

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

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

**REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS**

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## **EXECUTIVE SUMMARY**

The SHVIA *requires* the Commission to impose syndicated exclusivity, network nonduplication, and sports blackout rules on the delivery of nationally distributed superstations by satellite carriers. The arguments advanced by EchoStar and by the Satellite Broadcasting & Communications Association to the contrary are frivolous. Even if Congress had conditioned imposition of program exclusivity rules for superstations on “technical feasibility” -- which it emphatically did not -- none of the carriers has made any showing that they cannot implement such rules. Indeed, *all* of the satellite carriers are *today* implementing similar program exclusivity rules imposed by sports leagues through contracts.

The Act also requires the Commission to impose sports blackout rules on the retransmission by satellite carriers of network stations, unless carriers meet the “heavy burden” of showing that it would be infeasible to do so. The satellite industry has not come close to meeting that burden. To the contrary, the record is clear that in retransmitting network stations, the satellite industry can use the same, practical methods they already use for contractual sports blackouts -- and that carriers will presumably use in complying with sports blackout rules for superstations.

The Commission already specifies a particular form of contractual language for the assertion of syndicated exclusivity rights by TV stations. Any existing contract that contains the substantial equivalent of the Commission-specified language should be sufficient to obtain syndicated exclusivity protection against satellite carriers.

DirecTV proposes that program exclusivity rules be implemented on a Zip Code basis. Adoption of any such proposal must include provisions that, if any area within a Zip Code is subject to exclusivity protection, the entire area within that Zip Code enjoys such protection. Moreover, any Zip Code solution must include strong safeguards to prevent the very real danger that -- as has already happened in Canada -- reporting of incorrect Zip Codes becomes a way to evade geographic restrictions on dissemination of television programming.

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**REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)<sup>1</sup> hereby submits its Reply Comments in the above-captioned proceeding.

**1.     The Commission Must Reject The Proposals by EchoStar and SBCA to Ignore the Statute by Failing to Impose Program Exclusivity Rules With Respect to Nationally Distributed Superstations**

Under new Section 339(b) of the Communications Act, the Commission is *required* to promulgate rules regarding network nonduplication, syndicated exclusivity, and sports blackout with regard to satellite carriage of nationally distributed superstations. That this is a *requirement* is shown by the following:

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

- The plain language of Section 339(b)(1)(A) orders the Commission to impose program exclusivity rules on satellite carriers -- and contains no “out” relating to technical feasibility or economic burden.
- Earlier drafts of the bill (including the House-passed version of the bill that became the SHVIA, H.R. 1554) *did* include qualifying language about technical feasibility and economic burden -- but Congress *deleted* that language from the final Act.<sup>2</sup>
- The very next subparagraph, Section 339(b)(1)(B), *does* contain such qualifying language, confirming that Congress knew how to write such language and consciously decided against it here.
- Congress *did* include such qualifying language in an earlier directive to the Commission (as part of the original Satellite Home Viewer Act in 1988), but elected -- no doubt because the earlier approach was a failure -- not to do so in the SHVIA.

This is about as easy as reading a statute ever gets. To its credit, the largest DBS company, DirecTV, does not dispute that the statute means what exactly what it says. Nevertheless, having failed to persuade Congress to write the SHVIA in the way they wanted, EchoStar and the SBCA urge the Commission to ignore Congress’ explicit directives.

EchoStar, for example, finds it “perplexing” and “inconceivable” that Congress could have done what it did. EchoStar Comments at ii-iii. It therefore urges the Commission either to ignore the statute entirely, or to bring in “technical” and “economic” considerations through the back door and impose a toothless version of program exclusivity rules on satellite carriers. As

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<sup>2</sup> When Congress has “specifically considered and rejected” a proposal to include particular provisions in a statute, “[t]here could hardly be a clearer indication” that a law does

the Commission itself has recognized in its NPRM, however, the FCC's obligation to apply network nonduplication, syndicated exclusivity, and sports blackout rules to satellite carriers is "without any limitation based upon a satellite carrier's technical ability to comply." NPRM, ¶ 27.

