

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

In the Matter of:
EchoStar Satellite Corporation
v.
Young Broadcasting, Inc.
KRON-TV, Young Broadcasting Co.
of San Francisco
Young Broadcasting of Nashville, Inc.
News 2, Inc.
Young Broadcasting of Los Angeles, Inc.
And KCAL-TV
File No. CSR-5655-C

MEMORANDUM OPINION AND ORDER

Adopted: August 2, 2001

Released: August 6, 2001

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. EchoStar Satellite Corporation ("EchoStar") has filed a retransmission consent complaint against the above-captioned parties (collectively, "Young"), pursuant to Sections 76.7 and 76.65 of the Commission's rules. EchoStar alleges that Young has breached its obligation to negotiate in good faith terms for EchoStar's local retransmission of Young's ABC affiliate, WKRN, in Nashville, Tennessee and its NBC affiliate, KRON, in San Francisco, California.

1 EchoStar is a multichannel video programming distributor ("MVPD") that provides direct broadcast satellite ("DBS") service to subscribers on a national basis.

2 Young Broadcasting, Inc.; Young Broadcasting of San Francisco, Inc., licensee of KRON-TV, San Francisco, California; Young Broadcasting of Nashville, Inc., general partner of WKRN, G.P., licensee of WKRN-TV, Nashville, Tennessee; and Young Broadcasting of Los Angeles, Inc., operator of Fidelity Television, Inc., licensee of KCAL-TV, Los Angeles, California.

3 47 C.F.R. §§ 76.7 and 76.65.

2. EchoStar's complaint arises out of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA").⁴ The SHVIA authorizes satellite carriers to offer local broadcast signals to their subscribers. Section 325(b)(3)(C) of the Communications Act requires satellite carriers to obtain retransmission consent for the local broadcast signals they carry, and requires broadcasters, until 2006, to negotiate in good faith, consistent with competitive marketplace considerations, with satellite carriers and other MVPDs with respect to the retransmission of the broadcasters' signals.⁵ The Commission adopted rules implementing Section 325(b)(3)(C) in *Implementation of the Satellite Home Viewer Improvement Act of 1999 - Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 (2000) ("*First Report and Order*").⁶

II. PROCEDURAL MATTERS

3. The general pleading provisions of Section 76.7 govern retransmission consent proceedings and in most instances provide for the filing of a complaint, an answer to the complaint and a reply.⁷ Unless expressly permitted by the Commission, a reply pleading filed in response to an answer shall not contain new matters.⁸ The rules also provide that "[e]xcept as provided in this section, or upon a showing of extraordinary circumstances, additional motions or pleadings by any party will not be accepted."⁹ Discovery as-of-right does not apply in retransmission consent proceedings, but the Commission in its discretion may order discovery.¹⁰

4. In this proceeding, in addition to the filing of EchoStar's retransmission consent complaint ("Expedited Consideration Requested"), Young's Answer and EchoStar's Reply, the parties have filed 14 additional pleadings.¹¹ We find the number of pleadings filed in this proceeding, especially

⁴ SHVIA was enacted as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA") (relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.), PL 106-113, 113 Stat. 1501, Appendix I (1999).

⁵ 47 U.S.C. § 325(b)(3)(C)(ii).

⁶ See 47 C.F.R. § 76.65.

⁷ 47 C.F.R. § 76.7; *First Report and Order*, 15 FCC Rcd at 5477.

⁸ 47 C.F.R. § 76.7(c)(1).

⁹ 47 C.F.R. § 76.7(d).

¹⁰ 47 C.F.R. § 76.7(f); *First Report and Order*, 15 FCC Rcd at 5478.

¹¹ In the order in which they were received, these pleadings include: EchoStar's Request for Confidential Treatment; Young's Opposition to, and Request for Sanctions Concerning, EchoStar's Request for Confidential Treatment; EchoStar's Request for Discovery; EchoStar's Document Requests, Written Interrogatories, Requests for Admissions, and Requests for Depositions to Defendants; EchoStar's Reply to Opposition to, and Request for Sanctions Concerning, EchoStar's Request for Confidential Treatment; Young's Motion for Leave to File Response to EchoStar's Reply; Young's Response to EchoStar's Reply; Young's Opposition to EchoStar's Request for Discovery and, in the Alternative, Proposed Discovery Requests; Young's Document Requests, Written Interrogatories, Requests for Admissions, and Requests for Depositions to Complaint; Young's Motion for Leave to File Response to Reply of EchoStar to Opposition to, and Request for Sanctions Concerning, EchoStar's Request for Confidential Treatment, and Request for Appropriate Sanctions; Young's Response to Reply of EchoStar to Opposition to, and Request for Confidential Treatment, and Request for Appropriate Sanctions; EchoStar's Reply Regarding Request for Discovery; EchoStar's Opposition to Young's Motion for Leave to File Response to EchoStar's Reply; and, EchoStar's Opposition to Young's Motion for Leave to File a Response to EchoStar's Reply Regarding EchoStar's Request for Confidentiality.

in light of EchoStar's request for "Expedited Consideration," to be extraordinary. The pleadings of both parties appear designed to confound and frustrate the opposing party and delay the Commission's decision-making in this matter.¹² In addition to considering the pleadings authorized by Section 76.7 of the Commission's rules, we grant Young's Motion for Leave to File Response to EchoStar's Reply. We will consider Young's Response to the extent that new matters were raised by EchoStar in its Reply and to the extent that we believe the public interest will be served by the consideration of the matters addressed therein. We deny both parties' requests for discovery and will not consider pleadings filed in relation thereto. There are no special factors that would require discovery in this matter because both parties and the Commission have access to all relevant documentary evidence. The record in the case, while complicated, is sufficient on its face and the imposition of discovery is not necessary to resolve the complaint before us. We will consider separately EchoStar's Request for Confidential Treatment and related pleadings.

