

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

REPLY COMMENTS OF DIRECTV, INC.

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Dated: February 28, 2000

No. of Copies rec'd 074
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REPLY COMMENTS OF DIRECTV, INC.

DIRECTV, Inc. (“DIRECTV”)¹ hereby offers the following reply comments in the above-captioned proceeding.

I. INTRODUCTION & SUMMARY

In Section 1008(b) of the Satellite Home Viewer Improvement Act (“SHVIA”),² Congress has sent a clear signal that the current exclusivity rules – which are designed for the cable industry – must be adapted for, rather than simply imposed upon, the satellite industry. First, Section 1008(b)(1) does not simply extend the existing cable regulations to the satellite industry. Instead, the provision directs the Commission to engage in a rulemaking proceeding to determine how best to apply the existing regulations in the satellite context. Second, in stark contrast to the cable exclusivity rules, Congress has mandated that the network nonduplication

¹ DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, Inc., a licensee in the DBS service and a wholly-owned subsidiary of Hughes Electronics Corporation.

² Act of Nov. 29, 1999, Pub. L. No. 106-113, §1000(9), 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999, Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999, relating to copyright

and syndicated exclusivity rules in the satellite context apply only to the retransmission of nationally distributed superstations.³ Third, Congress has distinguished the scope of sports blackout protection afforded under SHVIA from that provided by the cable rules by specifying that such protection applies to the retransmission of nationally distributed superstations⁴ but only applies to the retransmission of network stations to the extent the Commission determines that such blackouts are “technically feasible and not economically prohibitive.”⁵ The plain language of the SHVIA, therefore, indicates that the Commission cannot mechanically impose the cable rules on the satellite industry, but rather that these rules must be adapted if they are to be applied to satellite carriers.

Furthermore, the legislative history of the SHVIA clearly reflects Congress’ awareness of, and sensitivity to, technological differences between the satellite and the cable industries. For example, in its *Joint Explanatory Statement* the SHVIA Conference Committee recognized that, when issuing regulations under the SHVIA, “the practical differences between the two industries must be recognized and accounted for.”⁶ These “practical differences” are indeed great: for example, satellite carriers serve subscribers nationwide, while cable operators serve a local audience; satellite technology also demands that programming be managed through centralized control centers, while cable technology allows programming to be managed at the local cable head end. Only by recognizing and taking such practical differences into account when crafting the satellite regulations will the Commission be able to create a regulatory regime that will not

licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.).

³ § 1008(b)(1)(A).

⁴ *Id.*

⁵ *Id.*

⁶ H.R. Rep. No. 464, 106th Cong., 1st Sess., at 92 (1999).

negatively impact the ability of DBS providers to compete against incumbent cable operators and thereby realize Congress' goal in passing the SHVIA of improving MVPD competition by making DBS providers stronger competitors to cable.

Many of the comments received in this proceeding show some recognition of the technological difficulties that must be overcome in adapting the cable network nonduplication, syndicated exclusivity, and sports blackout rules to the satellite industry. For example, a broad consensus has emerged that the "community unit" concept used in the cable regulations is inapplicable to the satellite context, and that satellite carriers should instead use subscriber zip codes to target any required blackouts. Other comments, however, show a basic incomprehension of the technological barriers faced by DBS providers in instituting multiple and different blackouts across an aptly described "mosaic of 35-mile zones scattered throughout the country."⁷

Taking these technological difficulties facing the satellite industry into account, but remaining cognizant of the goals of the SHVIA, DIRECTV has proposed:

- The Commission should maintain "zones of exclusivity" that parallel those used in the cable context, but the satellite regulations should require that subscribers falling within the relevant zone of exclusivity be ascertained by means of an electronic file specifying the affected zip codes rather than by "community units." This file would be subject to verification by the satellite carrier that the zip codes specified correspond to the actual zone of exclusivity specified in the broadcaster's or rights holder's contract.
- Contracts granting exclusive rights should specifically grant rights *vis-à-vis* satellite carriers in order for the rights holder to invoke its protection against satellite carriers.
- No sports blackout rules should apply to satellite retransmission of network signals.
- The notification periods for sports blackouts of nationally distributed superstations should be lengthened.

⁷ Comments of Echostar Satellite Corporation ("Echostar") at 2; Comments of the Satellite Broadcasting and Communications Association ("SBCA") at 2.

- For nationally distributed superstations, the Commission should adopt an exception to the sports blackout rules for blackouts affecting fewer than five percent of television households in the relevant DMA, as determined on a provider-by-provider basis.

These proposals should be adopted.

