

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 )  
)  
Retransmission Consent Issues )

CS Docket No. 99-363

REPLY OF U S WEST, INC.

U S WEST, Inc. ("U S WEST"), by its attorneys, hereby submits its reply to the Joint Opposition of the ABC, CBS, Fox and NBC Television Network Affiliate Associations and the National Association of Broadcasters (the "Network Affiliates") to U S WEST's Petition for Reconsideration in the above-captioned matter.

The Network Affiliates state that U S WEST has asked for "a total reversal of the Commission's considered decision in the *First Report and Order*."<sup>1/</sup> This statement is false. U S WEST has limited its request for relief to the issue of burden of proof, and, consistent with precedent, has asked the Commission to declare only that the burden of proof in a retransmission consent complaint proceeding will shift to a defendant television broadcast station where the complainant alleges facts that, if true, would establish a *prima facie* case that a Commission presumption against the defendant should apply.<sup>2/</sup> The requested relief implicates no other aspect of

<sup>1/</sup> Network Affiliate Opposition at 2.

<sup>2/</sup> Petition at 5. For example, a television broadcast station will be presumed not to be negotiating retransmission consent in "good faith" as required under the Rules where it proposes compensation or carriage terms that result from an exercise of market power by the broadcaster or by other multichannel video programming distributors ("MVPDs") ~~No. 11-0012-100~~ *Implementation of the*

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the Commission's retransmission consent rules or affects any other substantive or procedural rights that television stations may have thereunder. The Network Affiliates' bald assertion to the contrary is a misrepresentation of U S WEST's Petition.

In a similar vein, the Network Affiliates claim that a grant of U S WEST's Petition "would be a breathtaking rejection of the bedrock principle of American jurisprudence that a plaintiff must *prove* his claim."<sup>3/</sup> Again, this statement is false. At no point in its Petition did U S WEST even suggest that a retransmission consent complainant should *never* bear the burden of proof. Moreover, the concept of shifting the burden of proof to the defendant where the plaintiff has established a *prima facie* case has been a "bedrock principle of American jurisprudence" for nearly two centuries.<sup>4/</sup> Indeed, the United States Supreme Court, using language that is particularly relevant here, has held that "a rebuttable presumption clearly is a rule of evidence *which has the effect of shifting the burden of proof.*"<sup>5/</sup> For the reasons set forth in U S WEST's Petition, U S WEST is merely asking the

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*Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, CS Docket No. 99-363, FCC 00-99, at ¶ 56 (rel. Mar. 16, 2000) (the "First Report and Order").

<sup>3/</sup> Network Affiliate Opposition at 2 (emphasis in original).

<sup>4/</sup> See, e.g., *Powers v. Russell*, 30 Mass. 69, 77 (1833) ("But where the party having the burden of proof giv[ing] competent and *prima facie* evidence of a fact, and the adverse party, instead of producing proof which would go to negate the same proposition of fact, proposed to show another and distinct proposition which avoids the effect of it, then the burden of proof shifts and rests upon the party proposing to show the latter fact.").

<sup>5/</sup> *Heiner v. Donnan*, 285 U.S. 312, 329 (1932) (emphasis added).

Commission to apply this principle to its own legal presumptions against the broadcasters during the retransmission consent complaint process.<sup>6/</sup>

Significantly, at no point do the Network Affiliates challenge the presumptions that the Commission has adopted against them in this proceeding, nor do they otherwise suggest that the presumptions are inconsistent with the letter and spirit of the Satellite Home Viewer Improvement Act of 1999 (the “SHVIA”).<sup>7/</sup> Instead, the Network Affiliates contend that the Commission must infer from Congress’s silence that Congress intended to abandon the Commission’s historical approach to shifting the burden of proof and instead assign the burden of proof exclusively to MVPD complainants, even where any Commission presumptions against a defendant television station are shown to apply.<sup>8/</sup> As demonstrated below, however, it is precisely *because* of Congress’s silence that Commission should shift the burden of proof as requested by U S WEST.

At bottom, two fundamental legal principles are relevant here. First, it is well settled that the Commission “enjoys express statutory authority ‘to conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.’”<sup>9/</sup> Second, courts are

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<sup>6/</sup> The Network Affiliates go so far as to argue that shifting the burden of proof “would further derogate from the fundamental premise of the common law that complaining parties bear the burden of proof.” Network Affiliate Opposition at 3. Since U S WEST’s request is grounded in principles of common law that have existed for nearly 200 years, it is difficult to imagine how a grant of that request could be in derogation of common law.