III. ECHOSTAR'S CONFIDENTIALITY REQUEST

5. EchoStar filed a "Request for Confidential Treatment" of its Retransmission Consent Complaint pursuant to Section 76.9 of the Commission's rules, and the provisions governing submission of confidential materials, Sections 0.457 and 0.459 of the Commission's rules, requesting that its Complaint and exhibits attached thereto be afforded confidential treatment and not be placed in the Commission's public files.¹³ In support of its request, EchoStar asserts that certain exhibits to its complaint contain commercial or financial information that would not customarily be released to the public regardless of whether or not it is protected from disclosure by a privilege.¹⁴ According to EchoStar, disclosure of this information to other broadcast companies with which it is negotiating for retransmission consent could place EchoStar at a competitive disadvantage.¹⁵ EchoStar also asserts that disclosure of this information to distributors competing against EchoStar would severely prejudice EchoStar's ability to compete.¹⁶ EchoStar contends that in these circumstances, this information qualifies as automatically exempt from public examination under Section 0.457(d)(1)(iv) of the Commission's rules.¹⁷

6. In the alternative, EchoStar requests confidential treatment of the information pursuant to Section 0.459(b) of the Commission's rules.¹⁸ EchoStar asserts in support that the information is "extremely sensitive" as it sets forth concessions proposed by EchoStar and suggests areas of flexibility in EchoStar's attempt to reach retransmission agreements.¹⁹ In addition, EchoStar represents that it takes significant measures to ensure that the information is not disclosed to the public. Specifically, EchoStar states that the information is only available to EchoStar employees who have a specific need to work with

¹² Because of the extensive time period over which the record developed in this proceeding, we will not address the issue of timeliness with regard to the filing of some of these pleadings and accept all pleadings herein as timely filed.

¹³ 47 C.F.R. § 76.9 and 47 C.F.R. §§ 0.457, 0.459. EchoStar also filed a public version of its complaint.

¹⁴ EchoStar Request for Confidential Treatment at 2; *see* 47 C.F.R. § 0.457(d).

¹⁵ EchoStar Request for Confidential Treatment at 2.

¹⁶ *Id.*

¹⁷ 47 C.F.R. § 0.457(d)(1)(iv).

¹⁸ 47 C.F.R. § 0.459(b).

¹⁹ EchoStar Request for Confidential Treatment at 3.

such agreements, and the information is routinely kept in files labeled “Confidential.”²⁰ EchoStar also asserts that the attached material for which non-disclosure is sought is not available to the public and has not previously been disclosed to third parties outside the negotiation setting.²¹ EchoStar requests that the material be withheld from disclosure for an indefinite period because disclosure at any time could jeopardize the competitive position of EchoStar.²²

7. Young filed an opposition and a request for sanctions regarding EchoStar’s confidentiality request. Young asserts that EchoStar willfully and intentionally abused the Commission’s processes by filing a confidentiality request and then publicly disclosing the very materials for which confidentiality was sought on its own satellite channels as part of a program entitled “Charlie Chat.”²³ Young asks that EchoStar’s request be denied and that sanctions be imposed for abuse of process. Young argues that EchoStar’s request should be denied because it cannot satisfy several of the requirements necessary for the materials in question to be afforded confidential treatment and because EchoStar has otherwise put the information contained in the materials into the public domain. According to Young, even before EchoStar’s voluntary televised disclosure, none of the material for which it sought confidential treatment fit any category of material outlined in Section 0.457(d) concerning material not routinely available for public inspection.²⁴ Young argues that the only category of Section 0.457(d)(1) that is even remotely related to the EchoStar materials is the category of programming contracts between programmers and MVPDs outlined in subsection (iv). However, Young notes that EchoStar has not submitted any programming contracts, only drafts of retransmission consent agreements, along with related correspondence and e-mail.²⁵

8. Young also argues that EchoStar cannot satisfy the requirements of Section 0.459(b) and Section 76.9 of the Commission’s rules because many of the assertions in EchoStar’s request regarding the need for confidentiality no longer are true.²⁶ Young contends that while EchoStar requested confidentiality for the entirety of some 20 exhibits attached to its complaint, it voluntarily disclosed to the public the material for which it sought confidential treatment on a program televised to EchoStar subscribers.²⁷ Young argues that EchoStar’s willfully false assertions to the Commission regarding the

²⁰ *Id.* at 4.

²¹ *Id.*

²² *Id.*

²³ Young’s Opposition to, and Request for Sanctions Concerning, EchoStar’s Request for Confidential Treatment at iii, 5, and 11. Young provided a videotape copy of the program as an exhibit to its Opposition.

²⁴ *Id.* at 5.

²⁵ *Id.* at 6.

