

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of:)	
)	
Implementation of the Satellite Home Viewer Improvement Act of 1999)	CS Docket No. 00-2
)	
Application of Network Nonduplication, Syndicated Exclusivity, and Sports Blackout Rules To Satellite Retransmissions)	

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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EXECUTIVE SUMMARY

The SHVIA mandates that the Commission create network nonduplication, syndicated exclusivity, and sports blackout rules governing satellite retransmission of programming of nationally distributed superstations. In addition, it requires that the Commission, “to the extent technically feasible and not economically prohibitive,” create sports blackout rules governing satellite retransmission of local network station programming. The Commission has correctly suggested that these rules should parallel the cable exclusivity regulation in major respects including the geographic limitations on exclusivity protection applicable to cable systems. The NAB supports the creation of a satellite-specific regulation (rather than creating a meshed satellite/cable regulation) for simplicity and also to enable the Commission to create specific provisions in the satellite regulation to address satellite-specific issues.

Satellite carriers should be barred from serving subscribers who provide only Post Office Box addresses, since they provide no information about the viewer’s location.

Congress did not impose any “technical feasibility” limit on the application of network nonduplication, syndicated exclusivity, and sports blackout with respect to superstations.

Satellite carriers bear a heavy burden of showing that application of sports blackout to network stations would be unfeasible.

Programs substitutions by satellite carriers necessitated by the new program exclusivity rules are permissible only to the extent the satellite carriers comply with all applicable laws and regulations. There are substantial restraints on using other broadcast programming as the source for such program substitutions.

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The National Association of Broadcasters (“NAB”)¹ hereby submits its comments in response to the above-captioned proceeding.

1. The Commission Should Promulgate Separate Exclusivity Rules Patterned After the Cable Exclusivity Regulations

Under the SHVIA, the Commission is required to promulgate rules regarding network nonduplication, syndicated exclusivity, and sports blackout with regard to satellite carriage of nationally distributed superstations. In addition, the Commission is required, “to the extent technically feasible and not economically prohibitive,” to apply sports blackout rules to satellite carriage of network stations. 47 U.S.C. § 339(b)(1). As the Commission suggests in the NPRM, these rules should provide the same level of protection afforded to broadcasters under the corresponding cable regulations. For example, the geographic scope for protection should

¹ NAB is a nonprofit incorporated association that serves and represents America’s radio and television broadcast stations and networks.

parallel the protection provided to broadcasters in the cable context (*e.g.*, 35/55 miles for network nonduplication, 35 miles for syndicated exclusivity and sports blackout).

In the interest of clarity, however, the Commission should create a separate regulation regarding satellite carriers (albeit patterned after the existing cable regulations). This new regulation would provide broadcasters and satellite carriers alike with a single source for the exclusivity rules dealing with the satellite industry specifically.

2. Satellite Carriers Should Be Barred from Serving Subscribers Who Provide Only Post Office Box Addresses, Since They Provide No Information About the Viewer's Location

The Commission has requested comment regarding how a satellite carrier can accurately locate a subscriber whose address is a post office box or rural route number. NPRM ¶ 30. The problem of accurately identifying the geographic location of subscribers is, of course, one that satellite carriers must already address in connection with determining which subscribers are able to receive signals of Grade B intensity for purposes of the “unserved household” limitation. The same principles applicable in that context should apply here as well.

A Post Office box is of no value in determining where a subscriber actually lives, as the Copyright Act recognizes in requiring satellite carriers to provide “street addresses” -- not Post Office box addresses -- for their subscribers. For that reason, a subscriber who provides only a Post Office box should be considered to be ineligible to receive any programming by satellite. *See CBS Broadcasting Inc. v. PrimeTime 24*, 48 F. Supp. 2d 1342, 1358 (S.D. Fla. 1998) (satellite carrier violates SHVA by providing Post Office box addresses for subscribers). The contrary rule would be an open invitation to abuse: it would permit anyone in the United States to make himself or herself appear eligible to receive satellite-delivered programming without

regard to applicable geographic limitations by renting a Post Office box in a location in which the rules would not apply. Even if neither the subscriber nor the satellite carrier intends to abuse the system by providing a Post Office box address, the provision of such a non-street address makes it impossible to apply any rule that depends on the geographic location of the viewer.

Barring service to viewers who provide non-street addresses should apply equally to private “post office box” firms such as Mailboxes Etc., the location of which, like U.S. Post Office boxes, provides no information whatsoever about the physical location of the subscriber in question. Since the addresses of private “post office box” outlets such as Mailboxes Etc. are publicly available, satellite carriers should be required to preclude delivery of satellite-delivered programming to any subscriber that provides either a U.S. Post Office or a private box office address. Satellite carriers should be barred from retransmitting television stations (other than 100% syndex-proof and nonduplication-proof superstations) to such viewers even if the address does not appear on its face to be a private post office box: for example, if 39 West End Avenue is the address of a Mailboxes Etc. outlet, the satellite carrier should be precluded from serving anyone who provides that non-street address, even if camouflaged by use of a “Suite” rather than a “Box” number.