II. THE COMMISSION SHOULD MAINTAIN ZONES OF EXCLUSIVITY SIMILAR TO THE CABLE RULES, BUT SATELLITE SUBSCRIBERS SUBJECT TO BLACKOUT SHOULD BE IDENTIFIED BY ZIP CODE

The comments reveal a broad consensus that the “specified zones” in which a television broadcast station or other rights holder is permitted to assert its exclusivity or blackout rights should be the same in both the cable and satellite contexts. Every party that explicitly addressed this issue has agreed that it is appropriate to approximate the same geographic zones of exclusivity for satellite carriers as for cable operators.⁸ Especially in light of the fact that no party proposed that different specified zones be adopted in a satellite context, it is logical for the Commission to use the same specified zones for both industries.

Moreover, almost without exception, the commenters have echoed DIRECTV’s observation that it is not possible to import the “community unit” concept from the cable regulations into the rules governing the satellite industry.⁹ These commenters agree with

⁸ See Comments of DIRECTV at 8; Comments of the Association of Local Television Stations, Inc. (“ALTV”) at 7; Comments of Tribune Broadcasting Company at 3; Comments of the Office of the Commissioner of Baseball at 13; *accord* Comments of the National Football League (“NFL”) at 7. The NFL, however, drops a footnote arguing that for *both* cable and satellite, the zone of protection for sports blackout purposes (at least for blackouts of NFL games) should be the 75-mile zone that the NFL’s constitution and by-laws specifies as a team’s home territory. *Id.* at 7 n.7. The Commission should reject this unjustified expansion of the zone of protection.

⁹ See Comments of DIRECTV at 8; *accord* Comments of the ALTV at 7-8 & n.23; Comments of the Office of the Commissioner of Baseball at 13; Comments of the National Hockey League (“NHL”) at 18-19; Comments of the Motion Picture Association of America, Inc. (“MPAA”) at 5.

DIRECTV's proposal that satellite subscribers subject to blackout rules be ascertained by means of their zip code.¹⁰

The only party arguing that the "community unit" concept be imposed upon the satellite industry is the National Cable Television Association ("NCTA"), which urges the Commission to do so in order to make any blackout areas "as congruent as possible with the blackout areas for competing cable systems."¹¹ This position, however, appears to be predicated on NCTA's concern that allowing satellite carriers to use any other system of targeting blackouts, such as zip codes, would "unfairly skew marketplace competition."¹² The cable rules generally require cable operators to "black out programming throughout a community unit if any portion of the broadcaster's area of exclusivity overlaps with any portion of the community unit."¹³ As the NCTA correctly observes, this sometimes means that the blackout area is actually larger than the area covered by the exclusivity rights exercised.¹⁴

Satellite carriers will face exactly the same situation, however, should the Commission permit them to target blackouts based on zip code rather than by community unit. Zip codes do not precisely conform to geographic zones of exclusivity any more than community units do, and satellite carriers blacking out subscribers who live within an affected zip code are just as likely as cable operators to end up with a blackout zone larger than the zone of exclusivity. Thus, there is

¹⁰ See Comments of the ALTV at 7-8; Comments of the National Association of Broadcasters ("NAB") at 3.

¹¹ Comments of the NCTA at 3.

¹² *Id.*

¹³ *Id.* (emphases omitted) (citing 47 C.F.R. §§ 76.92, 76.151).

¹⁴ *Id.*

no reason to saddle satellite carriers with a regulatory construct that is specific to the cable industry.

Furthermore, zip codes are the *only* way by which DIRECTV can target blackouts. Because any other means of targeting blackouts is technically infeasible, a zip code approach should be adopted.¹⁵ Under this approach, a broadcast licensee or rights holder asserting blackout protection would provide DIRECTV with an electronic file of affected zip codes that corresponds to the station's or rights holder's "specified zone of exclusivity," subject to verification by DIRECTV that the zip codes provided correspond to the actual zone specified in the broadcaster's or rights holder's contract.¹⁶ This information would then be used by DIRECTV to target the appropriate subscribers.¹⁷

¹⁵ In its comments, the NHL has proposed to allow subscribers who are technically outside of the geographic zone of protection, but who live within a zip code that straddles the blackout boundary and are therefore blacked out, to seek an individualized waiver of the sports blackout in order "not to penalize" such subscribers. Comments of the NHL at 19. As a practical matter, DIRECTV does not have the technical capability to institute such individualized, household-by-household waivers, and the Commission should therefore reject the NHL's waiver suggestion.