²⁶ *Id.*; 47 C.F.R. § 0.459(b); 47 C.F.R. § 76.9(b).

²⁷ Young Opposition to, and Request for Sanctions Concerning, EchoStar’s Request for Confidential Treatment at iii. Young argues that because EchoStar has willfully and intentionally released the materials in issue to the public, EchoStar has waived its right to confidentiality pursuant to either 47 C.F.R. § 0.459 or 47 C.F.R. § 76.9. As support, Young cites *North Dakota v. Andrus*, 581 F.2d 177 (8th Cir. 1978) (holding that government has waived exemption from disclosure under FOIA where government provided materials in issue to a private party). Young also argues that it is the Commission’s long-standing policy to release allegedly confidential financial information when that information has been put in issue by the party requesting confidentiality. *See, e.g., Citizens Communications Center*, 25 R.R. 2d (P & F) 1005 (1972); *Garryowen Corp.*, 41 R.R. 2d (P & F) 51 (1977).

need for confidential treatment represent an egregious abuse of process, and that EchoStar should be sanctioned accordingly.²⁸

9. In response, EchoStar argues that its request for confidential treatment was filed out of an abundance of caution because EchoStar filed its retransmission consent complaint less than 24 hours after it took WKRN and KRON off the air. Under these circumstances, EchoStar asserts that it did not have an opportunity to discuss with Young its position on releasing negotiation documents or correspondence between the parties.²⁹ EchoStar contends that its request for confidential treatment was intended to avoid exposing sensitive information to Young and EchoStar competitors.³⁰ EchoStar also argues that its alleged disclosure of confidential treatment was in response to Young's March 5, 2001, news release in which EchoStar was challenged by Young to release all negotiating documents and exchanges of correspondence.³¹ EchoStar argues that in its "Charlie Chat" program it typically released no more than two sentences from only a portion of the 20 exhibits for which it sought confidential treatment.³² EchoStar asserts that it only disclosed what it regarded as the least sensitive information while considering modification of its confidentiality request.³³ EchoStar seeks to modify its request for confidential treatment to disclose to the public those letters or portions of correspondence that contain less sensitive information.³⁴ EchoStar also requests that the Commission sanction Young for misrepresentations and distortions filed in its Opposition to EchoStar's request.³⁵

10. EchoStar represented to the Commission that pursuant to Section 0.457(d) of our rules, certain exhibits attached to its complaint contain material that qualifies as commercial or financial information that would not customarily be released to the public and that these materials are therefore entitled to confidential treatment. However, as Young has stated, the only category that relates to EchoStar's request is Section 0.457(d)(1)(iv) which covers programming contracts between programmers and MVPDs.³⁶ EchoStar did not submit any programming contracts to the Commission, only draft retransmission consent agreements, correspondence and e-mails. EchoStar pleads in the alternative that its request be afforded confidential treatment pursuant to Section 0.459(b).³⁷ This section of the rules requires that a request that materials or information submitted to the Commission be withheld from public inspection contain a statement of the reasons for withholding the material from inspection.³⁸

²⁸ Young Opposition to, and Request for Sanctions Concerning, EchoStar's Request for Confidential Treatment at 11.

²⁹ Reply of EchoStar to Opposition to, and Request for Sanctions Concerning, EchoStar's Request for Confidential Treatment, and Request for Appropriate Sanctions at 4.

³⁰ *Id.*

³¹ *Id.* at 6 and Exhibit 1 (Young Press Release, Mar. 5, 2001).

³² *Id.* at 7.

³³ *Id.* at 10.

³⁴ *Id.* at 12.

³⁵ *Id.* at 13.

³⁶ 47 C.F.R. § 0.457(d)(1)(iv).

³⁷ 47 C.F.R. § 0.459(b).

³⁸ 47 C.F.R. § 0.459(b)(1)-(9).

11. EchoStar initially sought confidential treatment for the entirety of 20 out of 22 exhibits attached to its retransmission consent complaint. Yet despite its own request for confidentiality, and before either partially or fully withdrawing that request, EchoStar began publicly disclosing only certain EchoStar-selected portions of the information contained in those exhibits. Thereafter, on April 11, 2001 (41 days after the filing of its complaint and 23 days after the broadcast of the “Charlie Chat” program), EchoStar filed its modified request for confidentiality. EchoStar withdrew its request for confidential treatment with regard to 12 of the 20 documents for which it previously sought confidentiality in their entirety.³⁹ EchoStar further modified its request by providing redacted versions of 6 documents, a small portion of which EchoStar now requests confidential treatment.⁴⁰ Finally, EchoStar seeks confidentiality for substantial portions of 2 documents.⁴¹ We will grant EchoStar’s modified request for confidential treatment pursuant to Section 0.459 of the Commission’s rules. EchoStar’s modified request seeks to protect only sensitive material the disclosure of which could cause EchoStar competitive harm.⁴²