Even though the statute could not be more explicit in ordering the Commission to impose program exclusivity rules on retransmissions of nationally distributed superstations by satellite carriers, and even though C-band companies such as Netlink and PrimeTime 24 are unquestionably "satellite carriers," SBCA argues that the Commission should overrule the SHVIA and decline to impose any of these rules on C-band satellite carriers. For the reasons set forth above, the Commission must deny SBCA's entreaties, and must apply these rules to any "satellite carrier," including C-band carriers. Moreover, it is clear that Congress knew how to create C-band exemptions to the statute when it saw fit to do so. For example, Congress *did* create special rules applicable to C-band carriers with regard to grandfathering of distant network signals, *see* 17 U.S.C. § 119(a)(2)(B)(iii) ("C-band exemption to unserved households"), but elected *not* to create any C-band exemption with respect to the duty to impose program exclusivity rules on all satellite carriers. The NPRM is thus correct in concluding that the Commission must apply program exclusivity rules to retransmission of nationally distributed superstations by all satellite carriers, including both DBS companies and C-band companies.

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not have the meaning it would have had if the proposal had been accepted. *Runyon v. McCrary*, 427 U.S. 160, 174-75 (1976).

**2. EchoStar's Proposals to Gut the Program Exclusivity Rules Have No Basis in Law or Policy**

Consistent with its disregard for the intent of Congress, EchoStar urges the Commission to gut the program exclusivity rules by creating exceptions that would make them useless to (or very difficult to enforce by) broadcasters and copyright owners. *First*, EchoStar urges that “the deletion requirement for superstation programming (whether syndicated or network programming) [should] not set in unless requested by qualified broadcast stations whose geographic zones (not counting overlaps) cover a substantial majority of the nation.” EchoStar Comments at iv. *Second*, EchoStar asks the Commission to establish a procedure “for exempting satellite carriers [and superstations] from the syndex and network nondup[e] requirements on a case-by-case basis upon a showing of extraordinary hardship such as a possible loss of hundreds of thousands of subscribers.” *Id.*

The Commission has no authority to gut the rules that Congress directed it to apply by creating the gaping loopholes that EchoStar demands.<sup>3</sup> The rules that apply to cable systems, of course, contain no such loopholes. EchoStar’s proposed exemptions, far from establishing rules “as similar as possible” to those applicable to cable systems (Conference Report, 145 Cong. Rec. H11796 (daily ed. Nov. 9, 1999)),<sup>4</sup> as Congress directed, would create a huge and unfair advantage for satellite carriers by decimating the very rules that Congress has just ordered the

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<sup>3</sup> As discussed below, even if they were relevant -- which they are not -- EchoStar’s half-hearted claims about technical infeasibility collapse on inspection.

<sup>4</sup> *See also* NPRM at ¶ 9 (Congress intended proposed rules to “create parity between the regulations covering satellite carriers and cable operators”).

Commission to apply. Such an approach would thwart the will of Congress in enacting SHVIA, and the Commission should firmly reject it.<sup>5</sup>

**3. The Satellite Industry's Claims about Technical Feasibility With Respect to Nationally Distributed Superstations Are Irrelevant and Wrong**

Various satellite industry commenters make minimal -- and factually unsupportable -- claims about supposed technical problems with implementing program exclusivity rules for nationally distributed superstations. These claims are irrelevant, since Congress did not condition applicability of the rules on technical feasibility.

In any event, the satellite industry's claims about technical infeasibility wither on examination. Both DBS and C-band companies *already* carry out complex blackout programs with regard to many different programs without any technical problems whatsoever. The DirecTV Web site, for example, states that “[s]ports blackouts are a factor in every programming distribution service. Blackouts are determined primarily according to who has the rights to broadcast a given game in a given area, and are defined by the leagues. . . . If you live in a zip code that is within a blackout area, your satellite dish will be individually blacked out only for the affected game. You won't miss any other channels or games.”<sup>6</sup> DirecTV administers

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<sup>5</sup> EchoStar's overreaching demands here are consistent with its “heads I win, tails you lose” approach to the issue of “parity” between the cable and satellite industries. Here, EchoStar seeks to run away from the obligations that are imposed every day on cable companies by falsely claiming undue burden. In connection with retransmission consent, however, EchoStar demands that, even though broadcasters have a statutory right to grant (or deny) retransmission consent to any MVPD, the Commission should force stations to offer EchoStar the identical terms that EchoStar alleges they have offered to cable systems, despite the many important marketplace differences between EchoStar and cable systems.