<sup>7/</sup> Cf. *Time Warner Cable*, 9 FCC Rcd 3221, 3225 n. 81 (1994), citing *Panhandle Producers v. Economic Regulatory Ass’n*, 822 F.2d 1105 (D.C. Cir. 1987).

<sup>8/</sup> Network Affiliate Opposition at 5-6.

<sup>9/</sup> *GTE Service Corporation v. FCC*, 782 F.2d 263, 273 (D.C. Cir. 1985), quoting 47 U.S.C. § 154(j). See also *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (“This court has upheld in the strongest terms the discretion of regulatory agencies to control the disposition of their caseload.”) (citations omitted).

reluctant to infer from Congressional silence an intent to overturn established Commission rules or policies.<sup>10/</sup> At the time Congress passed the SHVIA, both the courts and the Commission had repeatedly recognized that the burden of proof may be shifted to non-complaining parties, either in recognition of explicit presumptions against the non-complaining party or where the complaining party otherwise established a *prima facie* case justifying a shift of the burden of proof.<sup>11/</sup> The Network Affiliates do not cite a single instance in the text or legislative history of the SHVIA in which Congress expressed any intent whatsoever that the Commission depart from this precedent

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<sup>10/</sup> See, e.g., *City of New York v. FCC*, 486 U.S. 67, 68 (1988) (“It is also quite significant that nothing in the Cable Act or its legislative history indicates that Congress explicitly disapproved of the Commission’s pre-emption of local [cable] technical standards. . . [W]e doubt that Congress intended to overturn the Commission’s decade-old policy without discussion or even any suggestion that it was doing so.”).

<sup>11/</sup> See, e.g., *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990) (“A charge that a carrier has discriminated in violation of [Section 202(a) of the Communications Act] entails a three-step inquiry: (1) whether the services are ‘like’; (2) if they are ‘like,’ whether there is a price difference; and (3) if there is a difference, whether it is reasonable. If the services are ‘like,’ the carrier offering them has the burden of justifying the price disparity as reasonable.”) (citations omitted); *National Communications Association, Inc. v. AT&T Corp.*, 1998 U.S. Dist. LEXIS 19067 (S.D.N.Y. 1998) (same); *Implementation of the Telecommunications Act of 1996*, 14 FCC Rcd 15550, 15621 (1999) (where carrier files a complaint alleging discrimination under Section 251(b)(3) of the Communications Act, defendant local exchange carrier bears burden of proof where complainant alleges facts which, if true, are sufficient to constitute a violation of the statute); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 - Rate Regulation*, 12 FCC Rcd 15554, 15567 (1997) (Commission upholds shifting of burden of proof to local cable franchising authority where cable operator’s disputed rate is at or below the rate presumed reasonable by the Commission); *United Community Antenna*, 63 FCC2d 1376, 1381 (1978) (adopting presumption of harm to broadcasters from cable importation of Canadian signals carrying duplicative programming, and shifting burden of proof to cable television operator); *Vision 3 Broadcasting, Inc. v. Time Warner Cable*, 14 FCC Rcd 15348, 15353 (CSB, 1999) (in must carry complaint proceeding initiated by low power television (“LPTV”) station, burden of proof shifts to defendant cable operator where LPTV station proffers evidence of its local programming).

when addressing the burden of proof issue in its retransmission consent rules. Instead, the Network Affiliates cite statutory provisions under which defendant satellite carriers bear the burden of proof from the moment a complaint is filed, and from this the Network Affiliates conclude that the burden of proof can never be shifted to a defendant television station *after* a complaint is filed.<sup>12/</sup>

The statutory provisions cited by the Network Affiliates, however, are categorical exceptions to the general rule that the complainant in an adjudicatory proceeding bears the burden of proof from the moment the complaint is filed. By contrast, U S WEST's Petition addresses the very different question of whether the Commission, having established a series of presumptions against television broadcast station defendants, can and should shift the burden of proof to those defendants in cases where it is shown that those presumptions apply. The SHVIA is absolutely silent on that point, and, for the reasons set forth above, the Commission should not infer from that silence any intent by Congress to vitiate the Commission's prior policies in this regard.<sup>13/</sup>

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<sup>12/</sup> Network Affiliate Opposition at 5-6, *discussing* 47 U.S.C. § 325(e)(6) and 17 U.S.C. § 119(a)(5)(D).