12. Although we grant EchoStar’s modified request for confidential treatment, this does not excuse EchoStar’s conduct in this matter. The Commission has stated that “casual” requests for confidentiality based on conclusory or generalized allegations will not be granted.⁴³ We find it difficult to conceive of a confidentiality request more casual than that initially filed by EchoStar in this proceeding. After requesting confidentiality for the entirety of 20 out of 22 exhibits attached to its complaint, EchoStar either withdrew its request or sought redacted treatment for a minute amount of fully 18 out of 20 of these documents. Moreover, we find that EchoStar failed in its duty of candor to the Commission. EchoStar began publicly disclosing on March 19, 2001, portions of the documents for which it sought confidentiality in their entirety, yet failed to apprise the Commission of this fact for an additional 23 days until it filed its request for modification. Indeed, it was the defendant in this proceeding, not EchoStar, that first brought these disclosures to the Commission’s attention. In this regard, we remind EchoStar that “Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding. Information submitted . . . must be current and updated as necessary and in a timely manner at any time before a decision is rendered on the merits of the complaint.”⁴⁴ Finally, we agree with Young that EchoStar’s conduct in filing material with the Commission requesting confidentiality, while concurrently engaging in a public debate over the issues raised in this proceeding and publicly disclosing selected portions of the alleged confidential material, constitutes an abuse of the Commission’s processes. We admonish

³⁹ See Reply of EchoStar to Opposition to, and Request for Sanctions Concerning, EchoStar’s Request for Confidential Treatment, and Request for Appropriate Sanctions, Exhibits 6, 10, 11, 12, 13, 15, 15, 17, 19, 20, 21 & 22.

⁴⁰ See *id.*, Exhibits 4, 7, 8, 9, 14 & 18.

⁴¹ See *id.*, Exhibits 3 & 5 (draft retransmission consent agreements).

⁴² We note that while Young submitted a Confidential version of its Answer incorporating all of EchoStar’s exhibits, in addition to its own Exhibits, Young represented to the Commission that it did not believe that any of this material warranted confidential treatment and did not request that the material be treated confidentially by the Commission. March 21, 2001 transmittal letter from Wade H. Hargrove, Esq. to Magalie Roman Salas, Secretary, Federal Communications Commission. Young also stated that it asked EchoStar to publicly release all of the documents and filings or permit Young to do so. *Id.* We will place in the public file only the redacted versions of the documents filed as part of Young’s Answer for which we have granted EchoStar’s request for confidentiality.

⁴³ See *Community TV Corp. in the Town of Merrimack, New Hampshire*, 9 FCC Rcd 6764 (CSB 1994) citing *National Exchange Carriers Ass’n v. Kleppe*, 547 F.2d 673, 680-81 (D.C. Cir. 1976); 47 C.F.R. § 0.459(c).

⁴⁴ 47 C.F.R. § 76.6(a)(6).

EchoStar for this abuse of process and caution EchoStar to take greater care with regard to future filings of this type.

IV. DISCUSSION

13. In its complaint EchoStar alleges that Young failed to negotiate in good faith with EchoStar over retransmission of Young's ABC affiliate, WKRN, in Nashville, Tennessee and its NBC affiliate, KRON, in San Francisco, California, forcing EchoStar to take the stations off the air at midnight February 28, 2001. EchoStar states that it believed that it had arrived at a retransmission consent agreement with Young in late June 2000.⁴⁵ According to EchoStar, under the terms of this agreement, in exchange for retransmission consent to carry WKRN and KRON, EchoStar would pay a fee for carriage of those stations and also would carry KCAL, an independent station owned by Young in Los Angeles.⁴⁶ Thereafter, EchoStar asserts that Young disputed the terms of the agreement and demanded payment for carriage of KCAL and argued over the terms of carriage of vertical blanking interval ("VBI") content.⁴⁷ EchoStar alleges that Young's conduct in negotiating for retransmission consent for WKRN and KRON violates both the Commission's objective good faith negotiation standards and the totality of circumstances test.⁴⁸

A. Good Faith Negotiation Background

14. 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.⁴⁹

The *First Report and Order* adopted a two-part test for good faith.⁵⁰ The first part of the test consists of a brief, objective list of negotiation standards.⁵¹ The second part of the good faith test is based on a totality

⁴⁵ Complaint at 10.

⁴⁶ *Id.*

⁴⁷ Complaint at 11, 12.

⁴⁸ *Id.* at 22, 25.

⁴⁹ 47 U.S.C. § 325(b)(3)(C)(ii).

⁵⁰ *First Report and Order*, 15 FCC Rcd at 5457.

⁵¹ *Id.* at 5462-64. First, a broadcaster may not refuse to negotiate with an MVPD regarding retransmission consent. Second, a broadcaster must appoint a negotiating representative with authority to bargain on retransmission consent issues. Third, a broadcaster must agree to meet at reasonable times and locations and cannot act in a manner that would unduly delay the course of negotiations. Fourth, a broadcaster may not put forth a single, unilateral proposal. Fifth, a broadcaster, in responding to an offer proposed by an MVPD, must provide considered reasons for rejecting any aspects of the MVPD's offer. Sixth, a broadcaster is prohibited from entering into an agreement with any party

(continued...)

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, constitute a failure to negotiate in good faith.⁵² The *First Report and Order* provided that MVPDs believing themselves aggrieved under the good faith rules could file a complaint pursuant to Section 76.7 of the Commission's rules.⁵³ The burden of proof in good faith complaints is on the MVPD complainant.⁵⁴

B. Objective Test

15. EchoStar specifies three of the objective test criteria that Young is alleged to have violated: (1) refusal to negotiate retransmission consent with EchoStar; (2) refusal to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations; and (3) refusal to put forth more than a single, unilateral proposal.⁵⁵ We will address each alleged violation in turn.

