

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF 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)
Retransmission)

CS Docket No. 00-2

To: The Commission

REPLY COMMENTS

THE WB TELEVISION NETWORK

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SUMMARY

The Commission's Notice of Proposed Rulemaking ("Notice") in this proceeding seeks to apply syndicated exclusivity ("syndex"), network non-duplication ("non-dup") and sports blackout rules to satellite delivery of "nationally distributed superstations," pursuant to the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"). The WB Television Network ("The WB"), the nation's fifth and still emerging television network, hereby replies to the comments filed in response to the Notice.

Local broadcast affiliates of emerging networks such as The WB are vulnerable to importation of strong, distant stations, whether by cable or satellite delivery systems. To assure the continued viability of local broadcast affiliates of these emerging networks, they must be afforded meaningful syndex, non-dup and sports blackout protection. In particular, The WB agrees with commenters who recognize that such rules must be the same for DBS satellite programming distributors as they are for cable operators. Congress intended there to be regulatory parity in applying these rules to DBS and cable. Indeed, the SHVIA provisions requiring the Commission to adopt such rules specifically refer to the Commission's cable television syndex, non-dup and sports blackout rules.

Moreover, the only statutory exception to this regulatory parity mandate is very narrow: in applying sports blackout protection to the retransmission of network signals by satellite carriers to subscribers, the Commission is to take into account the technical feasibility and possibility that it may be economically prohibitive to do so. However, the legislative history to this provision stresses that the burden of proving such economic hardship "is a heavy one," and that, absent such showing, "the rules should be as similar as possible to that applicable to cable services." The statute contains no technical feasibility or economic hardship exceptions for syndex and non-dup requirements applicable to nationally distributed

superstations. As one commenter succinctly stated, "[t]he Commission simply has no leeway in dealing with the nationally distributed superstations."

Identical cable and satellite rules are also necessary because DBS providers will be able to retransmit the signals of many major DMA network affiliates and independent stations into the service areas of broadcasters in small and medium DMAs. For example, in the Washington, DC DMA, where WBDC is the exclusive broadcast affiliate for The WB, if a cable operator serving areas within WBDC's protected zone imports another WB Network affiliate, such as WPIX from New York, WBDC may require the cable operator to delete any duplicated WB Network programming from WPIX. If, however, a DBS provider were to import WPIX, WBDC faces the identical audience and advertising revenue erosion problem. This identical problem calls for an identical solution.

Similarly, local broadcasters should have the same zones of syndex, non-dup and sports blackout protection for satellite delivery of television broadcast signals that they have under the Commission's cable television rules. Commenters across the board agreed with this concept. As the Association of Local Television Stations stated, such "zones of protection are definite; they suffer none of the difficulties associated with ascertaining whether a subscriber receives a signal of grade B intensity." Likewise, Tribune Broadcasting Company stated that the existing zones of protection are easier to determine than a less precise signal contour measurement, such as an "unserved household."

Additionally, the zones of protection should be measured as to their coverage of individual community units, as is the case with the Commission's cable television rules. The WB agrees with the National Cable Television Association that this would "be the most easily applied, easily understood and easily enforced approach." Community unit and cable franchise

area boundaries are clear to cable operators, satellite carriers and, perhaps most importantly, residents. If, for some reason, the community unit approach is unworkable, The WB agrees with commenters who found a zip code approach a reasonable alternative.

In addition, the Commission should adopt further non-dup protections for emerging networks. In mandating that "nationally distributed superstations" be accorded non-dup protection, Congress recognized that local television stations affiliated with emerging networks such as The WB will be vulnerable to DBS importation of powerful stations affiliated with the same network from larger DMAs. Furthermore, DBS satellite carriers may deliver such stations even to "served" households without obtaining retransmission consent. While the protections to be adopted by the Commission pursuant to Section 339(b) are a step in the right direction, programming broadcast by a local affiliate of an emerging network must be afforded the same degree of non-dup protection against importation of distant affiliates by DBS operators as by cable operators, whether or not the distant signal is a "nationally distributed superstation." Under the cable television non-dup rules, local stations holding exclusive contractual rights to network programming are fully entitled to exercise their non-dup rights, regardless of whether they are "primary" affiliates, "secondary" affiliates, or otherwise. Unless the same protections are afforded against DBS importation, local stations will have less incentive to enter into secondary affiliation arrangements with emerging networks.