<sup>6</sup> <http://www.directv.com/sports/sportspages/0,1072,13,00.html> (visited Feb. 28, 2000) (emphasis added); <http://www.directv.com/sports/sportspages/0,1072,13,00.html#NFL> (visited Feb. 28, 2000).

similar contractual exclusivity rules for a wide variety of other sports packages. EchoStar, too, is highly experienced in administering geographic limitations imposed by contract on numerous sports packages.<sup>7</sup> And the same is true for the C-band industry, as the sports leagues describe in detail in their Comments and Reply Comments. It therefore defies credulity to suggest that the satellite industry could not rise to the challenge of developing similar technological solutions to the program exclusivity rules that the Commission has been ordered to impose.<sup>8</sup>

Given their demonstrated ability to apply complex geographic restrictions on program delivery, the specific complaints made by the satellite industry about technical issues are grossly exaggerated and without merit. For example, the SBCA claims that complying with the program exclusivity rules for nationally distributed superstations -- which make up only a tiny fraction of hundreds of channels that the C-band industry offers -- would be “the death knell for the [satellite] industry” and would result in “termination of C-band service entirely.” SBCA Comments at 16, 17. The following addresses the satellite industry’s hyperbolic claims about feasibility in detail:

- EchoStar claims it would be “all but impossible” to develop a database of which subscribers live within 35 miles of particular stations. EchoStar Comments at 3. That is absurd: satellite carriers *already* do something much more complex,

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<sup>7</sup> The EchoStar (DishNetwork) Web site explains: “Blackout Rules For Sports Programming: Blackout rules are governed by the individual sports leagues, television networks and local college and professional teams and are beyond the control of DISH Network as to whether we are able to broadcast these games to you. Our main provider of Regional Sports Networks, FOX Sports, has a great explanation of blackouts at their website: [www.FOXsports.com](http://www.FOXsports.com).” <http://www.dishnetwork.com/programming/sports/index.html> (visited Feb. 28, 2000).

<sup>8</sup> EchoStar suggests, absurdly, that “broadcasters [can] . . . protect their contract rights . . . in court through a breach of contract suit if they believe that a programmer has violated an exclusivity clause.” EchoStar Comments at 9 n.11. But it is not *programmers* but *satellite carriers* such as EchoStar that invade the exclusive rights of stations by retransmitting programming into markets in which stations have purchased exclusivity.

namely determine which households are predicted by the Individual Location Longley-Rice (“ILLR”) model to be served by any of several nearby network stations. Determining whether a particular location is within 35 miles of a specified TV transmitter is a much simpler, purely mechanical task that can easily be performed by computers. And that task will be made even simpler if the Commission adopts DirecTV’s proposal to implement the program exclusivity rules on a Zip Code-by-Zip Code basis, as satellite carriers already implement sports blackout commitments in contracts.

- SBCA admits that C-band carriers can restrict programming on a Zip Code-by-Zip Code basis by using the “Geoloc” system, but suggests that it would be unacceptable to do so because some viewers in a particular Zip Code might live beyond the 35- or 55-mile protection area. SBCA Comments at 14. But this minor issue *already exists* with regard to cable systems, which routinely provide protection throughout a community unit even if part of the unit falls outside the 35- or 55-mile zone. The C-band industry can scarcely complain about being required to follow regulations that have the same effect on them as on the cable industry. Nor would the C-band industry’s claimed inability to add substitute programming (SBCA Comments at 14-15) -- even if true -- in any way justify a failure to carry out Congress’ express directive to impose programming exclusivity rules on all parts of the satellite industry.
- EchoStar claims that deleting different programs in a single national feed for different geographic areas would present “untold layers of complexity.” EchoStar Comments at 4. But EchoStar, DirecTV, and the C-band industry already implement equally complex geographic restrictions as a result of contracts with sports providers, and there is no reason they cannot use those same systems in dealing with other types of programming.

In short, even if the Commission could decline to impose program exclusivity rules on carriage of nationally distributed superstations on the satellite industry based on claims about

“feasibility” -- which it may not -- the satellite industry has offered no basis whatsoever for making any finding that it would be infeasible for it to comply with program exclusivity rules essentially identical to those applicable to cable systems.