16. EchoStar asserts that under the Commission's negotiation standards Young violated its good faith obligation, found in Section 76.65(b)(1)(i) of the Commission's rules, by generally refusing to negotiate retransmission consent.⁵⁶ EchoStar argues that Young's refusal to negotiate further in the absence of EchoStar's agreement to take on must-carry-like obligations with regard to KCAL and KRON, coupled with Young's demand that EchoStar pay for that carriage, amounts to a bad faith refusal to negotiate.⁵⁷ However, as the Commission stated in the *First Report and Order*, "[p]rovided that the parties negotiate in good faith in accordance with the Commission's standards, failure to reach an agreement does not violate Section 325(b)(3)(C)."⁵⁸ The record in this proceeding conclusively demonstrates that Young was an active participant throughout a lengthy negotiation process. Young has been in regular contact with EchoStar regarding retransmission consent since February 2000 through the days leading up to the February 28, 2001, deadline and thereafter.⁵⁹ Accordingly, although we will examine EchoStar's

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conditioned upon denying retransmission consent to any MVPD. Finally, a broadcaster must agree to execute a written retransmission consent agreement that sets forth the full agreement between the broadcaster and the MVPD. *Id.*

⁵² *Id.* at 5458.

⁵³ 47 C.F.R. § 76.7.

⁵⁴ 47 C.F.R. § 76.65(d).

⁵⁵ 47 C.F.R. § 76.65(b)(1)(i), (iii), (iv).

⁵⁶ 47 C.F.R. § 76.65(b)(1)(i).

⁵⁷ Complaint at 25. Under SHVIA, EchoStar states that if it provides any local station in a given market, it must also carry other stations requesting carriage starting January 1, 2002. EchoStar argues that any agreement with Young would go beyond that obligation because EchoStar would have to carry KCAL before the January 1, 2002 starting date regardless of any pending litigation concerning must carry and would be required to pay for that carriage. Complaint at 22.

⁵⁸ *First Report and Order*, 15 FCC Rcd at 5462.

⁵⁹ Young Answer at 10-23; Young Response to EchoStar Reply, Exhibit CC (April 16, 2001, Letter from Michael Sechrist, News 2, WKRN, Nashville to Michael Schwimmer, EchoStar.).

remaining allegations to determine whether Young in fact negotiated in good faith, we cannot conclude that Young failed or refused to negotiate with EchoStar.

17. EchoStar also contends that Young violated Section 76.65(b)(1)(iii) of the Commission's rules by acting in a manner that unreasonably delayed retransmission consent negotiations.⁶⁰ In support, EchoStar states that Young delayed negotiations and unreasonably refused to discuss the price for carriage of independent station KCAL until other non-price aspects of the retransmission consent package were agreed to by EchoStar.⁶¹ Young responds that it did not refuse to discuss a price term for KCAL and thereby delay the retransmission consent negotiations as alleged by EchoStar.⁶² Young contends that it believed that it had reached an agreement on the price of KCAL as part of a group price term agreed to in June 2000.⁶³ Young states that it was only after the parties did not go forward with this agreement that Young, in a November 2000 letter, told EchoStar that there was no point in discussing further the monthly fee for KCAL until agreement could be reached on other points.⁶⁴ Young notes that despite this statement, it did continue to negotiate a price for KCAL.⁶⁵

18. EchoStar has not established that Young violated Section 76.65(b)(1)(iii) by acting in a manner that unreasonably delayed retransmission consent negotiations.⁶⁶ Viewed in the context of the length of these negotiations and the disagreements regarding price and other terms that ensued after the failure of the agreement thought to have been reached in June 2000, Young's statement in its November 2000 letter did not unreasonably delay negotiations. In addition, as Young has documented, negotiations did go forward from that point and the parties did continue to negotiate a price for KCAL.

19. Finally, EchoStar argues that Young has violated Section 76.65(b)(1)(iv) of the Commission's rules which provides that a broadcaster violates its duty to negotiate retransmission consent in good faith by refusing to put forth more than a single unilateral proposal.⁶⁷ EchoStar argues that Young has engaged in take-it-or-leave-it bargaining because "EchoStar must agree to carry the *independent* KCAL and KRON stations (*and* must pay for them) as a condition for securing carriage of Young's network affiliates, or essentially, there is not a deal."⁶⁸ EchoStar argues that the only alternative offered by Young is an *a la carte* offer to carry its network stations at a price that is 4 times the amount that Young wants for these stations if EchoStar also agreed to carry KCAL and is 4 times the amount that broadcasters typically ask for retransmission of network stations.⁶⁹ Accordingly, EchoStar contends that

⁶⁰ *Id.*; 47 C.F.R. § 76.65(b)(1)(iii).

⁶¹ Complaint at 24, citing Exhibit 6 (November 27, 2000, letter from Wade H. Hargrove, Brooks, Pierce *et al.* to Angela Borrillo, EchoStar).

⁶² Young Answer at 25.

⁶³ *Id.*

⁶⁴ *Id.*, citing Exhibit 1 (November 27, 2000, letter from Wade Hargrove, Brooks, Pierce *et al.* to Angela Borrillo, EchoStar); *see also* Complaint at Exhibit 6.