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REPLY COMMENTS

The WB Television Network ("The WB"), by its attorneys, hereby submits these Reply Comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.^{1/} The WB is a limited partnership whose general managing partner is WB Communications, a division of Time Warner Entertainment Company, L.P. As an emerging network, The WB has a fundamental interest in the outcome of this proceeding. Emerging networks such as The WB continue to face severe obstacles in achieving local broadcast distribution. Broadcast affiliates of an emerging network are particularly vulnerable to the importation of strong, distant stations from much larger Designated Market Areas ("DMAs"), regardless of whether such importation is by cable or satellite delivery systems. To assure the continued viability of local broadcast affiliates of emerging networks, it is essential that they be afforded meaningful, technology neutral syndicated exclusivity

^{1/}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 Retransmission, Notice of Proposed Rulemaking, CS Docket No. 00-2, FCC 00-4 (rel. Jan. 7, 2000) ("Notice").

("syndex"), network non-duplication ("non-dup") and sports blackout protection.

Accordingly, The WB agrees with the commenters who recognize that DBS satellite programming distributors should be subject to the same syndex, non-dup and sports blackout rules that apply to cable operators.^{2/}

I. INTRODUCTION

The Commission has long promoted the emergence of new broadcast television networks.^{3/} For example, the Commission has assisted the Fox Television Network by exempting it from the former fin/syn rules,^{4/} granting a waiver of the daily newspaper cross-ownership cross-ownership restriction,^{5/} and granting a waiver of the broadcast station foreign ownership restriction.^{6/} More recently, in initiating the first biennial review of its rules as

^{2/}The WB takes no position regarding the imposition of such obligations on C-Band satellite programming distributors. Rather, these comments are limited to true DBS service providers such as EchoStar and DIRECTV.

^{3/}See Report on Chain Broadcasting, Commission Order No. 37, Docket No. 5060 (May 1941), modified, Supplemental Report on Chain Broadcasting (October 1941), appeal dismissed sub nom. NBC v. United States, 47 F.Supp. 940 (S.D.N.Y. 1942), aff'd., 319 U.S. 190 (1943); ABC-Paramount Merger Case, 8 RR 541 (1953); Network Broadcasting, Report of the Network Study Staff to the Network Study Committee (Oct. 1957), reprinted in Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1297, 85th Cong., 2d Sess. (1958); Second Report and Order in Docket No. 12859, 34 FCC 1103 (1963); Report, Statement of Policy, and Order in Docket No. 20721, 63 FCC 2d 674 (1977); Network Inquiry Special Staff, New Television Networks: Entry Jurisdiction, Ownership and Regulation, Final Report (Oct. 1980).

^{4/}Evaluation of the Syndication and Financial Interest Rules, Second Report and Order, 8 FCC Rcd 3282 (1993) at ¶ 105.

^{5/}Fox Television Stations, Inc., 8 FCC Rcd 5341 (1993), aff'd. sub nom, Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154 (D.C. Cir. 1995).

^{6/}Fox Television Stations, Second Memorandum Opinion and Order, 10 FCC Rcd 8452 (1995).

required by the Telecommunications Act of 1996, the Commission sought comment on the effect and necessity of the 35% national television ownership cap. It specifically asked, "How does the rule affect existing television networks or the formation of new networks?"^{2/} The Commission should continue this policy of promoting emerging networks, by giving such networks the tools to protect their affiliates and gain local distribution.

Emerging networks such as The WB, however, have had considerable difficulties gaining local distribution. For example, The WB, the nation's fifth broadcast television network, commenced operations on January 11, 1995, with two hours of prime time programming per week, broadcast by 48 affiliated stations (both primary and secondary affiliates) nationwide. Today, The WB is affiliated with full power stations (primary and secondary) in 83 DMAs nationwide, covering approximately 80% of U.S. television households, and 6 LPTV affiliates, accounting for DMAs covering an additional 2.4% of U.S. television households. However, despite the growth it has achieved, The WB continues to face serious coverage disadvantages. The four established television networks, ABC, CBS, NBC and Fox, have broadcast affiliates that essentially provide nationwide over-the-air coverage. Moreover, UPN, another emerging commercial television network which commenced operations only a few days after The WB, had achieved over 92% coverage of U.S. television households through full power television station affiliates by March of 1996, and additional

^{2/}In The Matter of 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant To Section 202 of the Telecommunications Act of 1996, Notice of Inquiry, 13 FCC Rcd 11276 at ¶ 16 (1998).

coverage through low power television station affiliates.^{8/} While UPN's off-air coverage has dipped slightly, it nevertheless remains at approximately 87% through primary and secondary full-power affiliates.^{9/} Thus, The WB continues to suffer an over-the-air coverage disparity compared with the five other principal commercial television networks.