**4. The Satellite Industry Has Not Come Close to Meeting the “Heavy Burden” of Showing It Would be Infeasible to Impose Sports Blackout Rules with Respect to Retransmission of Network Stations**

Although the Act does make the issue of feasibility and cost relevant to application of sports blackouts to network stations, the authoritative Conference Report emphasizes that the satellite industry would bear a “heavy burden” of “showing that conforming to rules similar to cable would be ‘economically prohibitive.’ . . . 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, 145 Cong. Rec. at H11796 (daily ed. Nov. 9, 1999). The carriers have not come close to meeting that burden; to mention only the most obvious failing, they have submitted no cost data whatsoever. Indeed, as explained in detail in the comments of the National Football League and other sports leagues, the same technology that carriers now use to carry out contractual sports blackouts can obviously be used to carry out sports blackouts imposed by the Commission.

**5. Any Contract That Contains the Language Set Forth in the Commission’s Rules Should Trigger Syndicated Exclusivity Protection**

The Commission has for many years specified the “magic words” needed to invoke syndicated exclusivity protection: “‘the licensee shall, by the terms of this contract, be entitled to invoke the protection against duplication of programming imported under the Compulsory Copyright License, as provided in . . . the FCC’s syndicated exclusivity rules.’” 47 C.F.R. §

76.159.<sup>9</sup> Since satellite carriers deliver over-the-air TV stations through “the Compulsory Copyright License,” any contract that contains the Commission-specified form of words, or its substantial equivalent, should be sufficient to permit a station to invoke syndicated exclusivity protection against a satellite carrier.

**6. The Commission Should Not Create Different Notification Periods and Procedures For Satellite Carriers Than For Cable Systems**

DirecTV and EchoStar ask the Commission to impose differing notice periods and notice procedures on satellite carriers than currently apply to cable systems. *E.g.*, DirecTV Comments at 9-11; EchoStar Comments at 9-10. There is no basis for the differential treatment that DirecTV and EchoStar would have the Commission create, and requiring stations to comply with two different notice regimes with respect to the program exclusivity rules would only invite confusion.

**7. The Use of Zip Codes, If Combined With Effective Means of Preventing Use of False Addresses, Is An Acceptable Method of Enforcing Program Exclusivity Rules**

DirecTV suggests that use of Zip Code lists is a practical way of enforcing the geographical restrictions created by program exclusivity rules. Any use of a Zip Code system must include rules for satellite carriers comparable to those for cable systems -- that the entirety of a geographic unit (whether Zip Code or community unit) is protected from duplicative programming if any portion of the unit is protected. There is no reason, however, why satellite carriers cannot themselves perform the mechanical task of generating lists of Zip Codes within 35 or 55 miles of a particular station, rather than requiring stations to provide such lists to them.

<sup>9</sup> Instead of referring to “the FCCs syndicated exclusivity rules,” it is also permissible to refer to “Section 76.151 of the FCC’s rules.” *See* 47 C.F.R. § 76.159.

Moreover, provisions must be included to prevent the use of false Zip Codes by subscribers. As set forth in our initial comments, no satellite carrier should *ever* be able to sign up a viewer for any TV station based on a Post Office address, or on any address belong to a private post office firm such as Mailboxes Etc. Such addresses simply contribute no information about the viewer's physical address.

According to commenter WIC Premium Television Ltd. ("WIC"), some 400,000 Canadians have falsely provided U.S. addresses so as to be able to subscribe to U.S. satellite service. Satellite carriers have no inherent business reason to prevent this type of activity, since they make more money if they have more customers (or sell more channels) through evasion of geographic restrictions. To prevent this type of abuse, satellite carriers should be required to (1) file undertakings with the Commission, under penalty of perjury, that they have no reason to believe that they have provided any broadcast programming through use of incorrect addresses, (2) file annual reports of audits by Big Five accounting firms that use the techniques described by WIC to determine whether subscribers are receiving programming in violation of geographical restrictions imposed by the Commission's rules (*see* WIC Comments at 5-8), and (3) provide lists to each TV station of all subscribers who receive nationally distributed superstations at any address. Absent such requirements by the Commission, there is no practical way for broadcasters to determine whether such abuses are occurring.<sup>10</sup>

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<sup>10</sup> Although these requirements are not now part of the Commission's program exclusivity rules applicable to cable systems, different treatment of satellite carriers is warranted by the fact that abuses of this type are vastly more likely to occur -- indeed, have been documented by WIC already to have occurred -- in the satellite industry.

## **Conclusion**

For the foregoing reasons, the Commission should adopt strong, enforceable program exclusivity rules applicable to satellite retransmissions of both nationally distributed superstations and network stations.

Respectfully submitted,

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