Rural route addresses are different: although such addresses typically include a box number, these boxes are presumably located close to the residential address at which the subscriber receives satellite-delivered programming. If these addresses can be “geocoded” with precision by standard software packages, the satellite carrier should use that precise physical location in applying the network nonduplication, syndicated exclusivity, and sports blackout

rules. If not, the satellite carrier should -- as the NPRM suggests -- use the Rural Route subscriber's Zip Code, or more precisely the "population centroid" of the Zip Code.

Finally, because accurate addresses are the linchpin of any system that depends on the geographic location of subscribers, satellite carriers should be required to certify, under penalty of perjury, that they are not aware of any basis for believing that subscribers have provided inaccurate (or non-street) addresses for purposes of evading any geographic restriction on delivery of programming.

3. Congress Did Not Impose Any "Technical Feasibility" Limit on the Application of Network Nonduplication, Syndicated Exclusivity, and Sports Blackout With Respect to Superstations

As discussed in detail in the comments filed by the Association of Local Television Stations, Congress considered, but rejected, imposition of a "technical feasibility" constraint on the Commission's obligation to impose network nonduplication, syndicated exclusivity, and sports blackout rules on satellite carriers. For that reason, the Commission does not have the option of declining to impose these rules on the satellite industry based on contentions by satellite carriers that they cannot comply with such rules. Rather, as has often happened in the past, the Commission should set performance standards, and leave to the satellite industry the question of how best to implement the Commission's standards.

4. Satellite Carriers Bear a Heavy Burden of Showing that Application of Sports Blackout to Network Stations Would be Unfeasible

The SHVIA provides that sports blackout rules must be applied to network stations "to the extent technically feasible and not economically prohibitive." 47 U.S.C. § 339(b)(1)(B). As the Conference Report makes clear, it would take an extraordinary showing by the satellite

industry to justify non-application of sports blackout to network stations: “[t]he burden of showing that conforming to rules similar to cable would be ‘economically prohibitive’ is a heavy one. It would entail a very serious economic threat to the health of the carrier. Without that showing, the rules should be as similar as possible to that applicable to cable services.”

Conference Report at H111796.

Because there is no discovery process in this rulemaking proceeding, and no opportunity to cross-examine claims of “burden” by satellite carriers, the Commission should not simply accept at face value contentions by satellite carriers that application of sports blackout would be “technically unfeasible” or “economically prohibitive.”² Rather, the Commission should conduct its own independent inquiry into the matter, and should decline to impose sports blackout rules with respect to network stations only if it is independently satisfied that the satellite industry’s claims of unfeasibility are clearly correct. (Of course, since satellite carriers *will* be required to apply sports blackout rules to nationally delivered superstations, it is difficult to imagine that the satellite industry could prevail on a claim that it is impossible to provide the same protection with respect to network stations.)

5. The Commission’s Rules Should Apply to Digital as Well as Analog Broadcasting

As the NAB pointed out in its reply comments regarding the “good faith” requirement, both Congress and the Commission have mandated that stations make a transition to digital

² Nor should the Commission fall prey to satellite industry claims that the technological and financial data allegedly demonstrating unfeasibility is confidential and proprietary, hence the Commission should just accept such claims on faith. This was the game played by the satellite industry in 1989, and that sordid history -- which devolved into multiple and complicated FOIA requests -- should not be repeated. *In the Matter of Imposing Syndicated Exclusivity Requirements on Satellite Delivery of Television Broadcast Signals to Home Satellite Earth Station Receivers*, Gen. Docket 89-89, 4 FCC Rcd. 3889 *et seq.*

broadcasting and (necessarily) make enormous expenditures to achieve that goal. NAB Reply Comments at 18. To deprive digital signals of the same exclusivity protection afforded to analog signals would violate the SHVIA, which requires the Commission to provide network nonduplication, syndicated exclusivity, and sports blackout protection generally, and not just to analog broadcasts. 47 U.S.C. § 339(b).

6. The Commission Has Properly Identified the Finite List of Nationally-Distributed Superstations

The Commission's tentative conclusion that there is a finite list of nationally distributed superstations covered by the statute is correct, and the Commission has correctly identified those stations as KTLA-TV, WPIX-TV, KWGN-TV, WSBK-TV, WWOR-TV, and WGN-TV. NPRM ¶ 6. Because a station can qualify for this list only if it was carried at certain times in the past, the list is frozen and cannot possibly expand in the future. The statute also makes clear that these stations will lose their special status if they should later become affiliated with the ABC, CBS, Fox, or NBC television networks, all of which as of January 1, 1995 offered 15 or more hours of programming per week to at least 25 affiliated stations. *See* 47 U.S.C. § 339(d)(2); *see also* 17 U.S.C. § 119(a)(5)(E) (same definition in Copyright Act). Although the third statutory reference to these six stations (in Section 325(b)(2)(B) (retransmission consent)) does not explicitly mention that the requirement that the stations not be affiliated with ABC, CBS, Fox, or NBC, that omission appears to be the result of a drafting oversight, which will presumably be corrected in a technical corrections bill.