The health of The WB's affiliates, and The WB's ability to attract new affiliates, would be seriously jeopardized if DBS operators could import "nationally distributed superstations"^{10/} such as WWOR, KTLA, or WPIX without being subject to non-dup and syndex requirements identical to those applicable to cable operators. Indeed, the Commission has recognized exclusivity as an important tool used by programmers to create support for new services, allowing these services to gain a foothold in the programming distribution marketplace.^{11/}

^{8/}Comments of Viacom, Inc., MM Docket No. 98-35, November 19, 1999 at 31-32.

^{9/}Id.

^{10/}According to Sec. 339(d)(2) of the statute: The term "nationally distributed superstation" means a television broadcast station, licensed by the Commission, that --

(A) is not owned or operated by or affiliated with a television network that, as of January 1, 1995, offered interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more States;

(B) on May 1, 1991, was retransmitted by a satellite carrier and was not a network station at that time; and

(C) was, as of July 1, 1998, retransmitted by a satellite carrier under the statutory license of section 119 of title 17, United States Code.

SHVIA Sec. 1008, adding 47 U.S.C. § 339(d)(2).

^{11/}New England Cable News, 9 FCC Rcd 3231 (1994) at ¶¶ 33-39, 40 ("We agree that exclusivity may promote diversity in the programming market when used to provide incentives for cable operators to promote and carry a new and untested programming service.")

Exclusivity offers distributors incentive to promote and carry a fledgling service, which in turn attracts support and investment which can offset the significant costs involved with launching a new programming service. Such exclusivity promotes diversity of programming services by giving new services like that offered by The WB an opportunity to establish themselves, to the benefit of consumers.

Congress has repeatedly cited the importance of local broadcasting and proclaimed the public interest in preserving the viability of such programming. Specifically, the 1992 Cable Act states that a "primary objective and benefit of our nation's system of regulation of television broadcasting is the local origination of programming."^{12/} The 1992 Cable Act underscores the importance of local programming, stating that "[b]roadcast television stations continue to be an important source of local news and public affairs programming and other local broadcasting services critical to an informed electorate."^{13/} Likewise, according to the Senate Report from the 1992 Cable Act, "[t]here is no doubt that, over the past 40 years, television broadcasting has provided vital local service through its programming, including its news and public affairs offerings and its emergency broadcasts."^{14/}

Furthermore, the legislative history of the Satellite Home Viewer Act of 1988 (the "SHVA")^{15/} indicates that Congress' recognized the public interest in protecting the television

^{12/}Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-135, 106 Stat. 1460 (1992), § 2(a)(10).

^{13/}Id. at § 2(a)(11).

^{14/}S. Rep. No. 92, 102d Cong., 1st Sess. 42 (1991).

^{15/}Pub. L. 100-667, 102 Stat. 3949 (1988).

broadcast network-local affiliate distribution system, and the importance of protecting local stations' rights to bargain for exclusivity against imported distant broadcast signals. According to the House Committee Report:

[f]ree local over-the-air television stations continue to play an important role in providing the American people information and entertainment. The Committee is concerned that changes in technology, and accompanying changes in law and regulation, do not undermine the base of free local television service upon which the American people continue to rely. The Committee is concerned that retransmissions of broadcast television service to home earth stations could violate the exclusive program contracts that have been purchased by local television stations. Depriving local stations of their program contracts could cause an erosion of audiences for such local stations because their programming would no longer be unique and distinctive.^{16/}

Indeed, Congress' stated purpose of the SHVIA was to "ensure[] that [DBS equipment] owners will have access to copyrighted programming while protecting the existing network/affiliate distribution system to the extent that it is successful in providing programming by other technologies."^{17/} As explained in detail below, Congress has carried forward the foregoing policy goals in adopting the Satellite Home Viewer Improvement Act of 1999,^{18/} most particularly by mandating the adoption of appropriate non-dup, syndex and sports blackout limitations on DBS importation of distant broadcast signals.

