commission’s rules and Section 325(b)(3)(C). We reiterate, however, that the Commission will not require any party to a retransmission consent agreement to offer or accept a specific term or condition or even to reach agreement as part of such renegotiation.

82. Although several commenters strongly favor the imposition of damages for adjudicated violations of Section 325(b)(3)(C), we can divine no statutory grant of authority to take such action. Congress instructed the Commission to revise its regulations governing retransmission consent to prohibit exclusive agreements and require good faith negotiation. We can divine no intent in Section 325(b)(3)(C) to impose damages for violations thereof. This is especially true where later in the same statutory provision, Congress expressly granted the District Courts of the United States the authority to impose statutory damages of up to \$25,000 per violation, per day following a Commission determination of a retransmission consent violation by a satellite carrier.<sup>188</sup> Commenters’ reliance on the program access provisions as support for a damages remedy in this context is misplaced. The Commission’s authority to impose damages for program access violations is based upon a statutory grant of authority.<sup>189</sup> We note, however, that, as with all violations of the Communications Act or the Commission’s rules, the Commission has the authority to impose forfeitures for violations of Section 325(b)(3)(C).<sup>190</sup>

#### **E. Expedited Resolution**

83. The Notice requested comment on whether expedited procedures are necessary to the appropriate resolution of either exclusivity or good faith proceedings.<sup>191</sup> Several commenters

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<sup>185</sup> EchoStar Reply at 25.

<sup>186</sup> EchoStar Comments at 23; BellSouth Reply at 18.

<sup>187</sup> Disney Reply at 14, citing 47 U.S.C. § 548(e); NAB Reply at 24; Network Affiliates Reply at 31.

<sup>188</sup> 47 U.S.C. § 325(e)(10).

<sup>189</sup> See *Program Access Report and Order*, 13 FCC Rcd at 15829-32.

<sup>190</sup> See 47 U.S.C. § 503(b).

<sup>191</sup> Notice at ¶ 26. The Notice observed that, in amended Section 325(e) of the Communications Act, Congress established expedited enforcement procedures for complaints by broadcasters that a satellite carrier has retransmitted such broadcaster’s signal in its local market in violation of Section 325(b)(1). *Id.*; see 47 U.S.C. § 325(e); see 47 U.S.C. § 325(b)(1), requiring that no MVPD may retransmit the signal of a broadcasting station, except with the express authority 338 or 614 of the Communications Act. The Notice also observed that good faith is not a defense under Section 325(e).

argue that, in Section 325(e) of the Communications Act, Congress expressly required expedited processing of broadcasters' complaints that satellite carriers have illegally retransmitted local broadcaster signals without consent.<sup>192</sup> Given this express directive by Congress, these commenters argue that the lack of an express directive to expedite good faith negotiation complaints indicates Congress' decision that such complaints should not receive expedited treatment.<sup>193</sup> U S West, however, notes that the Commission has wide discretion to manage its procedures "as will best conduce to the proper dispatch of business and to the ends of justice."<sup>194</sup> Disney asserts that the Commission must ensure that good faith negotiation complaints are resolved expeditiously.<sup>195</sup> In this regard, several commenters suggest various time limits within which the Commission should resolve complaints related to the good faith negotiation requirement and the exclusivity prohibition.<sup>196</sup>

84. Commenters generally favor expedited action by the Commission regarding complaints filed pursuant to Section 325(b)(3)(C). Because we conclude that, upon expiration of an MVPD's carriage rights under the Section 325(b)(2)(E) six-month compulsory license period or an existing retransmission consent agreement, an MVPD may not continue carriage of a broadcaster's signal while a retransmission consent complaint is pending at the Commission,<sup>197</sup> it is incumbent upon the Commission to expedite the resolution of these claims. We are mindful that Congress has imposed no express time limits for Commission resolution of retransmission consent complaints, whereas it has done so in other provisions of SHVIA and the Communications Act. We believe, however, that expeditious resolution of Section 325(b)(3)(C) complaints is entirely consistent with Congress' statutory scheme. We believe that, to ensure efficient functioning of the retransmission consent process, and to avoid protracted loss of service to subscribers, expedited action on these claims is necessary.

85. While commenters propose various time periods within which the Commission should resolve retransmission consent complaints, we believe the spectrum of issues that may be involved in these proceedings does not lend itself to selecting one time period by which the Commission should resolve all complaints brought under Section 325(b)(3)(C). For example, it would be inefficient and arbitrary to apply the same time period to a clear violation, such as outright refusal to negotiate, and a violation of the test involving analysis of the totality of the

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<sup>192</sup> See 47 U.S.C. § 325(e).

