

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

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In the Matter of:)
)
Implementation of the Satellite Home)
Viewer Improvement Act of 1999)
)
Retransmission Consent Issues:)
Good Faith Negotiation and Exclusivity)
)
)

CS Docket No. 99-363

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ORDER ON RECONSIDERATION

Adopted: August 10, 2001

Released: August 15, 2001

By the Commission:

I. INTRODUCTION

1. The Commission issued a *First Report and Order* in the above-captioned proceeding establishing rules and complaint procedures related to the obligation of local broadcasters to negotiate in good faith with multichannel video programming distributors ("MVPDs") for retransmission consent of their broadcast signals.¹ US WEST, Inc. ("US WEST") and the Wireless Communications Association International, Inc. ("WCA") filed petitions for reconsideration of the *First Report and Order*. The ABC, CBS, Fox and NBC Television Network Affiliate Associations and the National Association of Broadcasters ("Broadcasters") filed a joint opposition to the reconsideration petitions. US West and WCA each filed a reply.² As described below, we grant the Petitions for Reconsideration as to certain clarifications of our rules, but deny them in all other respects.

II. BACKGROUND

2. In the *First Report and Order*, the Commission adopted rules implementing certain aspects of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA").³ SHVIA authorizes satellite carriers to add more local and national broadcast programming to their offerings, and to make that programming available to subscribers who previously have been prohibited from receiving broadcast fare

¹*Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 (2000) ("*First Report and Order*").

²WCA's reply merely joins in the reply of US WEST.

³SHVIA was enacted as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA") (relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.), PL 106-113, 113 Stat. 1501, Appendix I (1999).

via satellite under compulsory licensing provisions of the copyright law. Among other things, Section 325(b)(3)(C) of the Communications Act requires satellite carriers to obtain retransmission consent for the local broadcast signals they carry, requires broadcasters, until 2006, to negotiate in good faith with satellite carriers and other MVPDs with respect to their retransmission of the broadcasters' signals, and prohibits broadcasters from entering into exclusive retransmission consent agreements.⁴

3. The *First Report and Order* determined that the statute does not intend to subject retransmission consent negotiation to detailed substantive oversight by the Commission.⁵ Instead, the *Order* concluded that Congress intended that the Commission follow established precedent, particularly in the field of labor law, in implementing the good faith retransmission consent negotiation requirement.⁶ Consistent with this conclusion, the *First Report and Order* adopted a two-part test for good faith. The first part of the test consists of a brief, objective list of negotiation standards.⁷ The second part of the good faith test is based on a totality of the circumstances standard. Under this standard, an MVPD may present facts to the Commission which, even though they do not allege a violation of the enumerated standards, given the totality of the circumstances constitute a failure to negotiate in good faith.⁸ An MVPD believing itself to be aggrieved under Section 325(b)(3)(C) may file a complaint with the Commission.

III. DISCUSSION

4. WCA and US WEST raise two common issues for reconsideration or clarification and US WEST advances a third issue for clarification. Each is discussed below.

A. Burden of Proof

5. In the *First Report and Order*, the Commission placed the burden of proof on the MVPD complainant to establish that a broadcaster violated its duty to negotiate retransmission consent in good faith.⁹ The Commission found this conclusion to be consistent with labor law precedent, which also places the burden on the complainant.¹⁰ The Commission also found that placing the burden of proof on

⁴47 U.S.C. § 325(b)(3)(C). Retransmission consent is the process whereby television broadcasters negotiate and consent to carriage of their signals by MVPDs such as cable television operators and satellite carriers.

⁵*First Report and Order*, 15 FCC Rcd at 5454.

⁶*Id.*

⁷*First Report and Order*, 15 FCC Rcd at 5462-64. First, a broadcaster may not refuse to negotiate with an MVPD regarding retransmission consent. Second, a broadcaster must appoint a negotiating representative with authority to bargain on retransmission consent issues. Third, a broadcaster must agree to meet at reasonable times and locations and cannot act in a manner that would unduly delay the course of negotiations. Fourth, a broadcaster may not put forth a single, unilateral proposal. Fifth, a broadcaster, in responding to an offer proposed by an MVPD, must provide considered reasons for rejecting any aspects of the MVPD's offer. Sixth, a broadcaster is prohibited from entering into an agreement with any party conditioned upon denying retransmission consent to any MVPD. Finally, a broadcaster must agree to execute a written retransmission consent agreement that sets forth the full agreement between the broadcaster and the MVPD. *Id.*

⁸*Id.* at 5458.