<sup>13/</sup> The Network Affiliates note the absence of explicit burden-shifting language in the Commission's 1996 *Local Competition Order* implementing the "good faith" negotiation requirement for common carriers in Section 251 of the Communications Act. *See* Network Affiliate Opposition at 5 n.11, *citing Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15576-77 ¶¶ 152, 154 (1996). Aside from the fact that the Commission cited Section 251 in support of its definition of "good faith" and not in relation to the issue of burden of proof, *see First Report and Order* at ¶ 22 n.42, the relevant portions of the *Local Competition Order* are silent as to burden of proof and thus cannot be cited as dispositive on that question. Similarly, neither of the labor law cases relied upon by the Network Affiliates state that the burden of proof "never shifts." Network Affiliate Opposition at 4 n.9, *citing North Cambria Fuel Co. v. NLRB*, 645 F.2d 177, 182 (3d Cir. 1981) and *NLRB v. St. Louis Cordage Mills*, 424 F.2d 976, 979 (8th Cir. 1970).

In addition, the Network Affiliates contend with no factual support whatsoever that shifting the burden of proof to defendant television stations under the circumstances suggested by U S WEST will “encourage the filing of frivolous complaints to intimidate broadcast stations during retransmission consent negotiations” and “ensnarl the Commission in countless frivolous adjudicatory proceedings.”<sup>14/</sup> Given that the Commission’s retransmission consent rules give television stations almost unlimited latitude to withhold retransmission consent for any reason they choose, the Network Affiliates’ concerns about being “intimidated” during retransmission consent negotiations ring false, particularly where, as in the case of U S WEST and other cable overbuilders, the MVPD at issue has no market power and thus can wield no leverage at the bargaining table. In any case, and contrary to what the Network Affiliates allege in their Opposition, U S WEST has never suggested that an MVPD complainant should be permitted to invoke “talismanic magic words” or use other dilatory tactics as a pretext for shifting the burden of proof to a defendant television station.<sup>15/</sup> As in other situations where the Commission shifts the burden of proof, an MVPD complainant should be required to sustain a threshold burden of alleging *facts* which, if true, would be sufficient to demonstrate that a Commission presumption against the defendant should apply.<sup>16/</sup> The Commission has already found such a requirement to be a sufficient deterrent against the filing of frivolous complaints, and the Network Affiliates’ speculation to the contrary offers no justification for the Commission to depart from that finding here.<sup>17/</sup>

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<sup>14/</sup> Network Affiliate Opposition at 3.

<sup>15/</sup> *See id.* at 3 n.4.

<sup>16/</sup> *See Implementation of the Telecommunications Act of 1996*, 14 FCC Rcd 15550, 15621 (1999).

<sup>17/</sup> *Id.*

In sum, U S WEST is not, as the Network Affiliates would have it, asking the Commission to “abandon conventional procedural rules.”<sup>18/</sup> Rather, U S WEST is only asking that the Commission *adhere* to conventional procedural rules by shifting the burden of proof to a defendant television station where a retransmission consent complainant establishes a *prima facie* case that any of the Commission’s presumptions against the defendant should apply. Conversely, the Network Affiliates have accorded those presumptions no legal significance whatsoever, and ask the Commission to proceed as if the presumptions do not exist. This cannot be what the Commission intended when it adopted the presumptions in the *First Report and Order*, and otherwise cannot be reconciled with the Commission’s approach to shifting the burden of proof in other cases.

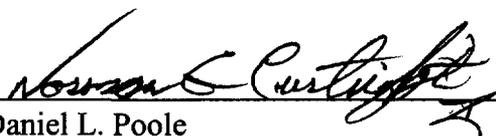
As before, U S WEST emphasizes that it has been and continues to be more than willing to negotiate retransmission consent agreements with local television stations on reasonable terms and conditions. The Commission, however, will only discourage such negotiations if its retransmission consent complaint procedures do not fairly allocate the burden of proof to the appropriate parties.

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<sup>18/</sup> Network Affiliate Opposition at 5.

Accordingly, consistent with the broader pro-competitive objectives of the SHVIA and the Commission's public interest mandate under the Communications Act, the Commission can and should adopt the burden-shifting mechanism proposed in U S WEST's Petition.

Respectfully submitted,

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June 15, 2000

**CERTIFICATE OF SERVICE**

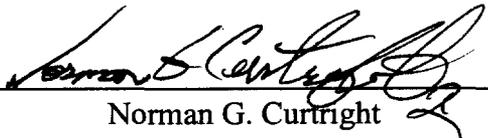
I, Norman G. Curtright, hereby certify that on this 15th day of June, 2000, copies of the foregoing "Reply of U S WEST, Inc" in CS Docket No. 99-363 were served first-class United States mail, postage prepaid to the following:

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