



## SUMMARY

In this reply, EchoStar reiterates its position, stated unequivocally in its initial comments, that the Commission must not mechanically impose the existing cable regulations governing sports blackout, syndex and nondup on the satellite industry. Contrary to the claim of a number of commenters, such an unyielding, wholesale application of the existing cable rules is inconsistent with both congressional intent and the reality of the satellite retransmission industry. In fact, “parity” with the cable industry and protection for rights holders (the twin goals underlying Section 339) can best be achieved by taking a balanced, industry-specific approach to implementing the obligations established in Section 339. Neither competition nor the consumer would benefit if the Commission were to, as the National Association of Broadcasters (“NAB”) flippantly puts it, “set performance standards, and leave to the satellite industry the question of how best to implement the Commission’s standards.”<sup>1</sup> If the standards cannot be feasibly implemented, the possible result – cessation of superstation retransmissions – will not achieve DBS parity with cable or benefit the consumer.

Moreover, under no circumstances should the Commission accede to the effort of the sports leagues to transcend the very specific mandate of Section 339 and use this proceeding as a platform for obtaining additional “intellectual property” type rights. These rights are being requested from the wrong forum and for the benefit of entities (the leagues) that are very able to protect themselves contractually.

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<sup>1</sup> Comments of NAB at 4.

The leagues specifically request additional deletion requirements that would “protect” regionalized game telecasts by depriving consumers of non-regional choices. These requested deletions, however, have nothing to do with protecting local gate receipts: the leagues request protection for local stations that telecast regional games against importation of other games. Nor are these requirements needed to preserve the local team’s willingness to sell the rights to its local games to distant television stations – which, as the NFL itself admits, was the rationale for imposing sports blackout rules in the first place. The telecasts that the leagues would like deleted are *not* distant feeds of the home team’s local games, and there is accordingly no basis for fearing that the local team would not sell its games to distant stations without the requested deletions. The leagues’ request is thus not only outside the scope of the sports blackout rules but also is not justified by the purported concerns underlying the rules. In any event, even if the Commission had the jurisdiction to act as a quasi-copyright agency without anything in the SHVIA giving it such authority, it should not entertain requests that are plainly anti-consumer as they further reduce the sports viewer’s choice.

The Commission should similarly refuse to expand the scope of Section 339 by imposing its requirements on the retransmission of *digital* signals. There is nothing in the statute to justify the inclusion of digital signals in these already too cumbersome requirements.

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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In the Matter of )

Implementation of the Satellite Home )  
Viewer Improvement Act of 1999 )

Application of Network Nonduplication, )  
Syndicated Exclusivity, and Sports Blackout )  
Rules to Satellite Retransmissions )

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CS Docket No. 00-2

To: The Commission

**REPLY COMMENTS OF ECHOSTAR SATELLITE CORPORATION**

EchoStar Satellite Corporation (“EchoStar”) hereby submits its reply comments on the Notice of Proposed Rulemaking (“NPRM”) in the above captioned proceeding.<sup>1</sup> This rulemaking was undertaken by the Commission in response to Section 1008 of the Satellite Home Viewer Improvement Act of 1999,<sup>2</sup> which instructs the Commission to implement rules

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<sup>1</sup> *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999; Application of Network Nonduplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions*, CS Docket No. 00-2, Notice of Proposed Rulemaking, FCC 00-4 (rel. Jan. 7, 2000) (“NPRM”).

<sup>2</sup> Act of Nov. 29, 1999, P.L. 106-113, § 1000(9), 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”), 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.).

and procedures governing network nonduplication (“nondup”), syndicated program exclusivity (“syndex”), and sports blackout requirements for satellite carriers.

**I. THE COMMISSION MUST FASHION SATELLITE-SPECIFIC REGULATIONS CONSISTENT WITH SECTION 339’S REQUIREMENTS**

Section 1008(b)(1) provides that, within 45 days after the enactment of the SHVIA, the Commission should commence a rulemaking to establish regulations that:

- (A) apply network nonduplication protection (47 CFR 76.92) syndicated exclusivity protection (47 CFR 76.151), and sports blackout protection (47 CFR 76.67) to the retransmission of the signals of nationally distributed superstations by satellite carriers to subscribers; and
- (B) to the extent technically feasible and not economically prohibitive, apply sports blackout protection (47 CFR 76.67) to the retransmission of the signals of network stations by satellite carriers to subscribers.<sup>3</sup>

EchoStar agrees that Congress intended the Commission to apply rules which are “as similar as possible” to the current cable regime.<sup>4</sup> This is not to say, however, that “Congress directed the Commission to apply the same rule – down to the citation – on satellite carriers as applies to cable operators,”<sup>5</sup> and that “the Commission lacks the discretion to weaken or modify the rules in any material respect.”<sup>6</sup> Indeed, such a formulaic approach is, as EchoStar

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<sup>3</sup> Section 1008 of the SHVIA, to be codified at 47 U.S.C. § 339(b)(1)(A)&(B).