¹⁶ The NAB argues that satellite carriers should be barred from serving subscribers who give only a post-office box and that satellite carriers should be required to certify that they have no basis for believing subscribers gave inaccurate or non-street addresses for the purposes of evading geographic restrictions. Comments of NAB at 2-4. There is no basis in the cable rules for such additional obligations, and as DIRECTV has proposed, the electronic file supplied by the broadcaster or rights holder would be subject to verification by DIRECTV that the zip codes provided match as closely as possible the zones of exclusivity in these parties' contracts. The NAB's proposal on this point accordingly should be rejected.

¹⁷ WIC Premium Television Ltd. ("WPT") has urged the Commission to impose a number of restrictions and controls upon satellite carriers to "reduce if not obviate both the domestic and external grey marketing" of satellite programming. *See* WPT Comments at 6 *passim*. These proposals are clearly beyond the scope of this proceeding and should not be addressed by the Commission at this time.

III. THE COMMISSION SHOULD MAINTAIN NOTIFICATION PERIODS FOR NETWORK NONDUPLICATION AND SYNDICATED EXCLUSIVITY RIGHTS THAT ARE SIMILAR TO THE CABLE RULES, BUT SUCH RIGHTS MUST CLEARLY APPLY TO SATELLITES AND MUST BE EXERCISED IN A NONDISCRIMINATORY FASHION

There is a broad consensus that the same notice periods for asserting network nonduplication or syndicated exclusivity rights be used for both the cable and satellite industries.¹⁸ DIRECTV supports this approach but notes, as other parties in this proceeding have as well, that the satellite regulations should require that contracts granting exclusivity rights specifically grant licensees exclusive rights *vis-à-vis* satellite carriers in order for a broadcaster or rights holder to invoke its protection against satellite carriers.¹⁹ Contracts specific to cable should not be enforceable against satellite carriers. Before satellite carriers are burdened with additional required action, it should be clear that broadcast licensees or rights holders indeed have negotiated for and received the rights necessary to trigger regulatory obligations.

Both the National Association of Broadcasters and the Association of Local Television Stations urge the Commission to require satellite carriers to designate a specific contact person to whom exclusivity notices should be sent.²⁰ This is not something that need be enshrined in regulation; simply addressing any exclusivity or blackout notice to the “Director of Programming Operations” at DIRECTV or, in the alternative, marking it “Attention: Sports

¹⁸ See Comments of DIRECTV at 9-11; Comments of the ALTV at 8; Comments of the MPAA at 3-4.

¹⁹ See Comments of DIRECTV at 9; Comments of Echostar at 9-10; Comments of Tribune Broadcasting at 6-7. *But see* Comments of the ALTV at 8 (arguing that “any local television station with exclusivity or nonduplication rights *vis-a-vis* cable should be considered to hold the same rights with respect to satellite carriers”).

²⁰ See Comments of the NAB at 7; Comments of the ALTV at 8.

Blackout” (or as otherwise appropriate) is sufficient to ensure that the information will be received and processed by the proper department.

It also is unnecessary for the Commission to promulgate any regulation granting distributors of syndicated programming a year-long period in which to assert their exclusivity rights.²¹ This regulation was crafted in order to permit an orderly and efficient initial distribution of programming in the context of hundreds, if not thousands, of cable operators and broadcast stations across the country. This justification simply does not apply to the discrete universe of nationally distributed superstations. Given this extremely limited context, exclusivity rights may easily be asserted and it is therefore unnecessary to import this portion of the cable rule into the satellite arena.²²

IV. SPORTS BLACKOUT REQUIREMENTS MUST BE IMPLEMENTED IN A WAY THAT IS CONSISTENT WITH STATUTORY REQUIREMENTS

As Echostar has highlighted in its comments, the language surrounding the SHVIA’s sports blackout requirements is perplexing: it explicitly provides for an exception to the sports blackout rule as it applies to network stations if the Commission determines that such blackouts are technically infeasible or economically prohibitive, but suggests that sports blackouts must be applied to superstations regardless of satellite carriers’ technical ability to comply.²³ In light of the extraordinarily complex and difficult task that instituting sports blackouts presents nationwide DBS operators, described in both DIRECTV’s and Echostar’s Comments,²⁴ DIRECTV again urges the Commission to refrain from imposing any sports blackout obligation

²¹ See Comments of DIRECTV at 11 n.26.

²² See Comments of the MPAA at 3 (arguing rights holders should be given “another means to protect the value of their programs”).

²³ See Comments of Echostar at 6-7 (citing Notice at ¶ 27).

