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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

PETITION FOR RECONSIDERATION

U S WEST, Inc. ("U S WEST"), by its attorneys, hereby submits its Petition for Reconsideration with respect to the Commission's *First Report and Order* in the above-captioned proceeding.^{1/}

As reflected in U S WEST's initial comments in this docket, U S WEST has made an affirmative commitment to providing competitive "overbuild" cable service within its telephone service area. Indeed, as of the date of this filing, U S WEST is constructing cable systems in communities totaling 800,000 homes passed.^{2/} Since the ability to offer broadcast programming is critical to the success of any overbuild effort of this magnitude, the Commission's "rules of the road" for retransmission consent will have a direct and immediate impact on whether consumers throughout the United States will enjoy the benefits of *bona fide* competition among multichannel video programming distributors ("MVPDs"). Accordingly, U S WEST is requesting reconsideration

^{1/} *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, CS Docket No. 99-363, FCC 00-99 (rel. Mar. 16, 2000) (the "*First Report and Order*").

^{2/} Comments of U S WEST, Inc., CS Docket No. 99-363, at 1 (filed Jan. 12, 2000) of Copies rec'd at 11
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of certain aspects of the Commission's *First Report and Order* which, if left as is, will make it only more difficult for U S WEST and other alternative MVPDs to obtain retransmission consent from local television stations under reasonable terms and conditions.

At the outset, it should be noted that to this day local television stations continue to offer U S WEST discriminatory or excessively burdensome terms and conditions for retransmission consent, many of which could be deemed permissible by virtue of the Commission's liberal definition of what presumptively qualifies as "good faith" negotiations under the *First Report and Order*. More specifically, U S WEST has encountered the following during recent retransmission consent negotiations with local television stations:

- a refusal to grant interim consent for signal carriage during the course of retransmission consent negotiations;
- demands for long term commitments (as long as ten years), with the station having unilateral "termination for convenience" rights, but U S WEST having no termination rights at all;
- provisions that give U S WEST no right to terminate where the station delivers a poor quality signal (even to the point of no signal at all), regardless of the duration of the problem;
- extremely broad "most favored nations" clauses;
- a demand that U S WEST affiliates deliver unreasonably high levels of advertising business to the station;
- a demand that U S WEST devote system bandwidth to additional programming or non-broadcast uses;
- confidentiality obligations that limit U S WEST's ability to complain of unfair or anticompetitive treatment; and

- an explicit refusal to give U S WEST retransmission consent under terms and conditions accorded to the incumbent cable operator.^{3/}

Neither U S WEST nor any other alternative MVPD stands any reasonable chance of obtaining Commission relief from the conduct described above if the agency's retransmission consent complaint process does not fairly allocate the burden of proof between an MVPD complainant and a defendant local television station. U S WEST therefore believes that the Commission should reconsider its decision to impose the burden of proof exclusively on the MVPD complainant *even in cases where the Commission presumes that the defendant broadcaster has not acted in good faith*. For example, a local television station will be presumed not to be negotiating in good faith with an alternative MVPD where it proposes compensation or carriage terms that result from an exercise of market power by other MVPDs in the market, or where it makes proposals that result from agreements not to compete or to fix prices.^{4/} In such cases, imposing the burden of proof exclusively on the MVPD complainant is a departure from the Commission's traditional policy of shifting the burden of proof where the complainant demonstrates that a legal presumption against the opposing party should apply. By way of example, under the Commission's rules concerning preemption of local zoning regulation of C-Band satellite earth stations, the Commission adopted a rebuttable presumption under which certain state and local regulation of such facilities is presumed unreasonable, and, where the presumption is shown to apply, the state or local authority at issue

^{3/} Compare, e.g., *First Report and Order* at ¶ 56 (listing examples of station proposals that presumptively qualify as "good faith").