⁹*Id.* at 5483.

¹⁰*Id.*

the MVPD complainant to be consistent with its belief that generally the evidence of a violation of the good faith standard will be accessible by the complainant.¹¹

6. WCA and US WEST assert that the Commission should reconsider its decision to impose the burden of proof exclusively on the MVPD complainant, especially in cases in which the Commission presumes that the defendant broadcaster has not acted in good faith.¹² Specifically, petitioners request that the Commission amend its rule to provide that when an MVPD's complaint alleges facts that, if true, would establish a *prima facie* case that a Commission presumption against a broadcaster should apply, the burden of proof will shift to the broadcaster.¹³ WCA and US WEST assert that the burden of proof should shift from the complainant to the defendant in instances such as when a broadcaster proposes compensation or carriage terms that result from the exercise of market power by the broadcaster or other MVPDs in the market, or when a broadcaster make proposals based on agreements not to compete or to fix prices.¹⁴ US WEST and WCA argue that its burden-shifting procedure is analogous to proceedings in which the Commission has adopted a rebuttable presumption that respondent parties must overcome in order for a disputed regulation to be permitted under the Commission's rules.¹⁵ Finally, petitioners argue that failure to adopt a burden-shifting procedure will result in more proceedings in which Commission-controlled discovery is necessary, thereby increasing administrative burden and delaying resolution of good faith complaints.¹⁶

7. The Broadcasters offer a number of arguments against US WEST and WCA's burden-shifting procedure. The Broadcasters assert that such a mechanism "would be a breathtaking rejection of the bedrock principle of American jurisprudence that a plaintiff must prove its claim."¹⁷ The Broadcasters observe that petitioners' burden-shifting procedure would subvert the Commission's decision to place the burden of proof on complainants because complainants would include burden-shifting allegations in every complaint.¹⁸ The Broadcasters also argue that the two areas of law on which the Commission relied in crafting the good faith negotiation rules, the good faith bargaining requirement of Section 8(d) of the Taft-Hartley Act and the good faith negotiation requirement of Section 251 of the Communications Act, do not permit a shifting of the burden to the defendant.¹⁹ Finally, the Broadcasters assert that the Commission actions establishing rebuttable presumptions in certain instances are irrelevant, arguing that none of the actions cited involves a duty to negotiate in good faith or even arise in the context of a Commission complaint proceeding.²⁰

¹¹*Id.*

¹²US WEST Petition at 3; WCA Petition at 4.

¹³US WEST Petition at 5; WCA Petition at 5-6.

¹⁴US WEST Petition at 3; WCA Petition at 4.

¹⁵US WEST Petition at 3-4; WCA Petition at 4, citing *Preemption of Local Zoning Regulations of Satellite Earth Stations*, 11 FCC Rcd 5809 (1996); *Access to Telecommunications Equipment and Services by Persons with Disabilities*, 11 FCC Rcd 8249 (1996).

¹⁶US WEST Petition at 5; WCA Petition at 5.

¹⁷Joint Opposition at 2.

¹⁸*Id.* at 3.

¹⁹*Id.* at 4-5.

²⁰*Id.* at 6.

8. We decline to establish the burden-shifting procedure suggested by US WEST and WCA. While we agree with petitioners that the Commission "enjoys express statutory authority to conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice,"²¹ US WEST and WCA have not persuaded us that reconsideration in this instance is warranted or appropriate. US WEST and WCA correctly state that the Commission, in the *First Report and Order*, determined that certain bargaining proposals, including proposals based on the exercise of market power by a broadcast station or other MVPDs in the market or proposals that result from agreements not to compete or to fix prices, are presumptively not consistent with the good faith negotiation requirement.²² We fail to see, however, how the establishment of such presumptions would lead to the shifting of the burden of proof for merely alleging facts that, *if true*, would establish a *prima facie* case of such presumption. Under such a framework, any complainant would be able to shift the burden of proof merely by alleging that a retransmission consent proposal demonstrates the exercise of market power by the broadcaster or another MVPD in the market. We do not see such a result intended in either the language or the legislative history of the statute, and despite petitioner's argument to the contrary,²³ we fail to perceive a sensible way to interpret Congress' silence on this issue as a reason to shift the burden of proof to the broadcaster in such cases. Nor do we believe that our procedures will allow a broadcaster to be other than vigorous in its defense. As the Commission noted in the *First Report and Order*, placing the burden of proof on the complainant:

