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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Lisa Chandler Cordell

February 28, 2000

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

RE: CS Docket No. 00-2
Reply Comments of the American Cable Association

Dear Ms. Salas:

On behalf of the American Cable Association ("Association"), we enclose ten (10) copies of the Association's Reply Comments in the above-referenced docket. We request that each Commissioner receive a personal copy of these materials.

We also include a "FILE COPY." We ask that you date-stamp and return it to the courier.

Please call with any questions.

Very truly yours,



Lisa Chandler Cordell

Enclosures

- cc: American Cable Association
- cc: Thomas Power, Senior Legal Advisor to Chairman Kennard
- Helgi Walker, Senior Legal Advisor to Commissioner Furchtgott-Roth
- Rick Chessen, Senior Legal Advisor to Commissioner Tristani
- Marsha MacBride, Legal Advisor to Commissioner Powell
- David Goodfriend, Legal Advisor to Commissioner Ness
- Deborah Lathen, Chief, Cable Services Bureau
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Before the
Federal Communications Commission
Washington, D.C. 20554

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

To: The Commission

REPLY COMMENTS OF THE
AMERICAN CABLE ASSOCIATION

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Association

February 28, 2000

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

To: The Commission

**REPLY COMMENTS OF THE
AMERICAN CABLE ASSOCIATION**

I. INTRODUCTION AND BACKGROUND

The American Cable Association ("Association") files these Reply Comments to address important issues raised by the Commission's Notice of Proposed Rulemaking ("Notice") in this docket and other parties' comments filed in response to that Notice. By authorizing DBS local service in the Satellite Home Viewer Improvement Act of 1999,¹ Congress sought to "place satellite carriers on an equal footing with cable operators with respect to the availability of broadcast programming."² The Association warns against developing a lop-sided regulatory framework that gives favor to DBS at the expense of

¹ See Act of Nov. 29, 1999, Pub. L. No. 106-113, 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999) ("1999 SHVIA").

² See *In the Matter of Implementation of the Satellite Home Viewer Act of 1999: Application of Network Nonduplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions*, Notice of Proposed Rulemaking in CS Docket No. 00-2 (released January 7, 2000).

smaller, independent cable businesses and their customers in smaller towns and rural America.

The Association files these Reply Comments on behalf of its approximately 300 member smaller, independent cable businesses and their smaller cable systems that serve more than 3.4 million customers nationwide from nearly 3,000 cable systems in smaller and rural communities throughout America. Many of the Association's members have fewer than 1,000 total customers. Then known as the Small Cable Business Association, smaller, independent cable businesses formed the Association in 1993 to represent the collective interests of its members and to speak with a unified voice regarding issues affecting their businesses. The Association regularly represents its members' interests in Commission proceedings to inform the Commission of characteristics and concerns of smaller and independently owned cable businesses and to ensure that Commission decisions do not unfairly and adversely impact the Association's members' businesses.

This rulemaking comes on the heels of Congress' aggressive efforts to further DBS competition to cable and thus improve consumer choice in multichannel video programming distributors ("MVPDs"). Intense pressure from DBS carriers led Congress to authorize DBS local service.³ This action has resulted in an explosion of DBS customers

³ The 1999 SHVIA largely responds to issues raised by several suits involving DBS carriers' illegal actions relating to retransmission of broadcast signals. See, e.g., *CBS Broadcasting Inc. v. PrimeTime 24 Joint Venture*, 48 F. Supp. 2d 1342; 1998 U.S. Dist. LEXIS 20442 (S.D. Fla. 1998), *judgment entered in* 1998 U.S. Dist. LEXIS 20488 (S.D. Fla.). As a result of those court decisions, millions of DBS subscribers faced losing satellite-delivered broadcast signals.

over the past two months.⁴ While promoting competition in the MVPD market remains an important objective, it remains equally important that the Commission promote meaningful competition among all MVPDs. This means that the Commission must align program exclusivity and sports blackout rules for cable and DBS to the greatest extent possible, thereby creating parity in competition.