²⁴ See Comments of DIRECTV at 16; Comments of Echostar at 2.

at all with respect to satellite-delivered network stations, and to create an exception to the rule with respect to nationally distributed superstations when only a small number of subscribers would be affected. Furthermore, any rules the Commission does craft need to be sensitive to the timing and programming constraints specific to the satellite industry.

A. No Sports Blackout Rules Should Apply to Satellite Retransmission of Network Signals

The language of the SHVIA clearly reflects Congress' awareness of the serious economic and technical concerns raised by the application of sports blackout rules to the retransmission of the signals of network stations by satellite carriers.²⁵ Any sports blackout requirement entails onerous technical and logistical burdens for DBS operators,²⁶ who must institute multiple and different blackouts simultaneously across the entire country, and imposes a serious long-term economic threat to the health of DBS operators. The Commission should therefore refrain from imposing sports blackout requirements wherever possible. As the SHVIA unequivocally gives the Commission a clear legislative and policy basis for refraining from applying sports blackout rules to satellite retransmission of network signals, no such rules should be imposed upon the emerging DBS industry.

However, to the extent that any sports blackout regulation, whether for the retransmission of network stations or nationally distributed superstations, is imposed upon the satellite industry, DIRECTV agrees with Echostar that the resulting regulatory framework must take into account the distinctive traits of satellite providers,²⁷ as outlined below.

²⁵ See 47 U.S.C. §339(b)(1)(B) (requiring that such rules be applied only to the extent "technically feasible and not economically prohibitive").

²⁶ See Comments of DIRECTV at 16.

²⁷ See Comments of Echostar at 9-10.

B. The Notification Period for Sports Blackouts in the Cable Context is Unworkable in the Satellite Context and Must Be Lengthened

The time frame allowed for notification of sports blackouts under the cable regulations is significantly shorter than the notification period under either the network nonduplication or the syndicated exclusivity rules. Section 76.67(c) requires that notification for regularly scheduled events be received “no later than the Monday preceding the calendar week (Sunday-Saturday) during which the program deletion is to be made,” and only 24 hours notice need be given for events that are not “regularly scheduled” or for revisions of previously submitted notices. These short notice periods are simply not feasible in the satellite context because they do not account for the programming limitations of this technology.

Although DIRECTV is cognizant of the fact that unforeseen circumstances, such as the weather, may impact game and telecasting schedules and that it would be preferable to rights holders to be able “to 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,”²⁸ the simple fact remains that satellite carriers cannot reprogram a blackout in such a short period of time.²⁹ Although the actual timing of the blackout can be, and is, controlled within a short window of time through the manual triggering that sports blackouts require, any more detailed changes entail substantial reprogramming that takes days, not 24 hours, to complete. In light of these technological barriers, DIRECTV again urges the Commission to adopt a rule requiring rights holders to give satellite carriers 10 working days notice of any revision to a notice previously submitted or an event not regularly scheduled.

²⁸ Comments of the Office of the Commissioner of Baseball at 13.

²⁹ See Comments of DIRECTV at 16 (describing in detail process of building in blackout).

Although the Office of the Commissioner of Baseball and the NHL urge the Commission to adopt the same notice periods for satellite carriers as for cable operators, they both admit that they serve their blackout notices prior to the beginning of their respective sports seasons.³⁰ This point supports DIRECTV's proposal that the Commission adopt a notification period of 60 days prior to the start of the season for sports having a specific season. A 60-day notification period prior to the event for non-seasonal but regularly scheduled events and a 30-day period for events that are not regularly scheduled are also reasonable, given the practical realities that broadcast arrangements for such events are settled within those time frames. The NHL's argument that the shorter notice periods used in the cable context should be imposed upon the satellite industry because "[t]wenty five years worth of experience has shown this to be an acceptable burden on both parties"³¹ is a *non sequitur*: these "years worth of experience" do not apply to the satellite industry, whose technology differs radically from that of the cable industry. The Commission therefore should reject the NHL's proposal to impose the short notice periods upon satellite carriers, because the proposal simply ignores the technological constraints faced by satellite operators.