^{16/}H.R. Rep. No. 887, Part 2, 100th Cong., 2d Sess. 26-27 (1988).

^{17/}H.R. Rep. No. 887, Part 1, 100th Cong., 2d Sess. 8 (1988).

^{18/}Pub. L. No. 106-113 Stat. 1051, Appendix I (1999) ("SHVIA").

II. THE SYNDEX AND NON-DUP RULES FOR SATELLITE DISTRIBUTORS SHOULD TRACK THE COMMISSION'S RULES FOR CABLE OPERATORS

As the Commission has recognized, in adopting SHVIA, Congress was "seeking to create parity between the regulations covering satellite carriers and cable operators."^{19/} The WB agrees with the Commission's assessment of Congressional intent. Thus, there is no reason why such rules cannot be identical for satellite carriers and cable operators.

A. Parity Considerations Reveal the Need for Identical Rules.

According to the statute,

Within 45 days after the date of the enactment of the Satellite Home Viewer Improvement Act of 1999, the Commission shall commence a single rulemaking to establish regulations that --

(A) apply network nonduplication protection (47 C.F.R. 76.92), syndicated exclusivity protection (47 C.F.R. 76.151), and sports blackout protection (47 C.F.R. 76.67) to the retransmission of the signals of nationally distributed superstations by satellite carriers to subscribers^{12/}

The direct references to the corresponding Commission rules for cable operators make it plain that Congress intended the Commission's rules for nationally distributed superstations delivered by DBS to be identical to the rules applicable to cable operators. Indeed, even though Section 339(b)(1)(B), which orders the Commission to "apply sports blackout protection (47 C.F.R. 76.67) to the retransmission of the signals of network stations by satellite carriers to subscribers," is qualified by the direction that any such protection be "to

^{19/}Notice at ¶ 9.

^{12/}SHVIA Sec. 1008, adding 47 U.S.C. § 339(b).

the extent technically feasible and not economically prohibitive,"^{13/} the legislative history states that

The 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.^{14/}

The Commission specifically cites this Congressional intent in the Notice.^{15/}

As commenters across the spectrum pointed out, Congress intended that satellite carriers have regulatory parity with cable operators as to both the benefits and the responsibilities surrounding carriage of local television broadcast signals. For example, Fox Entertainment Group stated that "the new satellite rule should be tailored as closely as possible to mirror the existing cable rule."^{16/} Likewise, the National Cable Television Association ("NCTA") specifically proposes that, "in order to promote 'parity' and a level playing field for fair competition, it is critically important that the blackout areas for satellite carriers be as congruent as possible as the blackout areas for competing cable systems."^{17/} In addition, the National Football League states that

We believe the Commission must complete the work that Congress began by applying the network nonduplication and syndicated exclusivity rules to satellite carriers in a manner that is parallel to the application of those rules to cable operators. Given the increased competition between cable and satellite services,

^{13/}SHVIA Sec. 1008, adding 47 U.S.C. § 339(b)(1)(B).

^{14/}Joint Explanatory Statement at 11.

^{15/}Notice at ¶ 3.

^{16/}Comments of Fox Entertainment Group at 1, citing Notice at ¶ 3.

^{17/}Comments of the National Cable Television Association at 3.

it would make little sense to protect the integrity of programming contracts with respect to one medium and not the other.^{18/}

The WB agrees with these commenters. Not only is regulatory parity a wise policy, it was specifically intended by Congress.

B. No Exceptions are Allowed for Syndex and Non-dup Requirements Applicable to Nationally Distributed Superstations Based on Technical Feasibility or Economic Hardship.

In addition to Congressional intent that satellite programming distributors be given regulatory parity with cable operators both as to the benefits and the responsibilities of local television broadcast signal carriage, Section 339(a)(1)(A) of the statute contains no exceptions for syndex and non-dup requirements applicable to nationally distributed superstations based on technical feasibility or economic hardship. As the Association of Local Television Stations points out, "Congress made a conscious decision not to qualify Section 339(b)(1)(A) with any provision permitting consideration of technical feasibility."^{19/} Similarly, as the National Hockey League succinctly stated, "[t]he Commission simply has no leeway in dealing with the nationally distributed superstations."^{20/}

Only Section 339(b)(1)(B) contains a narrow exception, which permits the Commission to consider the extent to which the sports blackout (and not the syndex or non-dup) rule

^{18/}Comments of the National Football League at 10. See also Comments of the National Hockey League at 10 ("The Leagues concur in the Commission's analysis that Section 339(b)(1)(A) was designed to create parity between cable and satellite in the carriage of nationally distributed superstations.")