^{4/} *First Report and Order* at ¶ 58.

bears the burden of proving that its regulation is permitted under the Commission's Rules.^{5/} Similarly, in determining whether to award a "finder's preference" to SMRS applicants, the Commission applies a rebuttable presumption that interference may result where a targeted station's actual transmission site is more than 1.6 kilometers from its assigned coordinates.^{6/} In such cases, the target licensee bears the burden of demonstrating that the siting variance at issue is minor as to its effects.^{7/}

Where an alternative MVPD alleges that a local television station's "bad faith" arises from the exercise of market power by other competing MVPDs or price-fixing agreements between the station and the alternative MVPD's competitors, it is almost invariably the case that the most critical evidence that supports the alternative MVPD's claim will be contained in confidential material in the exclusive possession of the station or other MVPDs in the market. Since discovery in MVPD-initiated retransmission consent cases is available only upon leave of the Commission, alternative MVPDs have no assurance that these documents will be made available during the retransmission consent complaint process. Given that the Commission has already established a presumption against a finding of "good faith" in "market power" and price-fixing cases, there is no legitimate public interest justification for the Commission to break from its own well-settled precedent and

^{5/} See 47 C.F.R. § 25.104(b); *Preemption of Local Zoning Regulations of Satellite Earth Stations*, 11 FCC Rcd 5809 (1996).

^{6/} *Daniel T. Meek*, DA 00-36, at ¶ 7 (WTB, rel. Jan. 11, 2000).

^{7/} *Id.*; See also *Access to Telecommunications Equipment and Services by Persons with Disabilities*, 11 FCC Rcd 8249 (1996) (Commission adopts rebuttable presumption that, by a date certain, all workplace non-common area telephones would be hearing aid compatible, thereby shifting the burden of proof to the party alleging otherwise).

require U S WEST or any other alternative MVPD to maintain the burden of proof where its complaint already establishes a *prima facie* case that a Commission presumption against a defendant local television station should apply. Moreover, failure to shift the burden of proof to the defendant in such cases will only increase the number of cases in which complainants will require Commission-approved discovery, thus exacerbating the administrative burden on the Commission's staff and delaying resolution of the underlying complaint. Accordingly, U S WEST asks that the Commission amend Section 76.65(d) of its Rules to provide that where an MVPD's complaint alleges facts that, if true, would establish a *prima facie* case that a Commission presumption against a defendant local television station should apply, the burden of proof will shift to that defendant local television station, subject to any protective order or other action the Commission deems necessary to protect the defendant's confidential documents.^{8/}

In addition, U S WEST asks for clarification as to how the Commission's one-year statute of limitations for MVPD-initiated retransmission consent complaints will apply to negotiations between an MVPD and a local television station for renewal of an existing retransmission consent agreement. Under the *First Report and Order*, retransmission consent negotiations that allegedly violate the Commission's rules trigger the one-year period *if* they are unrelated to any existing agreement between the parties.^{9/} Absent further clarification by the Commission, renewal

^{8/} U S WEST also asks the Commission to clarify that where an MVPD complainant alleges "bad faith" arising out of collusive conduct among local broadcasters and or competing MVPDs (as, for example, in the case of price-fixing), the MVPD may add such additional broadcasters and/or competing MVPDs as defendant parties, and that such defendant parties will be subject to whatever presumptions or discovery procedures the Commission applies to the MVPD's complaint.

^{9/} *First Report and Order* at ¶ 77.

negotiations arguably could be deemed “related” to the existing contract between the parties, and thus an MVPD complaint based on such negotiations might be time-barred if filed more than one year after the date of the existing contract. Since renewal negotiations often do not begin until after the first year of a multi-year retransmission consent agreement, this reading of the rule would preclude alternative MVPDs from filing renewal-based retransmission consent complaints in the vast majority of cases. U S WEST assumes that the Commission did not intend that the one-year statute of limitations prejudice alternative MVPDs in this manner. Accordingly, to ensure that there is no confusion among alternative MVPDs and local television stations about this issue, U S WEST asks that the Commission clarify that negotiations between an MVPD and a local television station to renew an existing retransmission consent agreement are not “related” to the parties’ existing contract for purposes of the one-year statute of limitations, and that such negotiations therefore trigger a new one-year filing period.

Finally, U S WEST asks the Commission to clarify that a local television station’s obligation to negotiate in good faith after the effective date of the *First Report and Order* (March 23, 2000) attaches regardless of any negotiations that may have taken place between the station and an alternative MVPD prior thereto. The purpose of this clarification is to ensure that local stations cannot claim a right to continue negotiating in bad faith simply because negotiations commenced before the Commission’s “good faith” rules went into effect.

WHEREFORE, for the reasons stated herein, U S WEST, Inc. requests that the Commission reconsider its *First Report and Order* in this proceeding consistent with the recommendations set forth above.

Respectfully submitted,

By: 
Daniel L. Poole
Norman G. Curtright

U S WEST, Inc.
1020 19th Street, N.W.
Washington, D.C. 20036
(303) 672-2817

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