⁶⁵ Young Answer at 25; *see also* Exhibit 7; Exhibit J; Exhibit 15; Exhibit 18.

⁶⁶ 47 C.F.R. § 76.65(b)(1)(iii).

⁶⁷ Complaint at 23; 47 C.F.R. § 76.65(b)(1)(iv).

⁶⁸ *Id.* at 23 (emphasis original). EchoStar alternatively refers to KRON as an independent station and as an NBC affiliate because KRON is slated to lose its NBC affiliation in January 2002. *Id.* at 16, 23.

⁶⁹ Complaint at 23; EchoStar Reply at 4.

Young's *a la carte* fee is unreasonable and that such an alternative to what EchoStar refers to as an illegal tying demand is no real alternative at all and therefore constitutes take-it-or-leave-it bargaining by Young.⁷⁰

20. In response, Young counters that it never conditioned carriage of its network affiliates, WKRN and KRON, upon carriage of its independent station KCAL, as part of a tying arrangement.⁷¹ Young claims that it has always offered to negotiate retransmission consent for its stations on an *a la carte* basis.⁷² Young argues that even if it had conditioned carriage of WKRN and KRON on carriage of KCAL, such condition is presumptively consistent with competitive marketplace considerations and the Commission's good faith negotiation requirement.⁷³

21. We believe that EchoStar has not met its burden of proof in establishing that Young has engaged in take-it-or-leave-it bargaining in violation of Section 76.65(b)(1)(iv) of the Commission's rules.⁷⁴ The Commission has stated that it will not prohibit proposals of 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.⁷⁵ The Commission held that such proposals for carriage conditioned on these kinds of terms are consistent with competitive marketplace considerations.⁷⁶ Good faith negotiation requires only that the broadcaster at least consider some other form of consideration if the MVPD cannot accommodate such carriage.⁷⁷ Here EchoStar has made clear that it finds unacceptable the fees that Young is asking for carriage of its stations and that it has little desire to carry independent station KCAL, but it has not demonstrated that it lacks channel capacity to carry Young's stations. Moreover, EchoStar has not demonstrated that Young has refused to consider other forms of consideration. Despite the fact that EchoStar does not wish to pay the *a la carte* price proposed by Young for carriage of its network stations, Young has offered, as an alternative to a package deal, to negotiate retransmission consent for each of its stations on an *a la carte* basis.⁷⁸

C. Totality of the Circumstances

⁷⁰ *Id.*

⁷¹ Young Answer at 24.

⁷² *Id.*, Exhibit B, Exhibit 9, and Exhibit 20.

⁷³ Young Answer at 24; *see First Report and Order*, 15 FCC Rcd at 5469.

⁷⁴ 47 C.F.R. § 76.65(b)(1)(iv).

⁷⁵ *First Report and Order*, 15 FCC Rcd at 5462.

⁷⁶ *Id.* at 5469.

⁷⁷ *Id.* at 5463.

⁷⁸ EchoStar alleges that that Young's *a la carte* offer was withdrawn during a telephone conversation on February 27, 2001, between Deborah McDermott, Executive Vice President of Young, and Charles Ergen, Chairman and CEO, EchoStar and this is further evidence of bad faith on the part of Young. EchoStar Reply at 5, Exhibit 3 (Declaration of Charles W. Ergen). Young categorically denies that it ever withdrew its *a la carte* offer and maintains that it has always been available to EchoStar. Young Response at 18, Exhibit AA (Declaration of Deborah McDermott); *see also* Young Answer at 21, Exhibit 20 (Feb. 28, 2001, letter from Michael Sechrist, Young Broadcasting). The record demonstrates that Young's *a la carte* offer has been a part of the negotiation process throughout and while there are conflicting Declarations submitted by the parties on the issue of whether Young's *a la carte* offer was withdrawn on the day before EchoStar took Young's stations off the air, no evidence has been presented to demonstrate that its conduct with regard to this matter involved bad faith on Young's part.

22. EchoStar also contends that Young's conduct violates the totality of the circumstances standard.⁷⁹ According to EchoStar, "Young has tied retransmission consent for its network-affiliated station to carrying two *independent* stations *and* paying for them to boot -- such onerous retransmission plus cash plus carriage requirements are 'sufficiently outrageous' to evidence bad faith."⁸⁰ EchoStar acknowledges that the Commission has presumptively viewed tying requests as consistent with competitive marketplace considerations, but argues that Young's demands are inconsistent with such considerations. First, EchoStar argues that the Commission's presumption cannot be read to cover Young's demands in which Young wants to be paid, in essence, four times for retransmission consent.⁸¹ EchoStar explains by stating that "Young is requesting that it be paid in cash for retransmission of its network affiliates, while also demanding that EchoStar carry two independent stations as a further payment in kind, and further insisting that EchoStar pay for those *independent* stations at a price that, moreover, is at or above the acceptable norm for *network*-affiliate stations."⁸² EchoStar contends that the presumption that tying is legitimate cannot be a pretext for Young to be compensated four times for the same retransmission consent, when each of the four payments standing alone would be generous compared to the norm in retransmission consent deals.⁸³