<sup>193</sup> NAB Comments at 32-33; Network Affiliate Comments at 28-29. Network Affiliates concludes that this disparate treatment indicates that the Commission lacks authority to adopt expedited procedures. Network Affiliate Reply at 28-29, citing *Russello v. United States*, 464 U.S. 16, 23 (1983).

<sup>194</sup> U S West Reply at 6-7, quoting *GTE Service Corp. v. FCC*, 782 F.2d 263, 273 (D.C. Cir. 1985), quoting 47 U.S.C. § 154(j).

<sup>195</sup> Disney Comments at 16.

<sup>196</sup> See DIRECTV Comments at 17 (five-month time limit); EchoStar Comments at 24 (four-month time limit for *per se* violations and seven-month time limit for differentials not based on competitive marketplace considerations); U S West Comments at 8 (120-day time limit); WCA Comments at 16 (120-day time limit); BellSouth Comments at 23 (45-day time limit); Seren Reply at 6 (45-day time limit); ACA Comments at 21 (50-day time limit).

<sup>197</sup> See *supra* nn. 130-131 and accompanying text, discussing foreclosure of carriage while a complaint is pending.

circumstances. Bearing in mind that the Commission must give maximum priority to matters involving statutory time limits, we instruct Commission staff to give priority to Section 325(b)(3)(C) complaints and resolve them in an expeditious manner, considering the complexity of the issues raised. We will monitor the resolution times of individual retransmission consent complaints and, if necessary, we will revisit this issue in the future.

#### F. Burden of Proof

86. The Notice sought comment on how the burden of proof should be allocated.<sup>198</sup> In this regard, we asked for comment on whether the burden should rest with the complaining party until it has made a *prima facie* showing and then shift to the defending party and what would constitute a *prima facie* showing sufficient to shift the burden to the defending party.<sup>199</sup>

87. Arguing that, consistent with NLRB cases in which the party claiming bad faith bears the burden of proof, several commenters counsel the Commission to provide that the burden of proof should always be on the MVPD complainant.<sup>200</sup> Indeed, several commenters assert that the Commission should adopt procedural rules that permit it to dismiss retransmission consent complaints summarily if the MVPD fails to satisfy a specified threshold standard.<sup>201</sup>

88. Other commenters support a shifting of the burden of proof after a *prima facie* demonstration.<sup>202</sup> Commenters assert that such a shifting is appropriate because of the difficulty of conclusively establishing the existence of an exclusive agreement or lack of good faith. For exclusivity complaints, DIRECTV and EchoStar suggest that a complaining party only provide affidavits or other documentary evidence to support its belief that a prohibited exclusive contract exists, and the burden of proof then shifts to the defendant to refute the existence of such agreement.<sup>203</sup> For good faith complaints, DIRECTV and EchoStar suggest that the complaining party should provide a description of the conduct complained of, including conduct alleged to violate any of the good faith negotiation standards supported by any documentary evidence or an affidavit signed by an officer of the complaining MVPD setting forth the basis for the complainant's allegations.<sup>204</sup> After the burden has shifted to the broadcaster, commenters urge the Commission to require the broadcaster to include with its answer a copy of any retransmission consent agreement the complainant alleges to contain unlawfully different terms and conditions,

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<sup>198</sup>Notice at ¶ 27.

<sup>199</sup>*Id.* The Commission adopted such a shifting burden approach in the program access context. See *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3416-22 (1993).

<sup>200</sup>NAB Comments at 30; Network Affiliate Comments at 29; ALTV Comments at 17; Disney Reply at 12; NBC Reply at 8.

<sup>201</sup>NAB Comments at 30; Network Affiliate Comments at 30. NAB asserts that, without specific factual evidence, the Commission should dismiss an allegation of "lack of good faith." NAB Comments at 30.

<sup>202</sup>DIRECTV Comments at 18-20; EchoStar Comments at 22; LTVS Comments at 12; U S West Comments at 9; BellSouth Comments at 25.

<sup>203</sup>DIRECTV Comments at 19; EchoStar Reply at 24.