<sup>4</sup> See *Joint Explanatory Statement of the Committee of Conference on H.R. 1554*, 106th Cong., 145 Cong. Rec. H11793, H11796 (daily ed. Nov. 9, 1999) (emphasis added)

<sup>5</sup> Comments of Fox Entertainment Group (“Fox”) at 3.

<sup>6</sup> Comments of the Association of Local Television Stations, Inc. at 2.

demonstrated in its comments, inconsistent with the statute, the rulemaking process, the cable rules themselves, and the reality of the retransmission market in the following key respects.

**First**, if it were the intent of Congress for the Commission to automatically employ the cable rules in the satellite context, then Congress would have simply made these rules applicable to satellite carriers without the need for a Commission rulemaking.<sup>7</sup> Instead, Congress ordered the Commission to conduct a rulemaking proceeding, evidently because it clearly understood that “the practical differences between the two industries must be recognized and accounted for.”<sup>8</sup>

**Second**, such practical differences are in fact reflected in the language of the statute itself, which acknowledges that compliance with at least certain of the cable rules in question may well be technically infeasible or economically prohibitive in the satellite area. Nevertheless, the National Association of Broadcasters (“NAB”) asserts that “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.”<sup>9</sup> Such an assertion is illogical. While the language and legislative history of Section 339 is somewhat unclear, it is inconceivable that Congress would have deliberately instructed the Commission to promulgate a rule requiring deletion of *superstation* programming without regard to feasibility even as it fully

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<sup>7</sup> See Comments of the Satellite Broadcasting and Communications Association (“SBCA”) at 2.

<sup>8</sup> *Joint Explanatory Statement of the Committee of Conference on H.R. 1554*, 106<sup>th</sup> Cong., 145 Cong. Rec. H11792 (daily ed. Nov. 9, 1999).

<sup>9</sup> Comments of NAB at 4.

acknowledged the possibility that the satellite carrier might not be capable of complying with a rule requiring deletion of *network* sports programming. Rather, the only way to sensibly interpret Section 339 is to acknowledge that the Commission is not free to completely refrain from imposing the protections contemplated in (A) (syndex, network nondup and sports blackout for superstations), whereas it has that freedom in the case of (B) (sports blackout rules for network stations) upon a finding that the rules would be technically infeasible or economically prohibitive. At the same time, the Commission is certainly free to consider technical and economic considerations in *fashioning*, through the rulemaking process, the protections contemplated by clause (A) and establishing appropriately circumscribed exceptions.

*Third*, it cannot be seriously disputed that there are economic and technological differences between the satellite and cable industries that render satellite distributors' compliance infeasible in certain circumstances. Unlike the local cable system, a satellite carrier beams down its programming to all of the nation, an area including all of the 35-mile specified zones of all the broadcasters in the country. To comply with a draconian regime of cable syndex, sports blackout and network nondup rules (short of no longer retransmitting the affected superstation feeds), a satellite carrier would need to develop a huge database categorizing millions of subscribers on the basis of whether they live within the 35-mile zone (and also within narrower 10-mile zones) of each commercial broadcast station in the country – a threshold task that is in itself impossible to carry out and would doom any attempt at compliance from the outset. Then, the satellite carrier would need to add an untold number of layers of complexity to its authorization/ unscrambling procedures to be prepared to respond to a mosaic of deletion requests from all over the nation, and to delete different programs in the same superstation feed for different 35-mile

zones scattered throughout the country. Indeed, the logistics, encryption and software requirements that would be involved are so overwhelming that, in an extreme regime of blackout requirements unmitigated by any exceptions, the likely result would be the end of satellite retransmission of certain superstation signals.