23. Second, EchoStar argues that the Commission's presumption is counterbalanced by the rule that conduct resulting from the exercise of market power is generally anti-competitive if it has the effect of significantly hindering MVPD competition.⁸⁴ EchoStar contends that here market power is present and has a pernicious effect on EchoStar's ability to compete. EchoStar states that for each local station that EchoStar carries, it must devote one channel of scarce satellite capacity that cannot be used anywhere in the country other than in one local market. Therefore, according to EchoStar, having to convey more local signals for Young would mean fewer cities in the country that EchoStar would be able to serve, thereby frustrating the objectives of Congress and the Commission to create more vigorous competition for cable.⁸⁵

24. EchoStar also alleges that Young is demanding from EchoStar more onerous terms for retransmission consent than the terms offered to other MVPDs, including cable operators in its local markets, as well as DIRECTV.⁸⁶ EchoStar claims that Young's refusal to accept what it refers to as its double "most favored nation" ("MFN") offer is proof that its conduct is not based on competitive marketplace considerations. EchoStar says that it offered as Young's option, either the best price that EchoStar pays to anyone else for retransmission of an independent station or the price that EchoStar's competitor DIRECTV agrees to pay Young.⁸⁷ EchoStar argues that if Young's behavior had been due to competitive marketplace considerations, this double MFN offer, by automatically equalizing Young's

⁷⁹ Complaint at 25.

⁸⁰ *Id.* (emphasis original).

⁸¹ *Id.*

⁸² *Id.* at 26 (emphasis original).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 27.

⁸⁷ *Id.* at 27-28.

treatment with that for a most favored broadcaster, should have disposed of the situation.⁸⁸ In addition, EchoStar contends that it expanded its MFN offer to cover other terms of the deal one day before it was required to shut-off Young's stations, but Young stated that it could not respond because the offer had not been made with sufficient time for consideration before the deadline. Moreover, EchoStar argues that Young's conduct violates the totality of circumstances standard because Young has ignored EchoStar's request to engage in mediation to facilitate an agreement, despite the Commission's endorsement of the mediation process.⁸⁹ EchoStar also charges that Young refused to enter into a short-term extension while efforts were made between the parties to resolve their differences and, as a result, EchoStar's customers have been made to suffer a disruption of service.⁹⁰

25. Young responds that it has not violated the totality of the circumstances test and has offered only negotiating proposals that are presumptively consistent with Commission standards. In addition, Young asserts that to the extent that Young has negotiated for carriage of KCAL as part of a group deal, EchoStar repeatedly agreed to compensate Young for such carriage.⁹¹ Young also disputes EchoStar's allegation that it must compensate Young four times for retransmission consent. Young argues that as part of a discounted package deal that EchoStar initially accepted in June 2000, EchoStar would pay a retransmission license fee for all of Young's stations, including KCAL and Young's NBC affiliate, KRON. Young argues that it did not demand carriage of "two independent stations" as further payment in kind and has always offered carriage of each of its stations on an *a la carte* basis.⁹² Moreover, Young asserts that it has compromised on the price for KCAL and its most recent proposal places compensation for KCAL below that of the license fee for its network affiliated stations.⁹³ Accordingly, Young argues that EchoStar's allegation that the price for KCAL is above the acceptable norm for network-affiliated stations is patently false.

26. Young also disputes EchoStar's allegations concerning its technical channel capacity. Young asserts that EchoStar was initially anxious to obtain a group station agreement that would include KCAL. Young argues that if EchoStar did not have the channel capacity to carry KCAL, presumably it never would have agreed to do so.⁹⁴ As support, Young points to an e-mail and a fax received from EchoStar as evidence that EchoStar had available channel capacity and that it was enthusiastic regarding the prospect of the launch and carriage of KCAL.⁹⁵

27. With regard to EchoStar's MFN offers, Young argues that even if it sought compensation above that agreed to with other MVPDs in the same market, that negotiating proposal is presumptively consistent with competitive marketplace considerations and the Commission's good faith negotiation requirements.⁹⁶ Young states that EchoStar repeatedly sought from Young information concerning the

⁸⁸ *Id.* at 28.

⁸⁹ *Id.*

⁹⁰ *Id.* at 28-29.

⁹¹ Young's Answer at 26, Exhibit 3; Exhibit F; Exhibit G; Exhibit 14; Exhibit 19.

⁹² *Id.* at 27.

⁹³ *Id.*, Exhibit 15; Exhibit 18.

⁹⁴ *Id.* at 28.

⁹⁵ *Id.*, Exhibit 3, Exhibit G.

⁹⁶ *Id.* at 28.

confidential terms that Young had agreed to with other MVPDs, including its competitor DIRECTV. Finally, Young argues that EchoStar mischaracterizes the situation surrounding its allegation that Young refused to enter into a short-term extension that ultimately caused a loss of service to EchoStar customers.⁹⁷ Young contends that EchoStar asked for early notice of termination on January 2, 2001, and was immediately given it two days later in a letter from Young which notified EchoStar that it had an eight week period during which it could notify its subscribers to enable them to make other arrangements to receive KRON and WKRN and thereby avoid a disruption in service.⁹⁸

28. EchoStar has not met its burden of proof with regard to the totality of circumstances standard. The Commission has stated that it did not intend that the totality of circumstances test to be used as a “back door” inquiry into the substantive terms negotiated between the parties.⁹⁹ The Commission has reserved this test to be used to entertain complaints alleging that specific retransmission consent proposals are sufficiently outrageous, or where evidence has been presented that differences among MVPD agreements are not based on competitive marketplace considerations.¹⁰⁰ Based on the record in this proceeding, these conditions are not present.