. . . should not be interpreted as permitting a broadcaster to remain mute in the face of allegations of a [good faith] 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. In addition, where necessary the Commission has discretion to impose discovery requests on a defendant to a [good faith] complaint. However, in the end, the complainant must bear the burden of proving that a violation occurred.²⁴

Petitioners have failed to demonstrate that the burden of proof of establishing a good faith violation should rest elsewhere. Accordingly, US WEST and WCA's request for reconsideration on this issue is denied.

B. Limitations Period

9. In the *First Report and Order*, the Commission established a one year limitations period within which a complainant must bring any complaint related to a violation of the good faith retransmission consent negotiation requirement, holding, in part, that a good faith:

complaint filed pursuant to Section 325(b)(3)(C) must be filed within one year of the date any of the following occur . . . (b) a broadcaster engages

²¹US WEST Reply at 3, quoting *GTE Service Corporation v. FCC*, 782 F.2d 263, 273 (D.C. Cir. 1985).

²²*First Report and Order*, 15 FCC Rcd at 5470.

²³See US WEST Reply at 3-5.

²⁴*First Report and Order*, 15 FCC Rcd at 5483.

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.* . . .²⁵

US WEST and WCA are concerned that, in certain circumstances, this provision of the limitations period could be applied to retransmission consent renewal negotiations thereby barring claims for good faith violations occurring during any renewal negotiations.²⁶ Petitioners request that the Commission clarify that negotiations between an MVPD and a broadcaster to renew an existing retransmission consent agreement are not related to the parties' existing contract for purposes of the one-year limitations period, and that such negotiations trigger a new one-year filing period.²⁷ The Broadcasters assert that the requested clarification is unnecessary, but do not oppose the clarification requested by US WEST and WCA.²⁸

10. We grant US WEST and WCA's request for clarification. Section 325(b)(3)(C) imposes an affirmative duty on broadcasters to negotiate retransmission consent in good faith until 2006. This duty applies to all retransmission consent negotiations during this period, including renewal negotiations. The intent in adopting Section 76.65(e)(2) was to ensure that complainants do not sit on grievances and that they bring good faith complaints in a timely manner.²⁹ For example, if a broadcaster and MVPD negotiate a five-year retransmission consent agreement in Year 1 and subsequently encounter a dispute regarding the proper interpretation of a provision of such agreement in Year 3, Section 76.65(e)(2) would bar a good faith complaint based upon the negotiations and contract executed in Year 1. On the other hand, if a broadcaster and MVPD negotiate and execute a five-year retransmission consent agreement in Year 1 and subsequently commence negotiations to renew or extend such consent in Year 4, any alleged violations of the good faith requirement stemming from such Year 4 negotiations are subject to complaint for a one-year period. An MVPD may not, however, use the commencement of such renewal or extension negotiations to raise good faith allegations solely related to the negotiations and contract executed in Year 1.

C. Effect of the Good Faith Rules on Pre-Existing Negotiations

11. US WEST asks the Commission to clarify that a broadcaster's obligation to negotiate after the effective date of the rules established in the *First Report and Order* attaches regardless of any negotiations that took place between the broadcaster and MVPD prior thereto.³⁰ The Broadcasters again assert that the requested clarification is unnecessary, but do not oppose the clarification requested by US WEST.³¹ We grant US WEST's request for clarification. A broadcaster's duty to negotiate retransmission consent in good faith commenced upon the effective date of our good faith rules regardless of any prior course of negotiations.

²⁵*First Report and Order*, 15 FCC Rcd at 5478 (emphasis added).

²⁶US WEST Petition at 5-6; WCA Petition at 2-3.

²⁷US WEST Petition at 6; WCA Petition at 3.

²⁸Joint Opposition at 7.

²⁹*First Report and Order*, 15 FCC Rcd at 5478.

³⁰US WEST Petition at 6.

³¹Joint Opposition at 7.

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that the Petitions for Reconsideration filed by US WEST, INC. and the Wireless Communications Association International, Inc. **ARE GRANTED AND DENIED** and the *First Report and Order* in this proceeding **IS CLARIFIED** to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary