FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 20, 22, 24, 80, 90, 99

[GN Docket No. 93–252; FCC 00–66]

Petitions for Reconsideration; Regulation of Mobile Radio Services

AGENCY: Federal Communications Commission.

ACTION: Final rule; petitions for reconsideration.

SUMMARY: This document denies petitions for reconsideration of the Second Report and Order (Second R&O) in this proceeding, regarding regulatory treatment of mobile services. Some of the petitions are dismissed because they provide no new information warranting reconsideration of the Second R&O, and others are dismissed because the issues raised are either moot or beyond the scope of this proceeding.

FOR FURTHER INFORMATION CONTACT: Jane Phillips, 202–418–1310.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order in GN Docket No. 93–252, FCC 00–66, adopted February 25, 2000, and released March 10, 2000. The complete text of this document is available on the Commission's Internet site, at *www.fcc.gov.* It is also available for inspection and copying during normal business hours in the FCC Reference Information Center, Courtyard Level, 445 12th Street, SW, Washington, DC, and may be purchased from the Commission's copy contractor, International Transcription Services, Inc., CY–B400, 445 12th Street, SW, Washington, DC.

Synopsis of the Order

1. On February 3, 1994, the Commission adopted the CMRS Second Report and Order (59 FR 18493, April 19, 1994), which implemented revisions to sections 3(n) and 332 of the Communications Act of 1934, which were enacted in the Omnibus Budget Reconciliation Act of 1993. These revisions created a comprehensive framework for the regulation of mobile radio services, including existing common carrier mobile services, private land mobile services, and new services such as Personal Communications Services. Between May 19 and July 1, 1994, the Commission received 15 petitions for reconsideration of the CMRS Second Report and Order, 19 oppositions, and 12 reply comments addressing a broad range of issues. (A list of parties filing petitions for reconsideration, oppositions and comments, and reply comments to the oppositions may be found in Appendix A of the full text of this Order.)

2. Some issues raised by petitioners on reconsideration are outside the scope of the CMRS Second Report and Order and are dismissed on that basis. (*see*, for example, footnote 3 of the full text of the Order.) Many of the issues raised on reconsideration have subsequently given rise to, or been addressed in, separate proceedings. (*see* footnote 4 of the full text of the Order.) Still others, including several requests for clarification, have been rendered moot by other subsequent events or Commission actions. (See footnote 5 of the full text of the Order.) The Commission in the CMRS Second Report and Order addressed several of the remaining issues previously. Because none of the petitioners has presented new information or argument that would warrant reversal, the Commission denies these petitions.

3. The two remaining issues, raised by McCaw Cellular Communications, Inc., concern requests that the Commission preempt states from requiring CMRS providers to file informational tariffs and from imposing their own interconnection requirements on CMRS providers. In the absence of evidence in the record that states are attempting to exercise jurisdiction with respect to informational tariffs and CMRS interconnection requirements, there appears to be neither a reason to address these issues nor a record sufficient to support substantive decisions with respect to them. Consequently, the Commission denies this petition.

Ordering Clause

4. The petitions for reconsideration, or portions thereof, filed by the American Mobile Telecommunications Association, McCaw Cellular Communications, Inc., MCI Telecommunications Corporation, the Personal Communications Industry Association, and the National Cellular Resellers Association with respect to the CMRS Second Report and Order in GN Docket No. 93–252 are denied on the merits. The remaining petitions, or portions thereof, filed by the American Mobile Telecommunications Association, Ameritech, CUE Network Corporation, GTE Service Corporation, McCaw Cellular Communications, Inc., MCI Telecommunications Corporation, the National Association of Regulatory Utility Commissioners, the National Cellular Resellers Association, the New York Department of Public Service, Pacific Bell, the Pennsylvania Public Utility Commission, SEIKO Telecommunications Systems, Inc., and the Waterway Communications System, Inc. are dismissed because the issues raised are either moot or beyond the scope of this proceeding.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 00–7131 Filed 3–22–00; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[CS Docket No. 99–363; FCC 00–99]

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

AGENCY: Federal Communications Commission.

ACTION: Final rule; procedures.

SUMMARY: This document implements aspects of the Satellite Home Viewer Improvement Act of 1999, enacted on November 29, 1999, and adopts regulations and procedures governing the negotiation of agreements in connection with the retransmission of television broadcast station signals by multichannel video programming distributors (''MVPDs''), including satellite carriers and cable systems. It establishes the standards for implementing a good faith negotiation requirement of broadcasters to MVPDs to ensure that negotiations are conducted in an atmosphere of honesty, purpose and clarity of process. This proceeding also adopts implementing rules and provides clarification regarding the prohibition against exclusive retransmission consent agreements. In addition, this document provides that voluntary mediation is an option that can be utilized by parties in protracted negotiations to aid in facilitating retransmission consent. We also establish that existing Commission complaint procedures provide an appropriate framework for parties alleging violations of the good faith negotiation requirement and the prohibition against exclusive agreements. Pursuant to the provisions of section 325(b)(3)(C) of the Communications Act, this document also concludes that the prohibitions on exclusive retransmission consent agreements and the good faith negotiation requirement terminate on January 1, 2006.

DATES: Effective March 23, 2000.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW,

Washington, DC 20554. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1–C804, 12th Street, SW, Washington DC 20554, or via the Internet at *jboley@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Steve Broeckaert at (202) 418–7200 or via internet at *sbroecka@fcc.gov.* For additional information concerning the information collection(s) contained in this document, contact Judy Boley at (202) 418–0214, or via the Internet at *jboley@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's First Report and Order, FCC 00–99, adopted March 14, 2000; released March 16, 2000. The full text of the Commission's First Report and Order is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY-A257) at its headquarters, 445 12th Street, SW, Washington DC 20554, or may be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 1231 20th Street, NW, Washington, DC 20036, or may be reviewed via Internet at *http://www.fcc.gov/csb/.*

Synopsis of the First Report and Order

I. Introduction

1. In this First Report and Order (''Order''), we adopt rules implementing certain aspects of the Satellite Home Viewer Improvement Act of 1999 (''SHVIA''). 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 via satellite under compulsory licensing provisions of the copyright law. The legislation generally seeks to place satellite carriers on an equal footing with local cable operators when it comes to the availability of broadcast programming, and thus give consumers more and better choices in selecting a multichannel video program distributor (''MVPD'').

2. 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. Section 325(b)(3)(C) required the Commission to commence a rulemaking within 45 days of the enactment of SHVIA and to complete all actions necessary to prescribe regulations within 1 year after such date of enactment. The Commission issued a Notice of Proposed Rulemaking (''Notice'') on December 22, 1999 (64 FR 72985). The Commission received numerous comments and reply comments to the Notice. We conclude the good faith negotiation and exclusivity portion of this rulemaking well ahead of our statutory deadlines for doing so because of the importance of implementing these provisions to MVPD competition and the growth of satellite service.

II. Background

3. In 1988, Congress passed the Satellite Home Viewer Act (''1988 SHVA'') in order to provide people in unserved areas of the country with access to broadcast programming via satellite. The 1988 SHVA enabled satellite carriers to provide broadcast programming to those satellite subscribers who were unable to obtain broadcast network programming over-the-air. As a general matter, however, the 1988 SHVA did not permit satellite carriers to retransmit local broadcast television signals directly to consumers.

4. The Cable Television Consumer Protection and Competition Act of 1992 (''1992 Cable Act'') amended the Communications Act, *inter alia,* to include section 325, which provides television stations with certain carriage rights on local market cable television systems. Within local market areas, commercial television stations may elect cable carriage under either the retransmission consent or mandatory carriage requirements. Section 325 as initially enacted contained no standards pursuant to which broadcasters were required to negotiate with MVPDs. The Commission established rules related to the retransmission/mandatory carriage election cycle, but did not adopt rules governing the negotiation process of retransmission consent.

5. SHVIA revises the 1988 SHVA and reflects changes not only involving the satellite industry and subscribers, but television broadcast stations and terrestrial MVPDs. SHVIA adopts changes in several areas, including retransmission consent, must-carry, and retransmission of local broadcast signals. In particular, SHVIA addresses several limitations previously placed on satellite carriers, including the issue of satellite carrier retransmission of local broadcast programming.

III. Summary of Decision

6. The Order determines that the statute does not intend to subject retransmission consent negotiation to detailed substantive oversight by the Commission. Instead, the order concludes 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. Consistent with this conclusion, the Order adopts a two-part test for good faith. The first part of the test consists of a brief, objective list of negotiation standards. 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.

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 specific standards enumerated above, given the totality of the circumstances constitute a failure to negotiate in good faith.

8. The Order concludes that it is not practicably possible to discern objective competitive marketplace factors that broadcasters must discover and base any negotiations and offers on, and that it is the retransmission consent negotiations that take place that are the market through which the relative benefits and costs to the broadcaster and MVPD are established. The Order provides examples of negotiation proposals that presumptively are consistent and inconsistent with ''competitive marketplace considerations.'' At the same time, the Order provides that it is implicit in section 325(b)(3)(C) that any effort to further anti-competitive ends

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. The Commission's rules regarding the good faith negotiation requirement sunset on January 1, 2006.

9. As for the prohibition on exclusivity, the Order interprets the phrase ''engaging in'' broadly. Thus, the Order would prohibit not only entering into exclusive retransmission consent agreements, but also negotiating exclusive agreements that would take effect after the sunset of the prohibition. The Commission's rules regarding exclusive retransmission consent agreements sunset on January 1, 2006.

10. An MVPD believing itself to be aggrieved under section 325(b)(3)(C) may file a complaint with the Commission. The Order provides that the procedural provisions of 47 CFR 76.7 will govern good faith and exclusivity complaints. The Order directs Commission staff to expedite resolution of good faith and exclusivity complaints. The Order provides that the burden of proof with regard to such complaints is on the MVPD complainant.

IV. Good Faith Negotiation Requirement

A. Congressional Intent in Amending Section 325 of the Communications Act

11. In SHVIA, Congress amended section 325(b) of the Communications Act, requiring the Commission to revise its regulations so that they shall:

> * * * until January 1, 2006, prohibit a television broadcast station that provides retransmission consent from * * * failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.

The Joint Explanatory Statement of the Committee of Conference (''Conference Report'') does not explain or clarify the statutory language, merely stating that:

> The regulations would, until January 1, 2006, prohibit a television broadcast station from * * * refusing to negotiate in good faith regarding retransmission consent agreements. A television station may generally offer different retransmission consent terms or conditions, including price terms, to different distributors. The [Commission] may determine that such different terms represent a failure to negotiate in good faith only if they are not based on competitive marketplace considerations.

The Notice sought comment on the correct interpretation of the good faith negotiation requirement of section 325(b)(3)(C).

12. At the outset of our discussion, we note that 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. As discussed in further detail below, section 325 also requires strict enforcement of, and severe penalties for, satellite carrier retransmission of local broadcast signals without consent after this six-month period expires. 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. 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) so as to avoid the highly undesirable interruption of local broadcast signals that satellite carriers have begun to provide to their subscribers in many cities across the nation. On an ongoing basis, we intend these rules to govern the negotiation of retransmission consent between broadcasters and all MVPDs.

13. The statute does not appear to contemplate an intrusive role for the Commission with regard to retransmission consent. Section 325(b)(3)(C) instructs the Commission to ''revise the regulations governing the exercise by television broadcast stations of the right to grant retransmission consent under this subsection. . . .'' The fact that Congress instructed the Commission to ''revise'' its existing retransmission consent regulations, coupled with the determinedly brief discussion of section 325(b)(3)(C) in the Conference Report, leads us to conclude that, in addition to the guidance that can be gleaned from SHVIA, we should also look for guidance in the legislative history of the retransmission consent provisions of the 1992 Cable Act. When Congress first applied retransmission consent to MVPDs in 1992, it stated that ''it is the Committee's intention to *establish a marketplace* for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to *dictate the outcome of the ensuing marketplace negotiations.*''

14. Based on this language, the Commission concluded in the *Broadcast Signal Carriage Order* that Congress did not intend that the Commission should intrude in the negotiation of retransmission consent. We do not interpret the good faith requirement of SHVIA to alter this settled course and require that the Commission assume a substantive role in the negotiation of the terms and conditions of retransmission consent. We note that Congress considered and explicitly rejected a comprehensive regime that required the Commission to:

> prohibit television broadcast stations that provide retransmission consent from engaging in discriminatory practices, understandings, arrangements, and activities, including exclusive contracts for carriage, that prevent a multichannel video programming distributor from obtaining retransmission consent from such stations.

Where Congress expressly considers and rejects such an approach, the rules of statutory construction do not favor interpreting a subsequent statutory provision to require the rejected alternative. Given the express congressional rejection of this anti-discrimination provision, we will not adopt rules to recreate this provision by regulation.

15. In support of the position that intrusive Commission action is unnecessary to implement the good faith negotiation requirement, commenters point to the fact that thousands of retransmission consent agreements have been successfully concluded between local broadcasters and MVPDs since adoption of the 1992 Cable Act. In addition, commenters note that within days after enactment of SHVIA, DIRECTV and EchoStar announced that they had entered into retransmission consent agreements with the owned-and-operated affiliates of several of the major television networks. As a result, these commenters argue that it would be wholly inappropriate to impose ''shotgun wedding'' style regulations on a marketplace that is already functioning. DIRECTV, however, argues that the existence of

these agreements does not ensure that agreements that have yet to be completed will progress as smoothly.

16. One commenter maintains that the purpose of the good faith requirement is merely to bring the parties to the bargaining table, stating that ''Congress signaled its desire only that broadcasters, having once made the decision to provide retransmission consent, should be required to negotiate with all interested MVPDs and not engage in an outright refusal to deal.'' Several broadcast commenters assert that Congress merely intended the Commission to revise its existing regulations to account for retransmission consent agreements between broadcasters and satellite carriers that now qualify for compulsory copyright license to provide local television stations to satellite subscribers.

17. ALTV advises the Commission to focus on Congress' overarching purpose in enacting section 325 in the 1992 Cable Act—assuring broadcasters the opportunity to secure compensation for the value of the retransmission of their signals by MVPDs. Conversely, other commenters assert that Congress intended the Commission to begin with the premise that television broadcast programming is an indispensable component of any MVPD's service package and that alternative MVPDs cannot compete effectively with incumbent cable operators if they are denied full and fair access to that programming in local markets.

18. We find instructive the legislative history of a previous version of SHVIA that was considered, but not enacted, by Congress. During the consideration of the House version of SHVIA, Representative Tauzin explained to Representative Dingell that the House bill, which included a detailed, anti-discrimination provision, would permit:

> [A] broadcast station * * * for example, [to] negotiate a cash payment from one video distributor for retransmission consent and reach an agreement with other distributors operating in the same market that contains different prices or other terms * * * [Indeed], as long as a station does not refuse to deal with any particular distributor, a station's insistence on different terms and conditions in retransmission agreements based on marketplace considerations is not intended to be prohibited by this bill * * * if a station negotiates in good faith with a distributor, the failure to reach an agreement with that distributor would not constitute a discriminatory act that is intended to be barred by this section.

In discussing this same previous version of SHVIA, Representative Berman echoed a similar sentiment stating ''[W]hile it is important that MVPDs have the opportunity to negotiate for retransmission consent, we do not in this bill subject the prices or other terms and conditions of nonexclusive retransmission consent agreements to [Commission] scrutiny.'' Again, these statements reflect consideration of the more onerous House version of SHVIA and its anti-discrimination requirement. We find it difficult to reconcile commenters arguments that SHVIA as enacted contains a broad grant of Commission authority to analyze and prohibit the substantive terms of retransmission consent with these statements.

19. Commenters argue that the statutory imposition of a good faith negotiation requirement is in derogation of the long-standing common law right to contract and therefore the duty, though statutorily imposed, must be narrowly construed. Commenters assert that even a statutory duty to negotiate in good faith does not require parties to do anything contrary to their own self-interest or make any particular concessions. Accordingly, argues Disney, the Commission is not empowered to become involved in the substance of retransmission consent negotiations.

20. We agree with those commenters that assert that section 325(b)(3)(C) should be narrowly construed. As commenters indicate, congressional 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.''

21. Commenters state that, in other contexts, the good faith standard has a well understood meaning that Congress must be presumed to have intended, particularly, where, as here, nothing in the statute or the legislative history suggests that Congress intended the Commission to develop its own definition of good faith. These commenters argue that SHVIA cannot be read to grant the Commission new, wholesale authority to define good faith or engage in a detailed case-by-case review of the retransmission terms offered to one MVPD as compared to another. These commenters assert that the most appropriate statutory example to follow is that of the good faith requirement of section 8(d) of the Taft-Hartley Act.

22. Given the dearth of guidance in the statute and legislative history, we believe that Congress signaled that the good faith negotiation requirement adopted in section 325(b)(3)(C) was sufficiently well understood that further explication was unnecessary. In such situations, we believe that Congress intends the Commission look to analogous statutory standards from which to draw guidance. While commenters offer various sources on which to rely, we agree with those commenters suggesting that the good faith bargaining requirement of section 8(d) of the Taft-Hartley Act is the most appropriate source of guidance. Section 8(d) of the Taft-Hartley Act details the collective bargaining duty of both employers and labor representatives, providing that:

> To bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment* * * but such obligation does not compel either party to agree to a proposal or require the making of a concession.

There are significant parallels between the congressional policy goal of good faith negotiation underlying both section 325(b)(3)(C) and section 8(d) of the Taft-Hartley Act. In this regard, there is substantial National Labor Relations Board (''NLRB'') precedent that the good faith negotiation requirement applies solely to the process of the negotiations and does not permit the NLRB to require agreement or impose terms or conditions on collective bargaining agreements. The Supreme Court has made this determination with force and clarity, stating that:

> It 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.

23. Congress clearly did not intend the Commission to sit in judgement of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD. Even if the Commission had the resources to accomplish such a delegation, we can divine no intent in either the statute or its legislative history to achieve such a result. As commenters indicated, when Congress intends the Commission to

directly insert itself in the marketplace for video programming, it does so with specificity. Despite the arguments of the satellite industry and other MVPDs, we find nothing supporting a construction of section 325(b)(3)(C) that would grant the Commission authority to impose a complex and intrusive regulatory regime similar to the program access provisions or the interconnection requirements of section 251 of the Communications Act. While the Commission generally will not intrude into the substance of particular retransmission consent negotiations and agreements, we note that section 325(b)(3)(C) sanctions only those retransmission consent agreements containing different terms and conditions, including price terms, with different MVPDs if such different terms and conditions are based upon competitive marketplace considerations.

24. Having reached this conclusion, we do not interpret section 325(b)(3)(C) as ''largely hortatory'' as suggested by some commenters. As we stated in the Notice, ''Congress has signaled its intention to impose some heightened duty of negotiation on broadcasters in the retransmission consent process.'' In other words, Congress intended that the parties to retransmission consent have negotiation obligations greater than those under common law. Absent fraudulent intent, common law imposes no obligation on parties to negotiate in good faith prior to the formation of a contract. We believe that, by imposing the good faith obligation, Congress intended that the Commission develop and enforce a process that ensures that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process.

B. Mutual Good Faith Negotiation Requirement

25. As a preliminary matter, we must determine to whom the ''good faith'' negotiation obligation applies. The Notice requested comment on whether the duty of good faith negotiation applies equally to the broadcaster and MVPD negotiating a retransmission consent agreement. Several commenters assert that the good faith negotiation requirement is a mutual obligation and that the Commission must consider and weigh the conduct of the MVPD in assessing whether the broadcaster has failed to satisfy the good faith negotiation requirement. Only DIRECTV asserts that the good faith negotiation requirement applies solely to broadcasters. DIRECTV argues that the language of section 325(b)(3)(C) applies solely to ''broadcast television stations'' and in no way, express or implied, is imposed on MVPDs.

26. We agree with DIRECTV that the language of section 325(b)(3)(C) on its face applies only to ''television broadcast station[s].'' To read the provision as a mutual obligation would contradict the express language of the statute and controvert Congress' intent. Moreover, Congress has demonstrated its ability to expressly impose a good faith negotiation obligation on both parties in other provisions of the Communications Act. Accordingly, we conclude that the good faith negotiation requirement in section 325(b)(3)(C) was intended to apply only to broadcasters. However, we caution MVPDs that seek retransmission consent that their conduct is relevant in determining whether a broadcaster has complied with its obligation to negotiate retransmission consent in good faith. Insistence by an MVPD on unreasonable terms and conditions or negotiating procedures will be taken into account by the Commission in assessing a broadcaster's observance of its good faith negotiation obligations.

C. Definition of Good Faith

27. The Notice sought comment on the criteria that should be employed to define ''good faith'' and sought comment on whether the Commission should explicitly define what constitutes good faith under section 325(b)(3)(C). The Notice requested comment on whether to adopt a two-part test for good faith similar to that embraced by the NLRB and by the Commission pursuant to section 251 of the Communications Act. The Commission also sought comment on any other specific legal precedent upon which we should rely and any other regulatory approach that might appropriately implement the good faith negotiation requirement of section 325(b)(3)(C) of the Communications Act.

28. Several commenters argue that both the NLRB and the section 251 good faith negotiation regimes are based upon the premise that one party to the negotiation may not have an interest in reaching an agreement. These commenters argue that, because broadcasters want their programming transmitted to the widest possible audience to increase advertising revenue and MVPDs desire valuable broadcast programming, both broadcasters and MVPDs have strong incentives for reaching retransmission consent. Several commenters support a two-part test to determine good faith similar to that suggested in the Notice. Fox asserts that, if the Commission adopts a two-part test for determining good faith, the specific actions that would constitute lack of good faith should be ''narrowly drawn to encompass only the most obvious and egregious breaches of good faith negotiating practices, and the Commission should always examine the factual context in which each alleged prohibition occurred.''

29. Time Warner proposes that the Commission adopt a ''zone of reasonableness'' standard for good faith in which, even if the broadcaster satisfies all of the procedural indicia of good faith, the Commission could determine that it violated its duty to negotiate in good faith ''if it insists [on] a level of consideration that is so plainly uneconomic that an MVPD would suffer greater financial harm from accepting the broadcaster's terms than from refusing to carry the station.'' NBC maintains that the Commission should contrive no standards before the fact. Instead, to the extent standards are appropriate, they should be developed out of actual experience in adjudicated controversies. Several commenters argue that the Commission should judge the conduct of the parties only by examining the totality of the circumstances.

30. We will adopt a two part test for good faith negotiation as proposed in the Notice. We believe that this test best implements Congress' intent in adopting the good faith negotiation requirement. A two-part test follows well established precedent in the field of labor law. In addition, the Commission has used a similar test in implementing its statutory obligations under section 251 of the Communications Act. Through the objective standards, this approach gives immediate guidance to the parties to retransmission consent negotiations that certain conduct will not be tolerated. Through the broader, totality of the circumstances test, the Commission will have the ability to prohibit conduct that, while not constituting a failure of good faith in all circumstances, does violate the good faith negotiation requirement in the context of a given negotiation. The totality of the circumstances test will also enable the Commission to continue refining and clarifying the responsibilities of parties to retransmission consent negotiations.

31. The first part of the test will consist of a brief, objective list of negotiation standards. Because the list consists of *per se* standards, of necessity, the standards must be concise, clear and constitute a violation of the good faith standard in all possible instances. Should an MVPD demonstrate to the Commission that a

broadcaster, in the conduct of a retransmission consent negotiation, has engaged in actions violative of an objective negotiation standard, the Commission would find that the broadcaster has breached its duty to negotiate in good faith. We disagree with those commenters who assert that the Commission should only define violations on a prospective adjudicatory basis. Given the short, six-month, period in which satellite carriers have to negotiate retransmission consent before expiration of the compulsory license of section 325(b)(2)(E), we believe it incumbent upon us to provide as much initial guidance as possible through which the parties may pursue negotiations.

32. The second part of the test is 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 objective standards, given the totality of the circumstances reflect an absence of a sincere desire to reach an agreement that is acceptable to both parties and thus constitute a failure to negotiate in good faith. We do not intend the totality of the circumstances test to serve as a ''back door'' inquiry into the substantive terms negotiated between the parties. While the Commission will not ordinarily address the substance of proposed terms and conditions or the terms of actual retransmission consent agreements, we will entertain complaints under the totality of the circumstances test alleging that specific retransmission consent proposals are sufficiently outrageous, or evidence that differences among MVPD agreements are not based on competitive marketplace considerations, as to breach a broadcaster's good faith negotiation obligation. However, complaints which merely reflect commonplace disagreements encountered by negotiating parties in the everyday business world will be promptly dismissed by the Commission.

33. The Commission sought comment on specific actions or practices that would constitute *per se* violations of the duty to negotiate in good faith in accordance with section 325(b)(3)(C). In addition to any other actions or practices, the Commission asked commenters to address whether it would be appropriate to include in any such list provisions similar to the violations of the obligation to negotiate interconnection agreements in good faith set forth in 47 CFR 51.301. The Commission acknowledged, however, that the good faith standard of SHVIA is different in significant respects to that contained in 47 CFR 51.301.

34. Commenters proposed numerous standards that the Commission should consider in adopting rules to enforce the good faith negotiation requirement. Broadcasters generally argue that, to the extent it does anything, the Commission should adopt streamlined rules that apply only to the process of the negotiations between broadcasters and MVPDs. The other group, consisting of satellite carriers, small cable operators and alternative MVPDs, argues that the only way the Commission can effectively enforce the good faith negotiation requirement is to involve itself in the substantive terms of retransmission consent agreements as well as the process of negotiations. These commenters propose that the Commission adopt an extensive list of substantive terms and conditions that should be prohibited as violations of the obligation to negotiate retransmission consent agreements in good faith.

35. Broadcast commenters propose several standards based on experience gathered in the NLRB field, the absence of which indicates a lack of good faith, including: (1) a party must have a sincere desire to reach agreement, (2) a party's negotiator must have authority to conclude a deal, (3) a party must offer to meet at reasonable times and convenient places, and (4) a party must agree to execute a written agreement once all terms have been agreed on. NBC proposes that extrinsic evidence that a party never intended to reach agreement, or extrinsic evidence of an understanding with a third party that the negotiating party will not enter into a retransmission consent agreement, should also evidence violations of the good faith negotiation requirement. Other commenters would prohibit a broadcaster from insisting on terms so unreasonable that they are tantamount to a refusal to deal. EchoStar argues that such procedural violations are meaningless because ''no bad faith actor would be so inept or so artless as to display its bad faith by not agreeing to a convenient time and place to meet, not appointing a representative to negotiate, and not committing to writing a retransmission agreement once a deal has been reached.''

36. DIRECTV proposes the following list of good faith negotiation standards based upon examples from labor law precedent, the Commission's program access rules, the interconnection provisions of the 1996 Act, and recognized marketplace dynamics. DIRECTV, supported by other commenters, proposes that, during the negotiation of a retransmission consent agreement, a broadcaster may not:

(a) Intentionally seek to mislead or coerce the MVPD into reaching an agreement it would not otherwise have made;

(b) Unreasonably obstruct or delay negotiations or resolutions of disputes;

(c) Refuse to designate a representative with authority to make binding representations if such refusal significantly delays resolution of issues;

(d) Refuse to negotiate in fact;

(e) Refuse to provide the satellite carrier with a high quality, direct feed of the broadcast signal;

(f) Engage in discrimination in the price, terms or conditions of retransmission consent afforded an MVPD relative to any other MVPD, unless such discrimination is related to ''competitive marketplace conditions'' as defined by the Commission * * *;

(g) Offer unreasonable positions, including, but not limited to:

1. a unilateral requirement that retransmission consent for a given broadcast station be conditioned on carriage under retransmission consent of another broadcast station, either in the same or a different geographic market;

2. A unilateral requirement that retransmission consent be conditioned on the exclusion of carriage under retransmission consent of other broadcast channels in a given market;

3. A unilateral requirement that retransmission consent be conditioned on a broadcaster obtaining channel positioning rights on the satellite carrier's system;

4. A unilateral requirement that the satellite carrier (i) commit to purchase advertising on the broadcast station or broadcaster affiliated media, or (ii) that a specified share of advertising dollars spent in a broadcaster's market be spent on that broadcaster;

5. A unilateral requirement that retransmission consent be conditioned on a satellite carrier not retransmitting distant network signals to qualified subscribers in the market, or a satellite carrier ''capping'' the number of qualified subscribers in the market who may receive distant network signals, thus depriving eligible subscribers of their statutory right to subscribe to distant network signals;

6. A unilateral requirement that retransmission consent be conditioned on the satellite carrier's carriage of digital signals.

To this list EchoStar, would add: (i) Insisting on an unreasonably short contract duration; (ii) threatening to run anti-satellite advertising; and (iii) refusal to deal, whether explicit or disguised under requests for

extortionate terms. Several commenters would include the imposition of non-optional tying arrangements requiring an MVPD to carry the affiliated programming of the broadcaster in exchange for retransmission consent. Other commenters suggest a standard requiring parties to provide information necessary to reach agreement.

37. Several commenters propose a standard prohibiting instances in which a broadcaster seeks higher consideration from an MVPD for any affiliated cable network programming in exchange for retransmission consent than it obtains from the incumbent cable operator, unless the broadcaster justifies that such higher consideration is cost-based or does not produce anti-competitive market conditions. In addition, BellSouth urges the Commission to find a violation when a broadcaster ties retransmission consent to minimum subscriber penetration levels. Another commenter would also brand as a good faith violation a demand of a nondisclosure agreement, a demand that the MVPD attest that the agreement complies with all applicable laws, or the refusal to include a provision permitting the agreement to be amended to reflect subsequent changes in the law.

38. Several broadcast commenters assert that the list of violations proposed by DIRECTV, EchoStar and others is so extensive and one-sided as to render any notion of equality at the bargaining table meaningless. Other commenters assert that, since the adoption of the 1992 Cable Act, carriage of additional programming as compensation for retransmission consent is most often the compensation agreed upon by broadcasters and MVPDs in their retransmission consent agreements. Disney argues that the legislative history of the 1992 Cable Act expressly endorsed such compensation and that, had Congress wished to prohibit the practice, it would have done so expressly. Disney further argues that no commenter offers a sustainable legal basis for presuming on a blanket basis that a request for additional programming carriage as consideration for retransmission consent would be illegal under current law or anti-competitive.

39. Consistent with our determination that Congress intended that the Commission should enforce the process of good faith negotiation and that the substance of the agreements generally should be left to the market, we will not adopt the suggestions of certain commenters that we prohibit proposals of certain substantive terms, such as offering retransmission consent in exchange for the carriage of other programming such as a cable channel, another broadcast signal, or a broadcaster's digital signal. Instead, we believe that the good faith negotiation requirement of SHVIA is best implemented through the following standards derived from NLRB precedent, commenter's proposals and the section 251 interconnection requirements. These standards are intended to identify those situations in which a broadcaster did not enter into negotiations with the sincere intent of trying to reach an agreement acceptable to both parties.

40. First, a broadcaster may not refuse to negotiate with an MVPD regarding retransmission consent. Section 325(b)(3)(C) affirmatively requires that broadcasters negotiate retransmission consent in good faith. This requirement goes to the very heart of Congress' purpose in enacting the good faith negotiation requirement. Outright refusal to negotiate clearly violates the requirement of section 325(b)(3)(C). Broadcasters must participate in retransmission consent negotiations with the intent of reaching agreement. Provided that the parties negotiate in good faith in accordance with the Commission's standards, failure to reach agreement does not violate section 325(b)(3)(C). Given the economic incentive for each side to reach agreement, we are hopeful that such impasses will be rare and short-lived.

41. Second, a broadcaster must appoint a negotiating representative with authority to bargain on retransmission consent issues. Failure to appoint a negotiating representative vested with authority to bargain on retransmission consent issues indicates that a broadcaster is not interested in reaching an agreement. This standard is the norm in NLRB precedent as well as our interconnection rules implementing section 251. This requirement does not empower MVPDs to demand that specific officers or directors of a broadcaster attend negotiation sessions. Provided that a negotiating representative is vested with the authority to make offers on behalf of the broadcaster and respond to counteroffers made by MVPDs to the broadcaster, this standard is satisfied.

42. 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. Refusal to meet at reasonable times and locations belies a good faith intent to negotiate. This requirement does not preclude negotiations conducted via telephone, facsimile, or by letter. Reasonable response times and unreasonable delays will be gauged by the breadth and complexity of the issues contained in an offer. The Commission is aware that, in many cases, time will be of the essence in retransmission consent negotiations, particularly as we approach the end of the six-month period provided for in section 325(b)(2)(E)—May 29, 2000. We advise broadcasters that, in examining violations of this standard, we will consider the proximity of the termination of retransmission consent and the consequent service disruptions to consumers. At the same time, we caution MVPDs that waiting until the eleventh hour to initiate negotiations will also be taken into account in enforcing this standard.

43. Fourth, a broadcaster may not put forth a single, unilateral proposal and refuse to discuss alternate terms or counter-proposals. ''Take it, or leave it'' bargaining is not consistent with an affirmative obligation to negotiate in good faith. For example, a broadcaster might initially propose that, in exchange for carriage of its signal, an MVPD carry a cable channel owned by, or affiliated with, the broadcaster. The MVPD might reject such offer on the reasonable grounds that it has no vacant channel capacity and request to compensate the broadcaster in some other way. Good faith negotiation requires that the broadcaster at least consider some form of consideration other than carriage of affiliated programming. This standard does not, in any way, require a broadcaster to reduce the amount of consideration it desires for carriage of its signal. This standard only requires that broadcasters be open to discussing more than one form of consideration in seeking compensation for retransmission of its signal by MVPDs.

44. Fifth, a broadcaster, in responding to an offer proposed by an MVPD, must provide reasons for rejecting any aspects of the MVPD's offer. Blanket rejection of an offer without explaining the reasons for such rejection does not constitute good faith negotiation. This provision merely ensures that MVPDs are not negotiating in a vacuum and understand why certain terms are unacceptable to the broadcaster so that the MVPD can respond to the broadcaster's concerns. We reiterate that good faith negotiation requires a broadcaster's affirmative participation. However, this standard is not intended as an information sharing or discovery mechanism. Broadcasters are not required to justify their explanations by document or evidence.

45. Sixth, a broadcaster is prohibited from entering into an agreement with any party a condition of which is to deny retransmission consent to any MVPD. For example, Broadcaster A is

prohibited from agreeing with MVPD B that it will not reach retransmission consent with MVPD C. It is impossible for a broadcaster to engage in good faith negotiation with an MVPD regarding retransmission consent when it has a contractual obligation not to reach agreement with that MVPD.

46. Finally, once the parties reach agreement on the terms of retransmission consent, the broadcaster must agree to execute a written retransmission consent agreement that sets forth the full agreement. Because the Commission may be called upon in certain instances to determine whether the totality of the circumstances involved in the negotiation of a particular retransmission consent agreement complies with section 325(b)(3)(C), it is vital that the parties reduce their entire agreement to writing. In addition, this requirement also minimizes subsequent misunderstandings between the parties related to their respective obligations.

47. We do not believe that we should at this time adopt further objective standards as proposed by the commenters. In appropriate instances, we will consider the conduct at the heart of such proposed standards when we examine a particular retransmission consent negotiation under the totality of the circumstances test.

48. The Notice further observed that section 325(b)(3)(C) provides that: it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.

The Notice sought comment on what constitutes a competitive marketplace consideration. The Notice also observed that the Commission has adopted non-discrimination standards in both the program access and open video system contexts and sought comment on the relevance, if any, of these standards to what constitutes a ''competitive market consideration.'' In addition, the Notice sought comment on any other factors or approaches to determining what constitutes competitive marketplace considerations under section 325(b)(3)(C).

49. A number of commenting parties urge that the competitive marketplace considerations language be interpreted as a requirement that the Commission judge the good faith of all retransmission consent offers based on whether they are based on ''competitive marketplace considerations.'' DIRECTV and EchoStar, for example, claim that competitive marketplace considerations would permit a broadcaster to discriminate between providers only in scenarios where Congress and the Commission have recognized that certain variance in price, terms or conditions correspond to legitimate behavior that may occur in the marketplace for video programming.

50. EchoStar asserts that, generally where a broadcaster has received any consideration for retransmission consent, it has been non-monetary, carriage of cable networks affiliated with the broadcaster, and argues that:

> The general rule, therefore, should be that broadcaster demands deviating from that formula, such as demands for money, demands for carriage of additional cable networks beyond those involved in the retransmission-for-carriage agreements with cable operators, or demands for retransmission of additional broadcast stations (beyond those owned and operated by the same network), should be presumptively viewed as not based on competitive marketplace considerations.

51. NAB argues that satellite carriers are not nascent businesses that need government protection, but instead are well-financed, powerfully-backed competitors in the multichannel marketplace. Commenters argue that satellite companies not only use local stations to increase the attractiveness of their overall product, but also sell the stations to viewers at substantial prices. One commenter notes that the fact that satellite carriers are able to charge a fee for retransmitted local signals demonstrates that these signals have value for which broadcasters must be compensated. EchoStar counters that ''the only reason * * * consumers purchase a satellite carrier's local signal offering is for value that the satellite carrier provides, including increased quality, convenience, and aesthetics (*i.e.*, lack of off-air antenna).''

52. Commenters assert that, in the early 1990s, when the retransmission consent provisions of the 1992 Cable Act first became effective, cable systems were effectively the only distributors from whom broadcasters could seek consideration through retransmission consent. Broadcasters assert that they were at a tremendous disadvantage because only a single buyer was prepared to bid for their product. Broadcast commenters state that, today, the existence of multiple MVPDs in at least some markets creates a more competitive marketplace for the sale of retransmission rights, and one that provides more opportunity for stations seeking to obtain compensation for granting these valuable rights. NAB states that the existence of multiple buyers is obviously a very important competitive marketplace consideration in this market, as in any market. EchoStar counters that multiple competitors in a market only serve to increase a broadcaster's ability to play one MVPD distributor against another in retransmission negotiations, an ability Congress sought to restrain by imposing the good faith and competitive marketplace considerations requirements on retransmission consent.

53. As discussed above, we do not believe, as a general matter, that section 325(b)(3)(C) was intended to subject retransmission consent negotiation to detailed substantive oversight by the Commission or indeed that there exist objective competitive marketplace factors that broadcasters must ascertain and base any negotiations and offers on. Indeed, in the aggregate, retransmission consent negotiations are the market through which the relative benefits and costs to the broadcaster and MVPD are established. Although some parties earnestly suggest, for example, that broadcasters should be entitled to zero compensation in return for retransmission consent or that the forms of compensation for carriage should be otherwise limited, this seems to us precisely the judgment that Congress generally intended the parties to resolve through their own interactions and through the efforts of each to advance its own economic self interest.

54. EchoStar suggests an economic paradigm against which retransmission terms might be compared to determine if they are based on ''competitive marketplace considerations.'' It suggests that in the ideal competitive market setting, revenues will be just sufficient to compensate providers for the costs of program creation, duplication, and distribution so that all participants are earning a fair rate of return. Further, having already noted that the marketplace may be distorted through the exercise of market power by cable operators, EchoStar urges that retransmission consent term outcomes for the cable industry provide a benchmark or threshold that should not be exceeded in the case of satellite carriage of broadcast signals. Further, it asserts that considerations extracted from certain cable operators (for example carriage of digital signals) would be inappropriate and not based on competitive marketplace consideration if they were significantly costlier to accede to for satellite carriers.

55. In our view this type of regulatory analysis and comparison is not what was intended through the enactment of

section 325(b)(3)(C). It is both internally inconsistent and not capable of administration in any reasonably timely fashion. The proposal is internally inconsistent in that it acknowledges that among the market participants, cable operators might be the most likely to have market power. If this were the case, using their negotiations as a proxy for a competitive market setting would not be logical. Under this analysis, broadcasters, already the hypothesized victims of an exercise of market power, would be obligated to continue in that role with other participants in the market. Further, EchoStar finds one of the most common features of these agreements—payment for carriage through the devotion of channel capacity to other affiliated services—presumptively a measure of bad faith. Acceptance of the cash rate but not the other currency of the negotiation could hardly be a replication of a competitive market. Even if these problems could be overcome, however, it seems unlikely that the data needed to measure a transaction against the economic model proposed would be available either to the parties in the course of their negotiations or to the Commission in the course of trying to judge their compliance with the standard of review proposed.

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.

Each of the 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. After passage of the 1992 Cable Act, Congress left the negotiation of 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.

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. 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. 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. 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.

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 * * * .'' This language clearly prohibits an MVPD, except during the six-month period allowed under section 325(b)(2)(E), from retransmitting a broadcasters 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 must carry 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. 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.

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). 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.

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. 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. One commenter urges the Commission to give its rules retroactive application to preexisting retransmission consent agreements.

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 consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith * * * .

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. 47 CFR 76.64(m) has been in effect since 1993 and expressly prohibits exclusive retransmission consent agreements. 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 47 CFR 76.64(m). 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 * * * .

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 * * *

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. The Commission found that exclusive retransmission consent arrangements between a television broadcast station and any multichannel video programming distributor were contrary to the intent of the 1992 Cable Act.

66. In the Notice, we sought to determine what activities would constitute ''engaging in exclusive contracts.'' 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''). We sought to determine whether parties were prohibited from negotiating exclusive contracts that would take effect after the date of January 1, 2006. We also sought

comment on whether any such contracts already existed, and if so, what effect the statute would have on such contracts. Finally, we sought comment on how to effectively enforce such a prohibition, and how to determine whether such agreements existed.

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. 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. 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.'' Two other commenters argue that broadcasters can impose unaffordable demands on smaller MVPDs, and that these demands can result in prohibited *de facto* exclusivity. 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.

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 'exercise practices' nor . . . of any *de facto* exclusivity.'' Network Affiliates assert that the use of the phrase ''engaging in'' does not demonstrate Congressional intent to ''increase the number of prohibited activities.'' 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.'' 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. 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). One commenter argues that the Commission should nullify any exclusive retransmission consent agreements that existed prior to SHVIA. The commenter suggests that the Commission's authority to nullify any such agreements stems from the requirements of the Commission's rules. Another commenter argues that the Commission should apply rules implementing the SHVIA prohibition on exclusive retransmission consent agreements retroactively. Some commenters from the broadcasting industry argue that any such agreements that were in existence prior to the enactment of SHVIA should be grandfathered.

72. Prior to the enactment of SHVIA, 47 CFR 76.64(m) prohibited all exclusive retransmission consent agreements. 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. 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. 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.

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). 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. Specifically, we sought comment regarding whether special relief procedures of the type found in 47 CFR 76.7 provide an appropriate framework for addressing issues arising under section 325(b)(3)(C).

76. There is general consensus among the commenters that the general pleading provisions of 47 CFR 76.7 provide appropriate procedural rules for good faith and exclusivity complaints. 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 47 CFR 76.7 provisions and direct complainants to follow these provisions in filing retransmission consent complaints. Consistent with the requirements of 47 CFR 76.7, 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 broadcaster has refused or failed to respond. 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.

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. 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. 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.

C. Discovery

78. Several commenters urge the Commission to provide discovery as-of-right in retransmission consent complaint proceedings. 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. One commenter asserts that retransmission consent agreements and the negotiations surrounding them constitute confidential business information that must be protected by strong nondisclosure agreements if subject to Commission-directed discovery procedures. 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.

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 47 CFR 76.9. Accordingly, we will employ Commission-controlled discovery as contemplated in the 47 CFR 76.7 procedures.

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. 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. 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 competitive marketplace considerations.'' 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. 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.

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. 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. 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).

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. Several commenters 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. 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. 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.'' Disney asserts that the Commission must ensure that good faith negotiation complaints are resolved expeditiously. 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.

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, 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 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. 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.

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. 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.

88. Other commenters support a shifting of the burden of proof after a *prima facie* demonstration. 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. 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. 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, subject to Commission confidentiality protections. Several commenters maintain that the Commission should impose sanctions against filers of frivolous complaints. 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.

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, we believe the burden should rest with the MVPD complainant to establish a violation of section 325(b)(3)(C). 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. 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 47 CFR 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 section 325(b)(3)(C) complaint. 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.'' The Commission sought comment on whether the Commission's rules regarding exclusive carriage agreements and good faith negotiation should automatically sunset on this date. 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 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.'' 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.

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. Others state that interpreting the statute as sunsetting 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. 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.

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.

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 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. 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 this document.

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 be effective March 23, 2000 pursuant to section 553(d)(3) of the APA. 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).

Final Regulatory Flexibility Analysis

a. As required by the Regulatory Flexibility Act (''RFA''), an Initial Regulatory Flexibility Analysis (''IRFA'') was incorporated in the Notice of Proposed Rulemaking (''Notice'') in CS Docket No. 99–363, FCC 99–406. The Commission sought written public comments on the proposals in the Notice, including comment on the IRFA. This Final Regulatory Flexibility Analysis (''FRFA'') conforms to the RFA.

b. *Need for, and Objectives of, this Report and Order.* Section 1009 of the Satellite Home Viewer Improvement Act (''SHVIA''), codified as section 325 of the Communications Act of 1934, as amended (''Act''), 47 U.S.C. 325, instructs the Commission to revise the regulations governing the exercise by television broadcast stations of the right to grant retransmission consent. Congress directed the Commission to devise regulations, procedures, and standards implementing a good faith requirement in the negotiation of agreements in connection with the transmission of television broadcast station signals by multichannel video programming distributors (''MVPDs''). This Report and Order adopts rules governing negotiation of retransmission consent between broadcasters and all MVPDs which will help to ensure that negotiations are conducted in an atmosphere of honesty, clarity of process and good faith. In particular, this proceeding provides a clear framework under which broadcasters and satellite carriers can achieve retransmission consent before expiration and interruption of local broadcast signals that satellite carriers have begun to provide their subscribers in many cities across the nation since the enactment of the SHVIA. Further, pursuant to the SHVIA, this proceeding also addresses implementing rules prohibiting exclusive retransmission consent agreements. Finally, the Report and Order adopts a complaint process to assist the Commission in enforcing the statutory obligations related to section 325(b)(3)(C).