<sup>204</sup>DIRECTV Comments at 19; EchoStar Comments at 22.

subject to Commission confidentiality protections.<sup>205</sup> Several commenters maintain that the Commission should impose sanctions against filers of frivolous complaints.<sup>206</sup> Network Affiliates argue that the adoption of a shifting burden mechanism will encourage the filing of frivolous complaints during the negotiation period in order to intimidate broadcasters.<sup>207</sup>

89. Commenters advance cogent arguments both for and against shifting the burden to the broadcaster after a *prima facie* showing by a complaining MVPD. However, as in labor law context,<sup>208</sup> we believe the burden should rest with the MVPD complainant to establish a violation of Section 325(b)(3)(C).<sup>209</sup> This conclusion is also consistent with our belief that generally the evidence of a violation of the good faith standard will be accessible by the complainant.<sup>210</sup> This should not be interpreted as permitting a broadcaster to remain mute in the face of allegations of a Section 325(b)(3)(C) violation. After service of a complaint, a broadcaster must file an answer as required by Section 76.7, which advises the parties and the Commission fully and completely of any and all defenses, responds specifically to all material allegations of the complaint, and admits or denies the averments on which the party relies.<sup>211</sup> In addition, where necessary, the Commission has discretion to impose discovery requests on a defendant to a Section 325(b)(3)(C) complaint.<sup>212</sup> However, in the end, the complainant must bear the burden of proving that a violation occurred.

#### G. Sunset of Rules

90. Section 325(b)(3)(C) directs that the regulations adopted by the Commission prohibit exclusive carriage agreements and require good faith negotiation of retransmission consent agreements “until January 1, 2006.”<sup>213</sup> The Commission sought comment on whether the Commission’s rules regarding exclusive carriage agreements and good faith negotiation should automatically sunset on this date.<sup>214</sup> On its face, this provision would seem to sunset the prohibition on exclusive retransmission consent agreements and good faith negotiation for all MVPDs. Under this reading of the statute, the Commission’s rule prohibiting exclusive

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<sup>205</sup>U S West Comments at 9; BellSouth Comments at 25.

<sup>206</sup>Disney Complaints at 17.

<sup>207</sup>Network Affiliate Reply at 30-31.

<sup>208</sup>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 [complainant]”); *NLRB v. St. Louis Cordage Mills*, 424 F.2d 976, 979 (8<sup>th</sup> Cir. 1970) (“The principle is firmly established that the burden is on the General Counsel [complainant] to prove the essential elements of the charges unfair labor practices.”).

<sup>209</sup>See Appendix B, § 76.65(d).

<sup>210</sup>See *supra* nn. 177-182 and accompanying text, discussing rejection of discovery as-of-right.

<sup>211</sup>47 C.F.R. § 76.7(b)(iii) & (iv).

<sup>212</sup>*Id.* at § 76.7(f).

<sup>213</sup>Communications Act § 325(b)(3)(C), 47 U.S.C. §325(b)(3)(C)(ii).

<sup>214</sup>Notice at ¶ 28.

retransmission consent agreements for cable operators would be deemed abrogated as of January 1, 2006.

91. The broadcast industry argues that this is the correct interpretation of SHVIA. One commenter states that “[b]ecause the statutory language is plain on its face, and because Congress acted with knowledge of the existing regulatory prohibition, it is clear that Congress intended to abrogate the Commission’s existing rule prohibiting exclusive retransmission consent agreements with cable operators.”<sup>215</sup> This commenter additionally argues that the prohibition on exclusive retransmission consent agreements was meant to correct imbalances in the marketplace, and thus was established as a temporary solution.<sup>216</sup>

92. The satellite industry and other MVPD representatives disagree with this interpretation of the statute. Two commenters argue that the date set out in the statute establishes a minimum time frame on the prohibition of exclusive retransmission consent agreements and the good faith negotiation requirement.<sup>217</sup> Others state that interpreting the statute as sunseting the Commission’s prohibitions on exclusive retransmission consent agreements runs contrary to the intent of Congress. Specifically, they argue that nothing in the legislative history demonstrates an intent to sunset Section 325(b)(3)(C), and without an affirmative statement of intent, no such intent may be inferred.<sup>218</sup> Commenters argue that to sunset the prohibition would result in anti-competitive behavior, and would thus undermine the goals of SHVIA. Finally, many commenters from the satellite industry and the MVPD industry argue that the Commission has authority to extend the prohibition on exclusive retransmission consent agreements beyond January 1, 2006, if the Commission determines that such an extension would be in the public interest.<sup>219</sup>