^{19/}See Comments of the Association of Local Television Stations, Inc. at 2.

^{20/}Comments of the National Hockey League at 10.

applicable to network stations (and not other nationally distributed superstations) might be technically unfeasible or economically prohibitive.^{21/} This narrow exception in no way changes the conclusion that Congress sought to have the Commission promulgate syndex and non-dup rules for nationally distributed superstations that are identical to those applicable to cable operators. Indeed, according to the National Football League, even as to the sports blackout rules, "[t]he real world operating experience of NFL Sunday Ticket conclusively demonstrates that no technological or economic objection can be raised to extending the blackout rule to satellite television."^{22/} Accordingly, The WB agrees with the Commission's conclusion that "[t]he SHVIA's directive to apply the network nonduplication, syndicated exclusivity, and sports blackout rules to satellite retransmission of nationally distributed superstations appears to apply without any limitation based upon a satellite carrier's technical ability to comply."^{23/}

^{21/}SHVIA Sec. 1008, adding 47 U.S.C. § 339(b)(1)(B).

^{22/}Comments of the National Football League at 8. See also Comments of Fox Entertainment Group at 3 ("Congress directed the Commission to apply the same rule -- down to the citation -- on satellite carriers as applies to cable operators.")

^{23/}Notice at ¶ 27. The Commission last considered the application of program exclusivity rules to the satellite industry over nine years ago in a proceeding mandated by the Satellite Home Viewer Act of 1988. See In re Imposing Syndicated Exclusivity Requirements on Satellite Delivery of Television Broadcast Signals to Home Satellite Earth Station Receivers, Report and Order, 6 FCC Rcd 725 (1991). The conclusions reached in that proceeding regarding the technical and economic feasibility of imposing blackout obligations on the satellite industry have absolutely no relevance to this proceeding. Not only were the Commission's conclusions expressly based on the large dish (C-Band) home dish industry that existed at the time, but those conclusions were acknowledged to be valid only through 1994, when the interim satellite compulsory copyright license was scheduled to expire. Id. at para. 13. Indeed, even then the Commission recognized that the post-1994 home satellite industry

(continued...)

Even if economic and technical feasibility were relevant, which they are not, such factors would not excuse imposition of equivalent regulatory responsibilities on DBS. The explosive growth enjoyed by DBS in recent years demonstrates the lack of any economic hardships. Moreover, the use of digital encryption or "DSS" technology renders technical compliance with such requirements a simple matter. If DBS operators can individually address particular subscribers, for example, to transmit pay-per-view events, this same technology will allow programming deletions consistent with non-dup, syndex and sports blackout obligations. Indeed, DIRECTV concedes that its current technology is routinely used for such purposes.^{24/} Clearly, the time is long overdue for the imposition of even-handed syndex, non-dup and sports blackout obligations on DBS.

C. Local Broadcasters Should Have the Same Zone of Protection That They Have Under the Cable Rules.

Under the Commission's syndex rules applicable to cable television, a television station's zone of protection is its specified zone, *i.e.*, up to 35 miles, unless its relevant contract establishes a smaller exclusivity zone.^{25/} Under the Commission's cable television non-dup rules, the zone of protection is up to 35 miles for a major market station and 55 miles

^{23/}(...continued)
and technology were likely to be significantly different and that, particularly with the development of DBS, the imposition of program exclusivity blackout obligations could be become feasible. *Id.* at paras. 13, 16.

^{24/}Comments of DIRECTV, Inc. at 8-9.

^{25/}47 C.F.R. §§1 76.151, 73.658(m).

holder that is generally 35 miles surrounding the reference point of the community in which the live sporting event is taking place.^{27/}

The Commission seeks comment on whether Congress intended to retain these same zones of protection for satellite carriers.^{28/} The WB agrees with commenters who conclude that Congress intended to retain the same zones of protection regarding satellite carriers as apply to cable operators. For example, "DIRECTV agrees that it is appropriate to approximate the same geographic zones for satellite carriers [as for cable operators]."^{29/} Similarly,