II. THE COMMISSION MUST EXTEND THE SPORTS BLACKOUT RULE TO DBS CARRIAGE OF NETWORK STATIONS.

The Commission must extend the sports blackout rule to DBS carriage of network stations. Congress contemplated that the sports blackout rule would apply to network stations carried by DBS providers, limiting the rule's application only where it would be technically infeasible and economically prohibitive. See 47 U.S.C. § 339(b)(1)(B).

Congress sought to impose a heavy burden of proof before the Commission could exclude application of the sports blackout rule to network stations:

These regulations under subparagraph (B) are to be imposed "to the extent technically feasible and not economically prohibitive" with respect to the affected parties. 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.

145 Cong Rec S 14696, S 14711 (Nov. 17, 1999). Satellite carriers have not sufficiently established why the Commission should not extend the sports blackout rule to DBS carriage of network stations.

⁴ See, e.g., *DBS Subscriber Growth Continues Unabated From New Year Record*, SATELLITE NEWS (Feb. 21, 2000); *DirecTV Makes Record Subscriber Gains*, SATELLITE NEWS (Feb. 14, 2000).

Administrative inconvenience and additional cost do not prove that application of the sports blackout rule to network stations is either technically infeasible or economical prohibitive, yet this is the logic upon which the satellite carriers base their argument. The comments filed by the two primary DBS carriers, EchoStar and DIRECTV, fail to justify how extension of the rule to network stations would be technically infeasible or economically prohibitive other to state their claim to that effect. For example, DIRECTV stated without further justification:

- "The onerous technical and logistical requirements of implementing sports blackout obligations on a daily basis across the country could impose a serious long-term economic threat to the health of DBS operators. In recognition of this fact, the Commission should refrain from imposing sports blackout requirements where it has the legal and policy basis to do so."⁵
- "As DBS operators begin delivering on the promise of providing a complete, substitutable service in competition with cable providers via the retransmission of local broadcast channels, the cost burdens of extraneous regulation should be minimized wherever possible. The Commission should therefore recognize the technical difficulties and economic burdens that applying the sports blackout rule to the retransmission of network signals would entail, and refrain from imposing any such rule on the emerging DBS industry."⁶

Similarly, EchoStar does not meet its burden of demonstrating why technical and economic considerations justify not extending the sports blackout rule to network stations.⁷ Rather, EchoStar attempts to convince the Commission that it should extend consideration of technical and economic issues to application of the network nonduplication and syndicated exclusivity, and sports blackout rules to superstations, something Congress did

⁵ Comments of DIRECTV, Inc. in CS Docket No. 00-2 (Feb. 7, 2000) at 18.

⁶ *Id.*

⁷ See generally Comments of EchoStar Satellite Corporation in CS Docket No. 00-2 (Feb. 7, 2000).

not direct the Commission to do.⁸ EchoStar instead hides behind its mantra of providing competition to cable as grounds for creating disparate regulatory treatment of cable and DBS:

- Y "[T]he 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 infeasibility 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."⁹
- Y "[T]he 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.' EchoStar does not believe that imposing rules so onerous as to result in the cessation of satellite retransmissions would be consistent with that goal. To the contrary, unless appropriately 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. . . The goals of SHVIA would remain unattained – indeed, would be resoundingly defeated – if the operation of law itself were to create yet another respect in which satellite carriers would be made less attractive than cable operators because of a legal constraint."¹⁰

The Commission must see these arguments for what they are – DBS attempts to dodge any regulation, while seeing it imposed across the board on smaller, independent cable businesses.

⁸ See EchoStar Comments at 2-8.

⁹ EchoStar Comments at i.

¹⁰ *Id.* at 8.

The Commission must view with skepticism these DBS "woe-is-me" pleas. Both companies of tremendous size and capitalization, EchoStar (\$20 billion market capitalization) and DIRECTV (\$16 billion market capitalization) have experienced unprecedented growth, and forecasts project this growth to continue.¹¹ Despite such growth and the vigorous competition to cable that results, EchoStar and DIRECTV now seek to upset the balanced approach Congress intended for the Commission to implement.