7. Stations Should be Required to Give Notices Solely to Satellite Carriers and Not to Their Distributors

The Commission has sought comment on the application of the notification process set forth in the cable exclusivity rules to satellite carriers. Television broadcast stations should be required to give notice only to satellite carriers, and should not be required to provide separate notice to the many individual distributors that may be affiliated with an individual satellite carrier. DirecTV and EchoStar, for example, are satellite carriers, while firms such as NRTC and Pegasus are merely distributors, as opposed to satellite carriers. The burden of notifying individual distributors should be on the satellite carriers themselves, who are in the best position to know which distributor services which areas. To ensure the smooth functioning of the notification process, satellite carriers should be required to publicly designate (perhaps on their Web sites) the name, address, phone number, and email address of the contact person for notices.

8. Program Substitutions by Satellite Carriers Are Permissible Only To The Extent the Carriers Comply With All Applicable Laws and Regulations

If satellite carriers wish to substitute other television broadcast station programming for programs that must be deleted because of the new program exclusivity rules, they may do so only to the extent they comply with all applicable statutory and regulatory obligations. In particular, a satellite carrier may carry substitute programming from another station only if:

- The carrier has obtained **retransmission consent** from the station being carried, as required by Section 325(b), or retransmission consent is not required because the

station is either (1) a noncommercial television broadcast station or (b) one of the six superstations to which retransmission consent does not apply.³

- The carrier makes the required **royalty payments** (15 or 18 cents per subscriber per month) for each additional station delivered to each household for any period during a given month. Unlike Section 111, which defines “distant signal equivalent” to permit substitution of programming without the payment of additional royalties, Section 119 requires a royalty payment for any carriage of a station during a given month and contains no exemption for substitute programming.

Because of these constraints, satellite carriers will, as a practical matter, be able to provide substitute broadcast station-transmitted programming only from other nationally delivered superstations or noncommercial stations, and then only to the extent they have paid the required royalties for doing so.

There are, of course, numerous other sources of nonbroadcast programming available to satellite carriers, such as cable network programming, that can be used to substitute for any program deletions required by the new rules. *See, e.g.,* Report & Order, *Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd. 5299, at ¶¶ 79-81 (1988), *recon. denied* 4 FCC

³ Although retransmission consent does not apply to retransmission of a network station to unserved households outside the station’s local market, *see* 47 U.S.C. § 325(b)(2)(C), a satellite carrier could not, as a practical matter, rely on that exemption to provide substitute programming, since almost all U.S. households are “served” by local network stations. *E.g.,* NPRM, ¶ 26 (most viewers within 35 miles of station are served). In the unlikely event that a carrier elected to obtain substitute programming from a network station and provide that programming to the tiny minority of its subscribers that reside in unserved households, it would also need to ensure that it did not deliver more than two distant network stations to any household in any one day. *See* 47 U.S.C. § 339(a)(1)(A); 17 U.S.C. § 119(a)(2)(B)(ii).

Rcd. 2711 (1989). Hence, there should be no false alarms about “blank screens” such as arose when the syndicated exclusivity rules were first imposed on cable.

9. The Commission Should Not Allow DBS Companies, Which Have Millions of Subscribers, to Exploit Any Exemption for Firms With Fewer than 1,000 Subscribers

The Commission has adopted exemptions to its cable program exclusivity rules designed to protect tiny, Mom-and-Pop cable systems from undue compliance burdens. *E.g.*, 47 C.F.R. § 76.67(f). It would make no sense to allow the giant DBS companies, DirecTV and EchoStar, which have millions of subscribers and are among the largest MVPDs in the nation, to benefit from similar rules. The DBS systems will establish computerized compliance systems to handle all of their exclusivity obligations, whatever the size of the population covered in a particular case. There is no reason to allow DBS companies to engage in the fiction that they are a combination of thousands of tiny Mom-and-Pop operations – a form of gamesmanship that is correctly forbidden in the copyright context. *See* 37 C.F.R. § 201.17(b)(2)(i) (contiguous cable systems treated as a single entity).

10. Nationally Distributed Superstations Should Be Treated As Local Stations Within Their Own Local Markets

The Commission has sought comment regarding whether the exclusivity rules apply to blackout programming on a local station if that station is also a nationally distributed superstation or whether the station would be treated only as a local station within its local market, notwithstanding that it is a nationally distributed superstation outside of its market. NPRM ¶ 34. In its own local market, a nationally-distributed superstation acts as any other local station does within its own local market, and it should therefore be treated as a local station within its local market.

Conclusion

For the foregoing reasons, the Commission should establish a strong, enforceable set of rules (1) providing network nonduplication and syndicated exclusivity protection with respect to satellite carriage of nationally distributed superstations and (2) providing sports blackout protection to satellite carriage of all television stations.

Respectfully submitted,

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