ALTV submits that the Commission is correct in proposing to provide local television stations with the same zones of protection provided under the cable television network nonduplication, syndicated exclusivity, and sports blackout rules. The 35-mile and 55-mile zones of protection are definite; they suffer none of the difficulties associated with ascertaining whether a subscriber receives a signal of grade B intensity. Furthermore, geocoding techniques already used to determine whether a household is served or unserved easily may be applied to determine whether a household is located within a local television station's specified zone. Therefore, the Commission ought command use of the most precise approach possible in establishing the location of households.^{30/}

Likewise, Tribune Broadcasting Company states that

There are strong arguments that a station's zone of protection under the program exclusivity rules should be coextensive with the boundaries of its 'local market' for retransmission consent purposes. However, because Congress did not raise the issue of cable protected zones in the Act, Tribune believes this is not the proper forum for changes in § 73.658(m) of the Commission's rules. Rather, hewing to the statutory mandate of competitive parity, the Commission should

^{27/}47 C.F.R. §§ 76.67(a), 73.658(m), 76.5(e).

^{28/}Notice at ¶ 14.

^{29/}Comments of DIRECTV, Inc. at 8.

^{30/}Comments of the Association of Local Television Stations, Inc. at 7-8.

apply the same definition of the protected zone for satellite carriers as it applies to cable systems. Satellite carriers should find it easier to adhere to the 35- and 55-mile limits in the program exclusivity rules than to determine whether a subscriber lives in an 'unserved household,' a term that implicates less precise signal-contour measurement.^{31/}

As to the practical effect of a station's zone of protection, NCTA points out in its comments that "[a] cable system is generally required 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."^{32/} According to NCTA, in addition to parity considerations,

requiring satellite carriers to black out programming on the same community unit basis that applies to cable operators is likely to be the most easily applied, easily understood and easily enforced approach. The boundaries of community units and cable franchise areas -- unlike the boundaries of exclusivity established by programming contracts and broadcasters' 35-mile zones -- are clear not only to cable operators and satellite carriers but also to residents. Customers would surely be confused and bewildered by a regulatory scheme that resulted in blackouts in one neighborhood in a community -- or on one side of a street -- but not on the other. And they would be confused by a regulatory scheme under which a program might be blacked out if a household subscribed to cable but not if the same household subscribed to DBS.^{33/}

The WB agrees. Moreover, a television broadcaster's zone of protection is dictated by its contract with the rights holder to the programming. As the Commission states in the Notice,

We believe that Congress' purpose in applying the network nonduplication, syndicated exclusivity, and sports blackout rules to those satellite retransmissions reflects a balance between providing access to national programming carried by the superstation and a recognition that, in the absence

^{31/}Comments of Tribune Broadcasting Company at 3 (footnote omitted).

^{32/}NCTA Comments at 3, citing 47 C.F.R. §§ 76.92, 76.151 (italics in original).

^{33/}Id. at 4.

of retransmission consent requirements, broadcasters and rights holders will have no opportunity to protect their contractual rights.^{34/}

If, for some reason, the community unit approach proves too difficult to implement (and The WB does not see any reason why it would be), the zip code approach would be a reasonable alternative. Like the community unit approach for cable operators, if any portion of the zip code were in the station's zone of protection, the station would be entitled to protection throughout the entire zip code. DIRECTV advocates this approach, stating that it currently uses this method "to target its contractually-required blackouts."^{35/} Likewise, the Commissioner of Baseball "agrees with the Commission that the simplest method is to apply Sports Rule protection on a 'zip code' basis. The carrier should be required to black out the telecast in all zip code areas that are located wholly or partially within the 35-mile specified zone."^{36/}

III. THE COMMISSION SHOULD ADOPT ADDITIONAL NON-DUP PROTECTIONS FOR EMERGING NETWORKS.

Section 339(b) of the Communications Act, as added by SHVIA, directs the Commission to adopt network non-duplication, syndicated exclusivity and sport blackout protections relating to the distribution by satellite carriers of "nationally distributed superstations" - - stations that have a long history of satellite carriage (dating back to May 1, 1991), that were still being distributed to satellite customers pursuant to the Section 119 compulsory license as of July 1,

^{34/}Notice at ¶ 9.

^{35/}Comments of DIRECTV, Inc. at 8-9. See also Comments of the National Hockey League at 19.

^{36/}Comments of the Office of the Commissioner of Baseball at 13.