Significantly, this rulemaking is not DBS providers' first attempt to undermine the balanced approach to DBS-cable competition Congress sought to implement. Before the ink could barely dry on legislation requiring mandatory carriage, DIRECTV and EchoStar already complained about must-carry obligations, asking Congress to eliminate them for DBS, while also asking Congress for more spectrum at no cost!¹² EchoStar has already come under Commission scrutiny for its failed efforts to comply with DBS public interest obligations.¹³ These measures, like program exclusivity and sports blackout, were designed to ensure a balanced environment in which different technologies could compete. To permit DBS to avoid the application of these rules will undermine a sophisticated and delicately balanced regulatory framework; the Commission should not surrender so easily.

¹¹ See *U.S. DBS Industry Closes the Decade With Another Record Year*, SATELLITE NEWS (Jan. 17, 2000).

¹² See Testimony of Steven J. Cox, Senior Vice President, DIRECTV, Inc. before the Senate Committee on Banking, Housing, and Urban Affairs (Feb. 1, 2000); see Testimony of David Moskowitz, Senior Vice President of Legal and General Counsel, EchoStar Communications Corporation, before the Senate Banking Committee (Feb. 1, 2000) ("One of the primary obstacles to providing equality to rural subscribers is, ironically, the must-carry requirements passed by Congress as part of the Satellite Home Viewer Improvement Act in the last session.").

¹³ *Show me the programming*, BROADCASTING & CABLE (Jan. 17, 2000) at 10.

The Commission should therefore establish sports blackout rules that closely parallel those that apply to cable, including application of those rules to DBS carriage of network stations.

III. THE COMMISSION SHOULD CREATE PARITY IN ITS PROGRAM EXCLUSIVITY AND SPORTS BLACKOUT RULES FOR DBS AND CABLE.

Congress directed the Commission to fashion DBS program exclusivity and sports blackout rules that closely parallel those that apply to cable.

A. The Zone of Protection Should Remain Comparable to That Applied in the Cable Context.

The Commission should adopt a mechanism to define the zone of protection comparable to that used in the cable context. The program exclusivity and sports blackout rules apply to cable systems on a community unit basis.¹⁴ Because satellite providers do not have identifiers assigned to the communities they serve, a comparable method for determining the areas to which the zone of protection applies involves reliance on zip codes. Under this method, a DBS provider would have to provide protection in all relevant zip codes that fall, in whole or in part, within the zone of protection. This would most closely align the DBS rules with the cable rules and would impose little additional burden.

B. The Commission Must Not Create Exceptions Based on Size Considerations.

No reason exists for the Commission to create exemptions based on size considerations. DIRECTV urges the Commission to create an exception to the sports blackout requirements where such "blackout would affect fewer than five percent of television households in the relevant DMA, as determined on a provider-by-provider

¹⁴ See 47 C.F.R. §§ 76.67(a), 76.92(a), 76.151.

basis."¹⁵ DIRECTV analogizes its proposed exemption to the exemption given to small cable systems.¹⁶

DIRECTV ignores the reality that such an exemption would not be even remotely comparable to the exemption for cable systems with fewer than 1,000 subscribers. Instead, with exception of the three smallest DMAs, five percent of the total television households would exceed 1,000; in most cases, by thousands of households.¹⁷ The Commission should therefore reject DIRECTV's proposed exception.

¹⁵ DIRECTV Comments at 17.

¹⁶ See 47 C.F.R. § 76.67(f).

¹⁷ See Television & Cable Factbook, Stations Vol. No. 67 (Warren Pub'g 1999) at A-1 - A-4.

IV. CONCLUSION

Congress intended that the Commission create a regulatory framework that places cable and DBS on an equal footing. To that end, the Commission must create program exclusivity and sports blackout rules for DBS that parallel those that apply to cable. This includes extending the sports blackout rule to DBS carriage of network stations and using zip codes to measure the zone of protection in the DBS context. Only then can the Commission ensure long-term meaningful competition.

Respectfully submitted,

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