The sports leagues uniformly take issue with these severe technological and economic restrictions. The National Football League (“NFL”), for example, asserts that:

any claim [of economic/technological infeasibility] by satellite carriers should be viewed with great skepticism. These same carriers are currently delivering local broadcast signals into those same local markets; they accomplish this local-into-local delivery by transmitting the signal throughout the United States and then “blacking out” all areas except the authorized local area. If satellite carriers can effectively black out in the context of the delivery of local signals, surely they can implement local blackouts of sports events.<sup>10</sup>

As this statement shows, however, the sports leagues misconstrue the nature of the blackout obligations. It is far easier for a satellite carrier to black out the majority of the nation for a pre-defined set of local markets, leaving one market served, than it is to black out multiple small areas across the country, and the difficulty gap only grows exponentially considering that deletion requests for different parts of different feeds can come from anywhere in the country at unpredictable times. The Commission must not be misled into underestimating the level of complexity involved.<sup>11</sup>

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<sup>10</sup> Comments of the NFL at 8.

<sup>11</sup> Likewise, current contractually required sports blackouts are broad-based enough to be manageable (as they do not demand the pin-point accuracy that would be required by rigid application of the syndex, network nondup and sports blackouts rules) and thus cannot be viewed as proof that satellite carriers can comply with a far more cumbersome set of requirements.

*Fourth*, the cable rules *themselves* contain provisions that are geared to take account of distinctive cost considerations facing cable operators – they exempt small cable operators from the syndex deletion requirement on account of the cost of equipment that would be required. Even if the Commission were to view its task as one of near-automatic importation of the cable regime, the Commission should still establish similar exceptions to take account of the corresponding (and here, much more formidable) difficulties facing satellite carriers.<sup>12</sup>

*Fifth*, the Commission appropriately requested comment on whether the proposed application of these rules is “consistent with the statutory requirements and the Commission’s goal of facilitating competition in the multichannel video programming distribution marketplace” – a concern that almost all commenters in this proceeding overlooked.<sup>13</sup> As the NPRM recognizes, the Commission should take into consideration the overall intent of the statute which is “to place satellite carriers on an equal footing with cable operators with respect to the availability of broadcast programming when formulating its regulations for satellite carriers.”<sup>14</sup> EchoStar does not believe that imposing rules so onerous as to result in cessation of satellite retransmissions would be consistent with that goal. To the contrary, unless appropriately

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<sup>12</sup> As EchoStar argued in its comments, the relevance of this exception lies in its *rationale* (concerns that the equipment needed for compliance with the rules would be too expensive for small cable operators). Here, the concerns with the technical feasibility and cost of compliance are more serious by several orders of magnitude than in the case of small cable operators, and the only way to achieve equivalence as between cable and satellite regulations is to promulgate exceptions corresponding to the same concerns that informed the small cable system exception, not just to replicate an exception that turns on a meaningless criterion for satellite carriers.

<sup>13</sup> NPRM at ¶ 2.

<sup>14</sup> NPRM at ¶ 1.

mitigated, such rules would have the effect of stymieing competition with cable operators, who would of course be able to continue retransmitting the superstation programming feeds – programs that rank among the more popular staples of any MVPD offering.

In short, the Commission must apply syndex, nonduplication and sports blackout protections in a manner that appropriately recognizes the distinctive characteristics of nationwide satellite coverage and associated issues of technical feasibility and cost, as well as the very real risk that satellite superstation carriage may simply be discontinued if the rules resulting from this proceeding are unduly onerous, resulting in loss of programming for over one million subscribers.

**II. THE COMMISSION SHOULD TAILOR ITS REGULATIONS TO SATELLITE RETRANSMISSION REALITIES AND SHOULD NOT IMPOSE ANY REQUIREMENTS BEYOND SHVIA'S MANDATE**

Thus, EchoStar urges the Commission to develop a regulatory framework tailored to the realities of satellite retransmission, a framework which affords the various rights holders the protections offered by Section 339 without jeopardizing the competitiveness of the DBS industry or the viability of superstation retransmission. Moreover, the Commission should firmly resist any efforts to impose requirements beyond the scope of Section 339's mandate.

**A. The Commission's Rules Must Include Appropriate Provisions to Cope with the Significant Technical and Economic Difficulties that Satellite Distributors' Face**

The Commission's Rules must first of all provide for appropriate provisions to cope with the significant technical and economic difficulties that satellite distributors face. Most importantly, the Commission should rule that the deletion requirement for superstation programming (whether syndicated or network programming) does not set in unless requested by qualified broadcast stations whose geographic zones (not counting overlaps) cover a substantial majority of the nation. Such a requirement would avoid the virtual impossibility of dealing with a nationwide mosaic of diverse deletion requests for the same feed.