1998, and that are not affiliated with a broadcast network that was in operation as of January 1, 1995. As the Notice correctly observes, the majority of stations meeting the definition of "nationally distributed superstations" are affiliates of one of the two principal emerging networks: The WB or UPN.^{37/} In mandating that this particular class of stations be accorded network nonduplication protection, Congress obviously recognized that local television stations affiliated with an emerging network are likely to be particularly vulnerable to DBS importation of powerful stations affiliated with the same network from much larger DMAs such as Los Angeles, New York or Boston. This potentially severe impact is exacerbated by the fact that DBS satellite carriers have free rein to deliver such "nationally distributed superstations" even to "served" households and without obtaining retransmission consent from the superstation licensee.^{38/}

The protections to be adopted by the Commission pursuant to Section 339(b) are welcome and undoubtedly will be a step in the right direction. However, The WB submits that additional protections are necessary to protect and foster the health and development of emerging networks. In particular, programming distributed by an emerging network should be afforded the same degree of network non-dup protection from importation of distant affiliates by DBS as is currently provided in the cable importation context, whether or not the distant signal is a "nationally distributed superstation." Such further protections not only are necessary to carry out the Congressional mandate for regulatory parity between cable and DBS, but also are particularly

^{37/}Notice at ¶6, n.11. While The WB agrees with the Commission's view that no station can qualify as a "nationally distributed superstation" if it does not already meet the applicable criteria, The WB disagrees that the list of such stations set forth in the Notice is necessarily exhaustive.

^{38/}SHVIA Sec. 1005, amending 17 U.S.C. §119 (d)(10); SHVIA Sec. 1009, amending 47 U.S.C. §325(b)(2)(B).

appropriate given the significant obstacles faced by emerging networks in obtaining distribution remotely comparable to that of the four established networks, and given the relative weakness of many of the stations available for affiliation with an emerging network.

The following two examples are offered to illustrate why the Commission should extend the network non-dup protection afforded emerging networks to ensure an equivalent level of protection against cable and DBS importation of distant stations. First, consider the situation of a station located in a smaller television market that holds the exclusive territorial rights to programming distributed by an emerging network. Under the cable non-dup rules, such a smaller market station is entitled to a 55-mile zone of network non-duplication protection.^{39/} This 55-mile zone does not differentiate between areas that are inside and outside the station's Grade B contour and, in fact, a multiplicity of communities falling at least partially outside the station's Grade B contour typically can be found within a station's 55-mile zone of protection. Thus, the cable rules operate to protect a smaller market station from the importation of duplicating network programming anywhere in the zone of protection, including those areas that are outside the station's Grade B contour.^{40/}

Under SHVIA, the Commission is statutorily required to give a smaller market station a similar measure of nonduplication protection as it receives under the cable rules insofar as the source of the duplicating network programming is a "nationally distributed superstation" imported via DBS. However, the statute does not expressly address the protection that should be afforded to an emerging network in the event that the source of the duplicate network programming

^{39/}47 C.F.R. §76.92(b)(2).

^{40/}SHVIA Sec. 1008, amending 47 U.S.C. §339(a).

imported by a DBS operator is not a "nationally distributed superstation." Up to two such stations can be imported by DBS providers to households outside the station's Grade B contour. In order to ensure parity of regulation between cable and satellite, and to prevent DBS carriers from circumventing their obligation to give nonduplication protection to emerging networks by importing stations that do not meet the three-part "nationally distributed superstation" test, it is essential that the Commission fill the "gap" in the statute by extending network nonduplication protection to cover emerging network programming generally.^{41/}

Another good illustration of why the Commission needs to adopt network nonduplication specifically directed at emerging networks involves secondary affiliations. Given the scarcity of local stations available to affiliate with an emerging network, emerging networks often find it critical to rely on secondary affiliations to obtain additional coverage and distribution in DMAs where a primary affiliate is unavailable. For example, in its recent *ex parte* submission to the Commission, Viacom noted that, as of March 1996, UPN had entered into secondary network affiliation agreements with over sixty television stations in DMAs reaching 18.6% of TV households.^{42/} As might be imagined, a secondary affiliation relationship with a local station can

^{41/}The risk that DBS providers would evade the program blackout obligations imposed on them with respect to "nationally distributed superstations" by finding other affiliates of emerging networks to import as distant signals is far from conjectural. The SHVIA authorizes satellite carriers to retransmit broadcast stations to subscribers in the stations' local markets and, beginning in 2002, mandates the carriage of all local stations in markets where any local signal is being retransmitted. Thus, it is a virtual certainty that satellite carriers will soon be uplinking numerous affiliates of emerging networks for local-to-local retransmission. Moreover, satellite carriers will be able to use any two of these signals to provide emerging network programming to unserved households in lieu of nationally distributed superstations.