29. In this case, the dispute, in part, involves a bargaining proposal that is presumptively consistent with competitive marketplace considerations: a proposal conditioned on carriage of other programming, *i.e.*, another broadcast station, Young’s VHF independent station in Los Angeles. EchoStar acknowledges this presumption, but argues that Young’s demands are sufficiently outrageous to evidence bad faith and are inconsistent with competitive marketplace considerations. EchoStar’s arguments in this regard fail. The parties expend considerable time arguing over whether retransmission consent was sought for two network affiliates (KRON and WKRN) and one independent broadcast station (KCAL) or whether retransmission consent was sought for one network affiliate (WKRN) and two independent broadcast stations (KRON and KCAL). The dispute at the heart of this proceeding, however, is what stations EchoStar will carry pursuant to retransmission consent and what compensation will be exchanged between the parties for such carriage. Whether such stations have network affiliation, or will subsequently lose such affiliation, is merely an element to be considered in the overall negotiation of a retransmission consent agreement acceptable to both parties. The Commission has expressly stated that: “[p]roposals for carriage conditioned on carriage of any other programming, such as . . . another broadcast station either in the same or a different market”¹⁰¹ and “[p]roposals for compensation above that agreed to with other MVPDs in the same market”¹⁰² are presumptively consistent with competitive marketplace considerations. EchoStar has not presented sufficient evidence that the terms and conditions proposed by Young are inconsistent with competitive marketplace considerations or in any way sufficiently outrageous to evidence a lack of good faith by Young. We also find that the refusal to agree to EchoStar’s “MFN” offer does not demonstrate that Young has failed to negotiate in good faith. As discussed, bargaining proposals for compensation above that agreed to with other MVPDs in the same market are presumptively consistent with competitive marketplace considerations.¹⁰³ Young’s decision not to accept EchoStar’s

⁹⁷ *Id.* at 29.

⁹⁸ *Id.*, Exhibit 4; Exhibit 7.

⁹⁹ *First Report and Order*, 15 FCC Rcd at 5458.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 5469.

¹⁰² *Id.*

¹⁰³ *Id.* at 5469.

offer to accept either the best price that EchoStar pays to anyone else for retransmission of an independent station, or the price that DIRECTV agrees to pay Young, is not in conflict with its good faith negotiation obligation. Nothing in our rules requires a broadcaster to accept, as part of its good faith negotiation obligation, a retransmission consent proposal that would put it on equal footing with other local broadcasters. We find the back-and-forth exchange exhibited between EchoStar and Young regarding carriage terms and conditions to be “. . . 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.”¹⁰⁴

30. Similarly, EchoStar’s argument that it must utilize scarce channel capacity in order to carry local signals that it does not wish to carry is not persuasive. In addition to the evidence that EchoStar was willing to carry all three Young stations if acceptable terms were found, the record also demonstrates that Young proffered retransmission consent proposals based on carriage of each channel on an *a la carte* basis. The fact that Young priced its *a la carte* price higher than that of the three channel package reflects Young’s legitimate desire to have all three channels carried, if possible. EchoStar was free to accept either of Young’s proposals, to offer counter proposals to any or all of Young’s proposals, or, as it did here, to cede carriage of all three channels. The fact that Young sought to occupy three channels of satellite transponder capacity, however, in no way violates our good faith retransmission consent rules.

31. Finally, we find Young’s failure to grant a short-term extension or to engage in mediation irrelevant for purposes of our analysis. Although the Commission strongly encourages parties to enter such retransmission consent extensions to avoid service interruptions to consumers, we did not imply that failure to agree to such an extension would violate our rules under either the objective or totality of the circumstances tests.¹⁰⁵ Similarly, although the Commission stated that it would look favorably on a broadcaster’s willingness to engage in voluntary mediation, it also expressly stated that refusal to engage in voluntary mediation would not be considered probative of a failure to negotiate in good faith.¹⁰⁶

¹⁰⁴ *Id.* at 5467.

¹⁰⁵ *Id.* at 5472.

¹⁰⁶ *Id.* at 5477.

V. ORDERING CLAUSES

32. Accordingly, **IT IS ORDERED** that EchoStar Satellite Corporation's retransmission consent complaint against Young Broadcasting, Inc., KRON-TV, Young Broadcasting Co. of San Francisco, Young Broadcasting of Nashville, Inc., News 2, Inc. and Young Broadcasting of Los Angeles, Inc. and KCAL-TV, filed pursuant to Sections 76.7 and 76.65 of the Commission's rules,¹⁰⁷ **IS DENIED.**

33. **IT IS FURTHER ORDERED** that EchoStar's Request for Confidential Treatment, as modified by its April 11, 2001 Reply of EchoStar to Opposition to, and Request for Sanctions Concerning, EchoStar's Request for Confidential Treatment, and Request for Appropriate Sanctions, **IS GRANTED** as indicated herein.

34. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules.¹⁰⁸

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree
Chief, Cable Services Bureau

¹⁰⁷ 47 C.F.R. § 76.7, 47 C.F.R. § 76.65.

¹⁰⁸ 47 C.F.R. § 0.321.