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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

**Re: Joint Opposition of the ABC, CBS, Fox, and NBC Television
Network Affiliate Associations and the National Association of
Broadcasters, CS Docket No. 99-363**

Dear Ms. Salas:

Enclosed please find the original and eleven copies of the Joint Opposition of the ABC, CBS, Fox, and NBC Television Network Affiliate Associations and the National Association of Broadcasters in the above-referenced docket.

If any questions should arise during the course of your consideration of this matter, it is respectfully requested that you communicate with the undersigned.

Sincerely,



David Kushner

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

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

CS Docket No. 99-363

To: The Commission

**JOINT OPPOSITION OF THE
ABC, CBS, FOX, AND NBC
TELEVISION NETWORK AFFILIATE ASSOCIATIONS
AND THE NATIONAL ASSOCIATION OF BROADCASTERS**

The ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the Fox Television Affiliates Association, and the NBC Television Affiliates Association (collectively, the "Network Affiliates") and the National Association of Broadcasters ("NAB"), by their attorneys, hereby submit this opposition to the Petitions for Reconsideration filed in the above-referenced matter by U S WEST, Inc. and by Wireless Communications Association International, Inc. ("WCA") on April 24, 2000. Both U S WEST and WCA seek reconsideration of certain portions of the Commission's *First Report and Order*, FCC 00-99, released March 16, 2000, in the above-captioned proceeding. The Network Affiliates represent more than 800 local television broadcast stations throughout the nation that are affiliated with one of the four major television broadcast networks. NAB is a nonprofit incorporated association that serves and represents America's television broadcast stations.

I. The Burden Of Proof Should At All Times Remain On The Complainant

Both U S WEST and WCA ask the Commission to reconsider its decision in the *First Report and Order* that the burden of proof rest with the MVPD complainant to establish a violation of the “good faith” negotiation requirements.¹ The Commission’s decision was made after extensive comments by many parties, both in the initial and reply comment phases.²

In their petitions for reconsideration, U S WEST and WCA seek to reverse the fundamental premise of the American legal system that a complainant, in all but the most unusual circumstances, has the burden of proving its case. Instead, U S WEST and WCA would have the Commission—based simply on an MVPD’s decision to include certain words in a complaint—force a defendant local station to take on the burden of proving its own innocence.³ The Commission should reject these requests for the following reasons:

First, a burden-shifting rule in the nature of the one advocated by U S WEST and WCA would be a breathtaking rejection of the bedrock principle of American jurisprudence that a plaintiff must *prove* its claim. U S West and WCA advocate, in essence, that an MVPD complainant need do nothing more than say the “magic words” in its complaint and, thereby, force a broadcast station into the untenable position of proving that it did not violate the duty to negotiate in good faith. This is nonsense. It is a total reversal of the Commission’s considered decision in the *First Report and Order*, which was reached after full briefing on this issue by many parties. The petitioners have

¹ See *First Report and Order* at ¶ 89.

² See *id.*, Appendix A (listing parties that filed comments and reply comments).

³ See U S WEST, Petition for Reconsideration, at 5; WCA, Petition for Reconsideration, at 5.

offered no reason why it should be reconsidered.

Because an MVPD could shift the burden of proof simply by making certain claims in its complaint, every MVPD would naturally do so, and the Commission would thus reverse the normal allocation of burdens in every case. Such burden-shifting is plainly undesirable as a matter of public policy. Among other things, it would encourage the filing of frivolous complaints to intimidate broadcast stations during contract negotiations with an *in terrorem* effect and ensnarl the Commission in countless frivolous adjudicatory proceedings. Network Affiliates and NAB believe that the administrative burden placed on the Commission would be greater dealing with such frivolous complaints than it would be for the very rare case in which Commission-approved discovery may be required.⁴

Second, because the “good faith” and “exclusivity” provisions of Section 325(b)(3)(C) are in derogation of the common law, they must be narrowly construed, as the Commission properly recognized in its *First Report and Order*.⁵ It would further derogate from the fundamental premise of the common law that complaining parties bear the burden of proof should the Commission