C. The Exception for Sports Blackouts Affecting Fewer Than 1,000 Subscribers Should Be Adapted for the Satellite Industry

The Comments filed indicate some confusion over the nature of the "fewer than 1,000 subscriber" exception to the sports blackout rule that currently exists in the cable context. Although also triggered by 1,000 or fewer subscribers, this exception is *not* the same exception as the one that exists in the network nonduplication or syndicated exclusivity rules. Both the network nonduplication and the syndicated exclusivity rules state that the relevant provisions of

³⁰ See Comments of the Office of the Commissioner of Baseball at 13; Comments of the NHL at 14.

those rules “shall not apply to a cable system serving fewer than 1,000 subscribers.”³² These exceptions are designed to protect the smaller, “mom-and-pop” cable operators by releasing them entirely from any obligation to institute blackouts that would otherwise be required under these rules.³³

The “1,000 subscriber” exception in the cable sports blackout rule, by contrast, states that the rule “shall not apply to any *community unit* having fewer than 1,000 subscribers.”³⁴ This exception is designed to address the fact that there may be instances in which the number of affected subscribers is so *de minimus* that the benefits to the rights holder of instituting a blackout is outweighed by the burden on the cable operator, *regardless of the size of the cable operator*.³⁵ However, because the cable “community unit” concept is not and should not be applicable to satellite carriers,³⁶ the Commission should craft an equivalent *de minimus* exception that is more appropriate to the satellite industry. DIRECTV’s proposal calls for the Commission to create an exception to the blackout rule stating that the rule shall not apply to any

³¹ See Comments of the NHL at 14.

³² 47 C.F.R. §§ 76.95(a) (network nonduplication), 76.15(b) (syndicated exclusivity).

³³ See *In re Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd. 5299, ¶ 94 (1988) (exempting systems serving fewer than 1,000 subscribers from exclusivity rules based on concern “that for small systems, the fixed and operational costs of providing exclusivity protection will be large relative to the benefits to viewers in these markets”).

³⁴ 47 C.F.R. § 76.67(f).

³⁵ Accordingly, the Office of the Commissioner of Baseball misapprehends the basis of the exception when it states that “[s]uch a concern [over the cost of the equipment required to effectuate blackouts] has no applicability in the context of satellite carriers who now serve millions of subscribers.” Comments of the Office of the Commissioner of Baseball at 12; see also Comments of the NHL 15 (similarly misinterpreting basis of exception).

³⁶ See discussion *supra* Section II.

blackout that would affect fewer than five percent of television households in the relevant DMA, as determined on a provider-by-provider basis.³⁷

D. No Further Sports Protection is Appropriate At This Time

DIRECTV concurs with Echostar and Tribune Broadcasting Company that issues regarding patterns of sports carriage such as those mentioned in the Notice³⁸ are not properly raised in this proceeding and should not be addressed at this time.³⁹ Although discussed at some length in the comments submitted by the sports leagues, these issues are – as the leagues themselves admit – currently only hypothetical in nature.⁴⁰ It is premature for the Commission to take any action on this subject at this time.⁴¹

V. CONCLUSION

Any network nonduplication, syndicated exclusivity, or sports blackout regulations that the Commission imposes on the satellite industry must remain true to both the letter and the spirit of the SHVIA. A wholesale imposition on the satellite industry of the program exclusivity rules

³⁷ That is, the blackout rule would not apply if the number of subscribers to a DBS provider's service which would be affected by a blackout was fewer than five percent of the television households in the relevant DMA. Such an exception will have a *de minimus* impact on rights holders while avoiding the adverse impact on consumers and easing the burden on DBS providers.

³⁸ See Notice at ¶ 33.

³⁹ See Comments of Echostar at 10; Comments of Tribune Broadcasting at 4-5.

⁴⁰ See Comments of the NHL at 22 (“A satellite carrier . . . *could* create a multi-game hockey package . . .”) (emphasis added); Comments of the NFL at 14 (“[T]he League *might* be forced to alter its distribution plan . . .”) (emphasis added); Comments of the Division 1-A Athletic Directors Association at 3 (“[A] satellite carrier *could* put together its own version of the early round of the NCAA Basketball Championship in March . . .”) (emphasis added); Comments of the NBA at 2 n.3 (joining position taken by the NFL and the NHL).

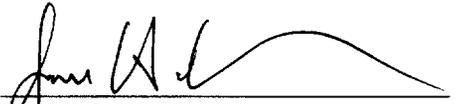
⁴¹ DIRECTV agrees with Tribune Broadcasting Company that, should the delivery of sports events on distant non-superstation signals create problems in the future that the sports leagues cannot resolve through private contractual arrangements, “the Commission can

applicable to the cable industry will neither fulfill the Commission's statutory mandate nor realize Congress' goal of improved MVPD competition. Instead, satellite-specific provisions must be implemented that account for the fundamental differences between cable and satellite services, and should, at a minimum, include DIRECTV's proposals set forth herein.

draft appropriate rules based on an appropriate factual record at that time." Comments of Tribune Broadcasting at 5.

Respectfully submitted,

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February 28, 2000
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