c. *Summary of Significant Issues Raised by Public Comments in Response to the IRFA.* We received one comment in direct response to the IRFA. The American Cable Association (''ACA'') argues that smaller cable systems play an important role in the distribution of local signals in rural America and smaller communities and that competitive imbalances from broadcaster abuses relating to retransmission consent threatens this role. In particular, ACA states that the ''IFRA remains devoid of any meaningful analysis of how any retransmission consent rules that may result would impact smaller cable businesses and their systems, nor does it propose alternative relief to accommodate the unique needs of those businesses. Instead, the Commission generally believes that entity size has no bearing on the issues raised in the Notice.'' We note, however, that in the IFRA we discussed the retransmission consent election process and the possibility that differences among MVPDs might justify different election schemes. We stated that we had not proposed to treat small entities differently in this regard, but sought comment on the possibility. We also sought comment on four specific alternatives that might lessen the compliance burden on small entities: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design standards: and (4) an exemption from coverage of the rule, or any part thereof, for small entities. None of the other parties in this proceeding filed comments on how issues raised in the Notice would impact small entities. Below, in the section of the FRFA titled, ''Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered,'' we discuss further ACA's comment concerning the possible impact on small entities.

d. *Description and Estimate of the Number of Small Entities To Which the Rules Will Apply.* The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules. The RFA defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small business concern'' under Section 3 of the Small Business Act. Under the Small Business Act, a small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (''SBA''). The rules we adopt as a result of the Report and Order will affect television station licensees, cable operators, and other MVPDs.

e. *Television Stations.* The Small Business Administration defines a television broadcasting station that has no more than $10.5 million in annual receipts as a small business. Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational, and other television stations. Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials. Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number. There were 1,509 television stations operating in the nation in 1992. That number has remained fairly constant as indicated by the approximately 1,579 operating full power television broadcasting stations in the nation as of May 31, 1998.

f. Thus, the rules will affect many of the approximately 1,579 television stations; approximately 1,200 of those stations are considered small businesses. These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television affiliated companies.

g. In addition to owners of operating television stations, any entity that seeks or desires to obtain a television broadcast license may be affected by the rules contained in this item. The number of entities that may seek to obtain a television broadcast license is unknown.

h. *Small MVPDs:* SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating $11 million or less in annual receipts. This definition includes cable system operators, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau data from 1992, there were 1,758 total cable and other pay television services and 1,423 had less than $11 million in revenue. We address below services individually to provide a more precise estimate of small entities.

i. *Cable Systems:* The SBA has developed a definition of small entities for cable and other pay television services under Standard Industrial Classification 4841 (SIC 4841), which covers subscription television services, which includes all such companies with annual gross revenues of $11 million or less. This definition includes cable systems operators, closed circuit

television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1,323 such cable and other pay television services generating less than $11 million in revenue that were in operation for at least one year at the end of 1992.

j. The Commission has developed, with SBA's approval, its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a ''small cable company'' is one serving fewer than 400,000 subscribers nationwide. Based on our most recent information, we estimate that there were 1439 cable operators that qualified as small cable companies at the end of 1995. Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. The Commission's rules also define a ''small system,'' for the purposes of cable rate regulation, as a cable system with 15,000 or fewer subscribers. We do not request nor do we collect information concerning cable systems serving 15,000 or fewer subscribers and thus are unable to estimate at this time the number of small cable systems nationwide.

k. The Communications Act also contains a definition of a small cable system operator, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals approximately 1450. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act. It should be further noted that recent industry estimates project that there will be a total 64,000,000 subscribers and we have based our fee revenue estimates on that figure.

l. *Open Video System* (''OVS''): The Commission has certified eleven OVS operators. Of these eleven, only two are providing service. Affiliates of Residential Communications Network, Inc. (''RCN'') received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. RCN has sufficient revenues to assure us that they do not qualify as small business entities. Little financial information is available for the other entities authorized to provide OVS that are not yet operational. Given that other entities have been authorized to provide OVS service but have not yet begun to generate revenues, we conclude that at least some of the OVS operators qualify as small entities.

m. *Multichannel Multipoint Distribution Service* (''MMDS''): The Commission refined the definition of ''small entity'' for the auction of MMDS as an entity that together with its affiliates has average gross annual revenues that are not more than $40 million for the proceeding three calendar years. This definition of a small entity in the context of the Commission's Report and Order concerning MMDS auctions that has been approved by the SBA.

n. The Commission completed its MMDS auction in March, 1996 for authorizations in 493 basic trading areas (''BTAs''). Of 67 winning bidders, 61 qualified as small entities. Five bidders indicated that they were minority-owned and four winners indicated that they were women-owned businesses. MMDS is an especially competitive service, with approximately 1,573 previously authorized and proposed MMDS facilities. Information available to us indicates that no MDS facility generates revenue in excess of $11 million annually. We conclude that there are approximately 1,634 small MMDS providers as defined by the SBA and the Commission's auction rules.

o. *DBS:* There are four licenses of DBS services under part 100 of the Commission's Rules. Three of those licensees are currently operational. Two of the licensees which are operational have annual revenues which may be in excess of the threshold for a small business. The Commission, however, does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be impacted by these proposed rules. DBS service requires a great investment of capital for operation, and we acknowledge that there are entrants in this field that may not yet have generated $11 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

p. *HSD:* The market for HSD service is difficult to quantify. Indeed, the service itself bears little resemblance to other MVPDs. HSD owners have access to more than 265 channels of programming placed on C-band satellites by programmers for receipt and distribution by MVPDs, of which 115 channels are scrambled and approximately 150 are unscrambled. HSD owners can watch unscrambled channels without paying a subscription fee. To receive scrambled channels, however, an HSD owner must purchase an integrated receiver-decoder from an equipment dealer and pay a subscription fee to an HSD programming package. Thus, HSD users include: (1) viewers who subscribe to a packaged programming service, which affords them access to most of the same programming provided to subscribers of other MVPDs; (2) viewers who receive only non-subscription programming; and (3) viewers who receive satellite programming services illegally without subscribing. Because scrambled packages of programming are most specifically intended for retail consumers, these are the services most relevant to this discussion.

q. According to the most recently available information, there are approximately 30 program packages nationwide offering packages of scrambled programming to retail consumers. These program packages provide subscriptions to approximately 2,314,900 subscribers nationwide. This is an average of about 77,163 subscribers per program package. This is substantially smaller than the 400,000 subscribers used in the commission's definition of a small MSO. Furthermore, because this is an average, it is likely that some program packages may be substantially smaller.

r. *SMATVs:* Industry sources estimate that approximately 5,200 SMATV operators were providing service as of December, 1995. Other estimates indicate that SMATV operators serve approximately 1.05 million residential subscribers as of September, 1996. The ten largest SMATV operators together pass 815,740 units. If we assume that these SMATV operators serve 50% of the units passed, the ten largest SMATV operators serve approximately 40% of the total number of SMATV subscribers. Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial

information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten SMATVs, we tentatively conclude that a substantial number of SMATV operators qualify as small entities.

s. *Description of Projected Reporting, Recordkeeping and other Compliance Requirements.* This Report and Order establishes a series of rules implementing good faith guidelines in connection with retransmission consent agreements between television broadcast stations and all MVPDs. The good faith negotiation requirement applies only to broadcasters, however the conduct of MVPDs that seek retransmission consent is not irrelevant to the Commission in determining whether a broadcaster has complied with its obligation to negotiate retransmission consent in good faith. During the process of developing and negotiating retransmission consent, parties will be guided by the principles and provisions established in this Report and Order. While the substance of the agreements should be left to the market, the Commission is responsible for enforcing the process of good faith negotiation. We have established standards, practices, and conduct, derived principally from NLRB precedent, that will be applicable to all retransmission consent negotiations. First among the negotiation standards is that a broadcaster may not refuse to negotiate with an MVPD regarding retransmission consent. Additional standards outline broadcaster conduct required to meet the good faith standard in retransmission consent negotiation.