93. A third approach to this issue is advanced by some representatives of the satellite industry and the cable industry. Time Warner argues that the Commission should make no determination at this point over whether to sunset the prohibition, but rather should make a decision closer to the expiration date set out in the statute.<sup>220</sup>

94. We believe that the statute is clear on its face, and that the correct interpretation of the language “until January 1, 2006” is that the prohibitions on exclusive retransmission consent agreements and the good faith negotiation requirement terminate on that date. We agree with commentators who argue that the provisions of Section 325(b)(3)(C) are meant to foster competition. However, in the absence of guidance from Congress as to the Commission’s authority after this date, we can not assume that Congress was establishing a minimum time frame and that the Commission has authority to promulgate rules prohibiting exclusive

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<sup>215</sup>Network Affiliates Comments at 25.

<sup>216</sup>*Id.* at 26.

<sup>217</sup>EchoStar Reply at 22; LTVS Comments at 7.

<sup>218</sup>BellSouth Comments at 19-20; EchoStar Reply at 22; WCA Comments at 7; U S West Comments at 7; DIRECTV Reply at 9; Time Warner Reply at 15.

<sup>219</sup>BellSouth Comments at 19-20; EchoStar Comments at 20-21; DIRECTV Reply at 9; LTVS Comments at 7; U S West Comments at 7-8; WCA Comments at 6.

<sup>220</sup>Time Warner Reply at 15.

retransmission consent agreements and requiring good faith negotiation beyond January 1, 2006. Congress has demonstrated its ability to craft legislation that established a sunset date which the Commission has express authority to extend.<sup>221</sup> Such language is not contained in SHVIA. The statute clearly states that the provisions would last “until January 1, 2006.” The legislative history does not express any intent to extend such provisions. Thus, we must interpret Section 325(b)(3)(C) as written and that January 1, 2006 is meant to be the sunset date for the prohibition of exclusive retransmission consent agreements and the rules on good faith retransmission consent negotiations.

## VII. ADMINISTRATIVE MATTERS

95. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act (“RFA”), see 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated in the Notice. The Commission sought written public comments on the possible significant economic impact of the proposed policies and rules on small entities in the Notice, including comments on the IRFA. Pursuant to the RFA, see 5 U.S.C. § 604, a Final Regulatory Flexibility Analysis is contained in Appendix C.

96. *Paperwork Reduction Act of 1995 Analysis.* The actions herein have been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose no new or modified reporting and recordkeeping requirements or burdens on the public.

97. *Effective Date.* As discussed, Section 325(b)(2)(E) of the Communications Act grants satellite carriers a six-month period during which they may retransmit the signals of local broadcasters without a broadcaster’s express retransmission consent. We have adopted these rules before the end of the six-month period provided by Section 325(b)(2)(E) so that MVPDs, particularly satellite carriers, and broadcasters understand their rights and obligations under Section 325(b)(3)(C) before that period expires. To afford parties the maximum amount of time to negotiate retransmission consent in good faith and to file complaints pursuant to Section 325(b)(3)(C) before the expiration of the six-month period, this First Report and Order will be effective upon publication in the Federal Register. We find good cause exists under the Administrative Procedure Act (“APA”) to have the rules adopted in this First Report and Order take effect upon publication in the Federal Register pursuant to Section 553(d)(3) of the APA.<sup>222</sup> Prompt effectiveness of these rules will provide a framework under which broadcasters and satellite carriers can achieve retransmission consent before the expiration of the six-month period set forth in Section 325(b)(2)(E).

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<sup>221</sup>See 47 U.S.C. § 548(5) (program access exclusivity sunset and Commission authority to extend).

<sup>222</sup>The APA generally requires publication in the Federal Register of substantive rules 30 days prior to their effective date but permits substantive rules to become effective with less than 30 days advance publication for good cause. 5 U.S.C. § 553(d)(1) & (3); 47 C.F.R. § 427(b).

**VIII. ORDERING CLAUSES**

98. Accordingly, **IT IS ORDERED** that, pursuant authority found in Sections 4(i) 4(j), 303(r) and 325 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r) and 325, the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix B.

99. **IT IS FURTHER ORDERED** that the rule amendments set forth in Appendix B **WILL BECOME EFFECTIVE** upon publication in the Federal Register.

100. **IT IS FURTHER ORDERED** that the Consumer Information Bureau, Reference Information Center, **SHALL SEND** a copy of this First Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas  
Secretary