The Commission should also establish a procedure for exempting satellite carriers from the syndex and network nondup requirements on a case-by-case basis upon a showing of extraordinary hardship such as (a) a possible loss of hundreds of thousands of subscribers or (b) a showing that it is infeasible (technically or economically) to comply with broadcaster's requests for program blackouts *and* continue carriage of a superstation's signal. Also, the Commission should establish a parallel process where affected superstations could petition for exemption or other relief on the basis of a showing of hardship.

The Commission should also rule that a station can only exercise syndex or nondup rights if its contractual exclusivity right is clear (*i.e.*, it clearly covers satellite retransmission by satellite). As the Tribune Broadcasting Company ("Tribune Broadcasting") points out, "syndicated exclusivity and network non-duplication rights did not exist in the DBS marketplace until the Act became law in November 1999 . . . the Commission should treat these

new rights in the same manner as it did syndicated cable exclusivity a decade before: give effect to contracts that unambiguously grant such rights as against DBS.”<sup>15</sup> Similarly, the Commission should only give effect to contracts that are non-discriminatory and exercised by a non-discriminatory fashion (*i.e.*, it does not result in certain distributors or distribution mediums being required to delete the programming even as another distributor or group of distributors do not need to delete it). As to sports blackout, the Commission should *not* at this point impose any sports blackout rules on satellite carriers, at least with respect to network stations (where, as the Commission notes, the cost is especially unjustified in light of the rare occurrences in which a sports team would be capable of invoking the rule).<sup>16</sup>

Finally, the Commission should lengthen the notice and contract disclosure requirements with respect to sport blackouts. The Office of the Commissioner of Baseball (“Baseball”) contends that “it is particularly important that Baseball have the ability to afford no more than 24 hours’ notice where changes do occur – regardless of whether the notice is sent to a cable operator or to a satellite carrier.”<sup>17</sup> According to the National Hockey League (“NHL”), “[t]wenty-five years worth of experience has shown this to be an acceptable burden on both parties.”<sup>18</sup> These years of experience, however, are not with the satellite industry but with the cable systems, where the short notice may well be an acceptable burden. For a local cable

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<sup>15</sup> Comments of Tribune Broadcasting at 7.

<sup>16</sup> If any sports blackout rules were to be adopted, they should apply only to regularly scheduled events, and the deletion obligation should require 60-day prior notice.

<sup>17</sup> Comments of Baseball at 13.

<sup>18</sup> Comments of NHL at 14.

system, response to a sports blackout request means simply deleting the sports event in question uniformly for all its subscribers. Not so for a national satellite operator, which has to partially blackout, for an isolated locality, a signal retransmitted throughout the nation. As DirecTV points out, a 24 hour notification period is, quite simply, technically unworkable in the satellite context.<sup>19</sup> Accordingly, the Commission must lengthen the sports notification periods.

Specifically, EchoStar agrees with Directv's proposal to require notice: (1) 60 days prior to the start of the season for sports with a specific season; and (2) 60 days prior to the event for regularly scheduled events.<sup>20</sup> With any less notice, satellite distributors would simply not be capable of complying with the blackout request. On the other hand, the Commission should not impose any blackout requirements for not regularly scheduled events and should not require deletion in the case of schedule changes. The scheme of deletion requirements to be imposed by the Commission here would be cumbersome enough as it is without last minute additions or changes to the timing of the deletion requirements, and it is very reasonable to rule that the sports rights holder should shoulder the consequences of any such changes or additions.

**B. Under No Circumstances Should the Commission Expand the Scope of Section 339's Requirements Beyond What the Statute Itself Requires**

Especially in light of how cumbersome the statutory requirements already are, the Commission should resist the demands of various commenters to impose further requirements beyond the SHVIA's mandate. In particular, the Commission should make clear that: (1)

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<sup>19</sup> Comments of Directv at 15-17.

<sup>20</sup> *Id.*, 17.

programming deletion requirements apply only to distant, not local-into-local, retransmissions; (2) it will not extend additional protections to “regionalized” sports programming; and (3) Section 339(b) does not apply to the retransmission of digital signals.

*First*, the Commission should apply programming deletion requirements only to distant, not local-into-local, retransmissions. The geographic exclusivity rationale proffered in defense of these requirements is plainly inapplicable to local retransmissions.