t. Pursuant to the directive by Congress, this proceeding also describes and explains the limits relating to exclusivity agreements and implements rules in that regard. Specifically, the SHVIA prohibits all exclusive retransmission agreements for television broadcast stations and MVPDs prior to January 1, 2006. 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. The Commission also establishes complaint procedures and sets forth the requirements of complainants to address situations where there is evidence of exclusive retransmission consent agreements.

u. In the event that the good faith negotiation obligation provisions are not adhered to, enforcement procedures also have been established to report concerns and complaints and address disputes between parties. An MVPD believing itself aggrieved, may file a complaint with the Commission. Based upon pleadings filed, a determination will be made by the Commission on the issue of good faith.

v. *Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered.* In this Report and Order, of major importance is the principle of sustaining an environment where there will be fairness, fair dealings, and true competition between parties in the process of developing agreements on retransmission consent. This proceeding develops a definite framework for retransmission consent agreements so that television broadcast stations and MVPDs are aware of their rights and obligations under section 325(b)(3)(C).

w. As noted, American Cable Association (''ACA'') asserts that because retransmission consent agreements have been largely unrestricted, broadcasters have tried to extract unreasonable concessions in return for retransmission consent from smaller cable systems and will continue to do so. It states that the Commission must establish sufficient safeguards to protect individual smaller cable businesses. ACA suggests that the Commission should articulate its expectations regarding good faith negotiations and extend those obligations to all retransmission consent negotiations, including cable. We do not believe it necessary to develop specific rules for particular subsets of the MVPD market. The good faith negotiation requirement applies to a broadcaster's negotiations with all MVPDs, including small cable operators. The Report and Order adopts rules to implement this obligation with regard to all broadcaster negotiations with all MVPDs. For example, we set forth good faith negotiations standards, which proscribe the actions or practices that would violate a broadcast television station's duty to negotiate retransmission consent agreements in good faith. Further, procedures to address exclusivity complaints are also established. Small businesses are subject to these provisions and will benefit from the protection provided. We believe this sufficiently ameliorates ACA's concerns.

x. *Report to Congress:* The Commission will send a copy of this Report and Order, including this FRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801(a)(1)(A). A copy of this Report and Order and FRFA (or summary thereof) will also be published in the **Federal Register**, pursuant to 5 U.S.C. 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Ordering Clauses

98. Pursuant to 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.

99. The rule amendments set forth will become effective March 23, 2000.

100. The Consumer Information Bureau, Reference Information Center shall send this First Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 76 Cable Television Service.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 76 as follows:

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. In § 76.64 paragraph (m) is revised to read as follows:

§ 76.64 Retransmission Consent.

* * * * *

(m) Exclusive retransmission consent agreements are prohibited. No television broadcast station shall make or negotiate and agreement with one multichannel video programming distributor for carriage to the exclusion of other multichannel video programming distributors. This paragraph shall terminate at midnight on December 31, 2005.

* * * * *

3. Section 76.65 is added to Subpart D to read as follows:

§ 76.65 Good faith and exclusive retransmission consent complaints.

(a) *Duty to negotiate in good faith.* Television broadcast stations that provide retransmission consent shall negotiate in good faith the terms and conditions of such agreements to fulfill the duties established by section

325(b)(3)(C) of the Communciations Act 47 U.S.C. 325; provided, however, that it shall not be a failure to negotiate in good faith if the television broadcast station proposes or enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations. If a television broadcast station negotiates with multichannel video programming distributors in accordance with the rules and procedures set forth in this section, failure to reach an agreement is not an indication of a failure to negotiate in good faith.

(b) *Good faith negotiation.*—(1) *Standards.* The following actions or practices violate a broadcast television station's duty to negotiate retransmission consent agreements in good faith:

(i) Refusal by a television broadcast station to negotiate retransmission consent with any multichannel video programming distributor;

(ii) Refusal by a television broadcast station to designate a representative with authority make binding representations on retransmission consent;

(iii) Refusal by a television broadcast station to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations;

(iv) Refusal by a television broadcast station to put forth more than a single, unilateral proposal.

(v) Failure of a television broadcast station to respond to a retransmission consent proposal of a multichannel video programming distributor, including the reasons for the rejection of any such proposal;

(vi) Execution by a television broadcast station of an agreement with any party, a term or condition of which, requires that such television broadcast station not enter into a retransmission consent agreement with any multichannel video programming distributor; and

(vii) Refusal by a television broadcast station to execute a written retransmission consent agreement that sets forth the full understanding of the television broadcast station and the multichannel video programming distributor.

(2) *Totality of the circumstances.* In addition to the standards set forth in section 76.65(b)(1), a multichannel video programming distributor may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station breached its duty to negotiate in good faith as set forth in section 76.65(a).

(c) *Good faith negotiation and exclusivity complaints.* Any multichannel video programming distributor aggrieved by conduct that it believes constitutes a violation of the regulations set forth in this § 76.64(m) may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in § 76.7.

(d) *Burden of proof.* In any complaint proceeding brought under this section, the burden of proof as to the existence of a violation shall be on the complainant.

(e) *Time limit on filing of complaints.* Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:

(1) A complainant multichannel video programming provider enters into a retransmission consent agreement with a television broadcast station that the complainant alleges to violate one or more of the rules contained in this subpart; or

(2) A television broadcast station engages in retransmission consent negotiations with a complainant that the complainant alleges to violate one or more of the rules contained in this subpart, and such negotiation is unrelated to any existing contract between the complainant and the television broadcast station; or

(3) The complainant has notified the television broadcast station 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 contained in this subpart.

(f) *Termination of rules.* This section shall terminate at midnight on December 31, 2005.

[FR Doc. 00–7163 Filed 3–22–00; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[I.D. 022800D]

Fisheries of the Northeastern United States; Magnuson-Stevens Act Provisions; Northeast Skates; Overfished Fisheries

ACTION: Designation of Council responsibilities for the Northeast skate fisheries; determination of overfished fisheries.

SUMMARY: NMFS announces that the Assistant Administrator for Fisheries, on behalf of the Secretary of Commerce (Secretary), has designated the New England Fishery Management Council (NEFMC) as the Regional Fishery Management Council (Council) responsible for developing a fishery management plan (FMP) for seven species of skate (barndoor, clearnose, little, rosette, smooth, thorny, and winter skate) found in Federal waters off the coast of the New England and Mid-Atlantic states. NMFS also informs the public of its determination that four of the species comprising the Northeast skate fisheries (barndoor, smooth, thorny, and winter skate) are overfished.

FOR FURTHER INFORMATION CONTACT: Myles Raizin, Fishery Policy Analyst, 508–281–9104.

SUPPLEMENTARY INFORMATION:

Background

Soon after the passage of the Fishery Conservation and Management Act in 1976, the Secretary designated species-specific management responsibilities to the Councils. The skate species were not among those designated for management. In April 1999, the NEFMC requested the Secretary to grant the NEFMC sole authority to manage seven species of skate found in the Northeast—namely the barndoor, clearnose, little, rosette, smooth, thorny, and winter skate. In August 1999, the Mid-Atlantic Fishery Management Council agreed that it would be appropriate for the NEFMC to manage the Northeast skate fisheries. On March 14, 2000, NMFS informed the NEFMC that the Assistant Administrator for Fisheries, NMFS, on behalf of the Secretary, designated the NEFMC as the Council responsible for developing an FMP for seven species of skate found in Federal waters off the coast of the New England and Mid-Atlantic states.