⁴ See Petition of U S WEST at 5 (arguing that failure to shift the burden of proof will “increase the number of cases in which complainants will require Commission-approved discovery”); Petition of WCA at 5 (same). Under no circumstances should MVPDs be able to invoke some talismanic “magic words” that will open the door to discovery and a “fishing expedition” in an attempt to find something—anything—to make their case. Such an ability would permit MVPDs to harass broadcast stations and would be tantamount to allowing discovery as-of-right, which the Commission properly rejected. See *First Report and Order* at ¶¶ 78-79. As the Commission correctly recognized, evidence of a violation of the good faith standard will generally be available to an MVPD complainant, and, where it is not, the Commission has adopted adequate procedural protections for both sides. See *id.* at ¶ 79. U S WEST and WCA have presented no evidence not already considered by the Commission that would warrant shifting the burden of proof merely to assist MVPDs in filing complaints.

⁵ See *First Report and Order* at ¶ 20.

implement any burden-shifting mechanism. As the Commission stated:

[C]ongressional language in derogation of the common law should be interpreted to implement the express directives of Congress and no further. The United States Supreme Court has reiterated this rule of statutory construction on several occasions, holding that “[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.” In addition, the Court has stated that, when a statutory provision does derogate from the common law, it “must be strictly construed for no statute is to be construed as altering the common law, farther [sic] than its words import.”⁶

It would be going further than the express directive of Congress to implement any burden-shifting mechanism. Moreover, Section 325(b)(3)(C) should be read to favor the retention of the long-established and familiar principle that complainants bear the burden of proof.

Third, the entire “good faith” negotiation and “exclusivity” regime of SHVIA is analogous to the good faith bargaining requirement of Section 8(d) of the Taft-Hartley Act.⁷ As the Commission recognized, the collective bargaining duty of employers and unions set forth in that Act is the “most appropriate source of guidance” in interpreting Section 325(b)(3)(C).⁸ Yet in the labor law context, where often the disparity in bargaining power between employer and union is far greater than any potential disparity between a broadcaster and an MVPD, the burden of proof never shifts.⁹

⁶ *Id.* (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952), and *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304 (1959)).

⁷ See 29 U.S.C. § 158(d).

⁸ *First Report and Order* at ¶ 22.

⁹ See *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
(continued...)

There is no reason to ever shift the burden of proof in the “good faith” negotiation and “exclusivity” context.

Fourth, in creating a procedural regime to govern complaints arising from violations of Section 325(b)(3)(C), the Commission also looked to its rules implementing the good faith negotiation requirement of Section 251 of the Communications Act upon common carriers.¹⁰ Even though the Commission there created a *per se* violation of the duty to negotiate in good faith and listed several other actions that would be presumed to violate the statutory duty, the Commission did not adopt any burden-shifting mechanism and left Commission review to be handled on a case-by-case basis.¹¹

Fifth, 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. For example, in Section 325(e)(6) of the Communications Act, added by SHVIA, Congress specifically provided that a defendant satellite carrier has the burden of proving any

⁹(...continued)

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”).

¹⁰ See *First Report and Order* at ¶ 22 n.42; Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues, *Notice of Proposed Rule Making*, FCC 99-406 (released Dec. 22, 1999), ¶¶ 17-18.

¹¹ See generally Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, FCC 96-325, 4 Comm. Reg. (P & F) 1 (1996), at ¶¶ 138-56; see *id.* at ¶ 152 (finding that it is “a *per se* failure to negotiate in good faith for a party to refuse to include in an agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules”); *id.* at ¶ 154 (stating that “actions that intended to delay negotiations or resolution of disputes are inconsistent with the statutory duty to negotiate in good faith”).

defense to an allegation of illegal signal retransmission.¹² Similarly, in another key provision of SHVIA applicable to satellite carrier retransmissions of broadcast stations, Congress placed the burden on satellite carriers to prove that they provide distant network stations only to “unserved households.”¹³ However, Congress placed no such burden on a defendant broadcaster in an action alleging breach of the “good faith” or “exclusivity” provisions. “Where 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.”¹⁴

Finally, the Commission decisions cited by U S WEST and WCA in support of their view that the burden of proof ought to be shifted are irrelevant.¹⁵ Unlike the Commission’s decision implementing Section 251 of the Communications Act, none of these decisions had anything to do with a duty to negotiate in good faith; indeed, none even arises in the context of a complaint proceeding at the Commission. As discussed above, the Commission’s own precedents under Section 251 (and those from the NLRB in similar “good faith” proceedings) unanimously support the burden of proof allocation set forth by the Commission in the *First Report & Order* here.

It is a fundamental principle of American jurisprudence that a plaintiff must *prove* its claim. For each of the above reasons, the Commission cannot and should not abandon that principle.

¹² See 47 U.S.C. § 325(c)(6).

¹³ See 17 U.S.C. § 119(a)(5)(D).

¹⁴ *Russello v. United States*, 464 U.S. 16, 23 (1983).

¹⁵ See *Access to Telecommunications Equipment and Services by Persons with Disabilities, Report and Order*, FCC 96-285, 3 Comm. Reg. (P & F) 766 (1996), at ¶¶ 35-39; Daniel T. Meek, *Memorandum Opinion and Order*, DA 00-36 (WTB/CWD released Jan. 11, 2000), at ¶ 7; *Preemption of Local Zoning Regulation of Satellite Earth Stations, Report and Order and Further Notice of Proposed Rule Making*, FCC 96-78, 2 Comm. Reg. (P & F) 723 (1996), at ¶¶ 28-37.

II. It Would Be Irrational To Treat Renewal Negotiations As “Related” To An Expiring Retransmission Consent Agreement

Both U S WEST and WCA ask for clarification on how the one-year statute of limitations for complaints filed pursuant to Section 325(b)(3)(C) should apply for complaints arising from negotiations to renew an existing retransmission consent agreement.¹⁶ Network Affiliates and NAB do not believe that a clarification is necessary but do not take exception to the construction U S WEST and WCA propose. Where there is an expiring retransmission consent agreement, it is expected that the parties will have to negotiate a new agreement and that the Commission’s triggering events in new rule Section 76.65(e) will be implicated anew.¹⁷ It seems obvious that the Commission did not intend—and the rule does not state—that complaints arising from renewal negotiations of any multi-year retransmission consent agreement would invariably be time-barred.

Similarly, U S WEST’s request to clarify that local broadcast stations must negotiate in good faith after March 23, 2000, also asks to clarify the obvious.¹⁸ Local broadcast stations fully recognize that they have a duty to negotiate in good faith, and they will do so in accordance with the Commission’s rules.¹⁹ Indeed, the good faith of broadcasters is demonstrated by the fact that a noncable MVPD (DirecTV) has recently successfully concluded retransmission consent negotiations with some 80 or more stations in markets across the United States.

¹⁶ See Petition of U S WEST at 5-6; Petition of WCA at 3.

¹⁷ See 47 C.F.R. § 76.65(c).

¹⁸ See Petition of U S WEST at 6.

¹⁹ See 47 C.F.R. § 76.65(a) (duty to negotiate in good faith); *id.*, § 76.65(f) (sunset of rule).

Conclusion

For the above reasons, Network Affiliates and NAB respectfully urge the Commission to deny the Petitions for Reconsideration filed by U S WEST and WCA.

Respectfully submitted,

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June 2, 2000

Certificate of Service

The undersigned, of the law firm of Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., hereby certifies that s/he has served a copy of the foregoing **Joint Opposition of the ABC, CBS, Fox, and NBC Television Network Affiliate Associations and the National Association of Broadcasters**, by depositing said copy in the United States mail, first class postage paid, addressed as follows:

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This the 2nd day of June, 2000.

Lori H. Peoples