*Second*, the Commission should absolutely refuse to extend additional protections to “regionalized” sports programming. In particular, the Commission should completely resist the demands of the sports leagues to “allow local affiliates to exercise network nonduplication protections against the importation of other games played at the same time but broadcast in other regions of the country.”<sup>21</sup>

As Tribune Broadcasting notes, expanded deletion requirements would run completely counter to the goal of promoting U.S. consumers’ access to sports programming: “Each of the nationally distributed superstations gained popularity, in part, through its presentation of sports events. Given Congress’ intention that consumers not be deprived of their longstanding viewing options, any further limitations on superstations’ delivery of sports telecasts would be contrary to the legislative intent.”<sup>22</sup> The Commission itself has determined that the retransmission of sporting events on satellite systems “expand[s] and enhance[s] access

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<sup>21</sup> Comments of NFL at 13, Comments of the National Basketball Association (“NBA”) at 2, n. 3; Comments of NHL at 22.

<sup>22</sup> Comments of Tribune Broadcasting at 5.

to sports programming, particularly to niche audiences.”<sup>23</sup> As in the context of its concern with the migration of sports programming from broadcast signals, the Commission should continue to “promote the availability of a broad and diverse menu of programming to the American public.”<sup>24</sup> Broad and economical access to a variety of sports programming cannot be achieved, however, if satellite carriers are saddled with unduly burdensome regulations such as those proposed by the sports leagues here.

Nor do the proposed additional deletions facilitate or indeed implicate the underlying purposes of the sports blackout rule. Deletions intended to “protect” regionalized game telecasts by depriving consumers of non-regional choices have nothing to do with protecting local gate receipts: the leagues request protection for local stations that telecast regional games against importation of other games. Nor are these requirements needed to preserve the local team’s willingness to sell the rights to its local games to distant television stations – which, as the NFL itself admits, was the rationale for imposing sports blackout rules in the first place.<sup>25</sup> The telecasts that the leagues would like deleted are *not* distant feeds of the home team’s local games, and there is accordingly no basis for fearing that the local team would not sell its games to distant stations without the requested deletions. Moreover, EchoStar

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<sup>23</sup> *Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992, Inquiry into Sports Programming Migration*, 9 FCC Rcd. 3440, 3509 (1994).

<sup>24</sup> *Id.* at 3507.

<sup>25</sup> See Comments of NFL at 7 (“without blackout protection, sports teams would refuse to sell the rights to their local games to television stations serving distant markets due to their fear of losing gate receipts if the local cable system imported the local sporting event carried on the distant station.”) (internal citation omitted, citation to NPRM omitted).

respectfully believes that the sports leagues enjoy ample contractual protections and overwhelming leverage already, and do not need any additional protection to be volunteered for their benefit without any provision in the legislation.

In short, the leagues' request is not only outside the scope of Section 339, but it also conflicts with key Congressional and Commission goals and is completely unjustified in light of the purported concerns underlying the sports blackout rules.

*Third*, the Commission should hold that Section 339(b) does not apply to the retransmission of digital signals. A number of commenters disagree, asserting that there is no difference between analog and digital signals that would warrant differential treatment.<sup>26</sup> None of these commenters, however, provide any support for this position. Certainly, the statute itself does not provide any support. In fact, the language of Section 339 itself clearly suggests that Congress fully intended that digital signals be excluded from the syndex, nondup and sports blackout requirements. In particular, Section 339(c), which deals with eligibility standards for receiving distant signals, instructs the Commission to make "a further recommendation relating to an appropriate standard for digital signals,"<sup>27</sup> indicating that Congress did not intend the eligibility rules to apply to digital signals without further study. When, in the same section of the law, there is no mention of even such an inquiry in connection with the syndex, nondup and sports blackout rules, it is difficult to believe that Congress intended the deletion requirements to apply automatically to digital signals. Indeed, the Commission's proposal relating, for example,

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<sup>26</sup> Comments of Baseball at 13; Comments of NHL at 23; Comments of NAB at 5; Comments of Turner Broadcasting Company at 7.

<sup>27</sup> SHVIA Section 1008, to be codified at 47 U.S.C. § 339(c).

to digital must-carry was based on specific legislative authority contemplating the extension of the must-carry obligation to digital signals, *see* 47 U.S.C. § 614(b)(4)(B), authority that is absent here.

### **III. CONCLUSION**

EchoStar respectfully requests that the Commission adopt a separate deletion and blackout regime for satellite carriers that is customized to the realities of satellite retransmission in a manner consistent with the foregoing.

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Dated: February 28, 2000

**CERTIFICATE OF SERVICE**

I, Colleen Sechrest, hereby declare that the foregoing Reply Comments of Echostar Satellite Corporation were sent this 28<sup>th</sup> day of February, 2000 by messenger (indicated by \*) or first-class mail to the following:

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