^{42/}*Ex parte* presentation of Viacom Inc. and CBS Corporation, FCC File Nos. BTC-19991116ABW, et al. (February 11, 2000).

be far more fragile than a primary affiliation relationship, and the established networks often seek to dissuade their affiliates from entering into a secondary affiliation with an emerging network. Nevertheless, a secondary affiliation is clearly better than no affiliation, particularly to an emerging network, and the existence of a secondary affiliation has often been instrumental to the attraction of capital necessary to put an additional station on the air in a particular DMA to become a primary affiliate of an emerging network.

The problem that arises under SHVIA is as follows. The definition of "unserved household" is framed in terms of a subscriber's inability to receive a Grade B signal of "an over-the-air signal of a primary network station affiliated with that network."^{43/} Thus, in DMAs where a station is a secondary affiliate of an emerging network, all of the households will be deemed unserved as to the emerging network (even households located in the heart of the station's Grade B contour). Accordingly, DBS satellite carriers can, without retransmission consent, import up to two distant stations affiliated with the emerging network.^{44/}

As discussed in the prior example, the DBS provider clearly will be subject to network nonduplication blackout obligations if the distant affiliates imported into the secondary affiliates' DMA are "nationally distributed superstations." However, absent the adoption of rules more generally extending nonduplication protection with respect to emerging network programming, DBS providers will simply find other affiliates of the emerging network to import. This will create an unintended disparity between DBS and cable, since local stations holding exclusive contractual rights to network programming are fully entitled to exercise their non-dup rights

^{43/}SHVIA Sec. 1005, amending 17 U.S.C. §119(d)(10) (emphasis added.)

^{44/}SHVIA Sec. 1008, adding 47 U.S.C. §339(a).

against cable operators without regard to whether the local station is a "primary" affiliate, "secondary" affiliate, or otherwise. Moreover, an additional unintended anomaly would result because a local station would be fully protected against DBS importation into its grade B contour of distant stations affiliated with its primary network, typically one of the "big four," but would not be protected against DBS importation of distant stations affiliated with its secondary network, typically an emerging network in far greater need of such protection. Indeed, unless fully equivalent non-dup protections are afforded against DBS importation, local stations will have even less incentive to enter into secondary affiliation arrangements with an emerging network.

As the Commission has noted, the network non-dup rules applicable to cable systems are not statutorily mandated.^{45/} Thus, the fact that Section 339(b) does not mandate the additional protections for emerging networks advocated herein does not mean that the Commission cannot adopt them. Indeed, given the clear mandate for parity, as well as the unquestionable public interest benefits derived from the promotion of additional television networks, the Commission would be remiss if it did not address the anomaly situations described above. Accordingly, The WB urges the Commission to adopt the following catch-all regulation:

Any commercial television station licensed by the Commission holding network non-duplication rights to network programming distributed by a network, other than a network as defined in Section 202(e)(1) of the Telecommunications Act of 1996, shall be entitled to invoke network non-duplication protection against importation by a satellite carrier of such network programming to the same extent as would be available in the case of such importation by a cable system.

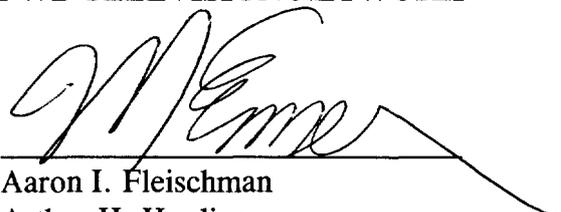
^{45/}Notice at ¶ 13.

IV. CONCLUSION

The WB agrees with commenters in this proceeding who have urged the Commission to follow Congressional intent and adopt syndex, non-dup and sports blackout requirements for satellite distributors that are identical to those imposed on cable operators. Emerging networks such as The WB have the same concerns over local distribution whether such distribution is by cable operators or DBS distributors. Indeed, the Commission must go beyond the minimum requirements of Sec. 339(b) to ensure that emerging networks are afforded the same degree of non-dup protection against DBS importation as currently exists in the cable context.

Respectfully submitted,

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