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Eloise Gore
Cable Services Bureau
Federal Communications Commission
445 12th Street, N.W, Room 4-A802
Washington, D.C. 20554

**Re: Reply Comments of TV Guide, Inc. and Affiliates 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**

Dear Ms. Gore:

Enclosed for filing is a 3.5-inch diskette containing the reply comments of TV Guide, Inc. and its affiliates UVTV and Superstar/Netlink Group LLC for the above referenced proceeding.

Sincerely,

Charles B. Ammann

Enclosure

cc: International Transcription Service (w/encl.)

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**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)	
)	

REPLY COMMENTS OF TV GUIDE, INC. AND AFFILIATES

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February 28, 2000

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

REPLY COMMENTS OF TV GUIDE, INC. AND AFFILIATES

TV Guide, Inc. ("TV Guide") and its affiliates UVTV, Inc. and Superstar/Netlink Group LLC, hereby submit these Reply Comments in response to the various comments filed in the above-captioned rulemaking proceeding.

I. INTRODUCTION AND SUMMARY

As stated in TV Guide's initial comments, the C-band industry should be exempt from any rules adopted by the Commission imposing program exclusivity restrictions on satellite carriers. An exemption for C-band was specifically supported by the Satellite Broadcasting and Communications Association ("SBCA") in its comments and, more importantly, was not addressed by any other commenter in this proceeding. In fact, the C-band industry was hardly acknowledged by any of the other commenters, and in the two instances where it was, the reference was either unsupported or not fully developed. Additionally, the commenters immediately follow their C-band references with DBS examples and applications, drawing into question whether they fully understand that the C-band industry has substantial technological

limitations and declining subscriber counts, rendering unnecessary any rules requiring the blackout of programming on C-band superstation and network station signals.

Moreover, the blackout methodologies recommended by the network and sports representatives in their initial comments cannot currently be applied to the C-band industry. Moreover, it would not be technically or economically feasible to develop new methodologies.¹ In fact, if program exclusivity rules were imposed on the C-band industry, satellite carriers and distributors would most likely cease delivering superstations and networks to C-band subscribers, depriving those subscribers of the broadcast television programming Congress sought to preserve when enacting SHVIA.

While network and sports representatives argue against the consideration of technical or economic feasibility in the application of program exclusivity rules to the satellite industry, this was not Congress' directive. Instead, Congress directed the Commission to establish regulations *as similar to cable as possible*, recognizing that there would clearly be differences between the industries. The Commission took economic and technical feasibility into consideration when formulating the cable exclusivity rules, and indeed created an exemption based on a finding of such economic unfeasibility for small cable systems, and such consideration should be afforded to the satellite industry's equivalent of the small cable system—the small and ever declining C-band industry. Further, as explained in TV Guide's initial comments, it was Congress' intent to exempt the C-band industry from the exclusivity rules altogether.² This intent is not only expressed in the colloquy between Senators Hatch and Stevens, but also by the legislation itself—Congress would not have exempted C-band subscribers from the “unserved” household

¹ Comments of TV Guide at 9-14.

² Comments of TV Guide at 7-9.

restriction in Section 1005(a)(2)(B)(i) of the Satellite Home Viewer Improvement Act (“SHVIA” or the “Act”) in an effort to preserve the television programming only to re-impose exclusivity and therefore take the programming away elsewhere in the Act.

Even if the Commission finds that it cannot completely exempt C-band from any satellite exclusivity rules, it should, at a minimum, delay any application of the rules to the C-band industry while it investigates how such rules could be applied to C-band’s existing technology without causing hundreds of thousands of subscribers to lose programming they should be entitled to continue receiving.

II. SATELLITE CARRIERS DELIVERING SUPERSTATIONS AND NETWORK STATIONS TO THE C-BAND INDUSTRY SHOULD BE EXEMPT FROM ANY EXCLUSIVITY RULES

When enacting SHVIA, Congress intended for the C-band industry to be generally exempt from any restrictive rules limiting the distribution of programming services to C-band dishes.³ Moreover, given the C-band industry’s small size and declining subscriber base, it should enjoy a blanket exemption from the program exclusivity rules in the same manner as afforded small cable systems in the cable rules. In addition, while many of the sports commenters make reference to the application of the sports blackout rules to open video systems (“OVS”), and the “fairness” of applying that same rule to satellite,⁴ they make no mention of the blanket exemption enjoyed by Satellite Master Antenna Television (“SMATV”) systems and

³ *Id.*

⁴ Comments of the National Basketball Association at 4; Comments of the Office of the Commissioner of Baseball at 7; Comments of the National Hockey League at 12.

Multichannel Multipoint Distribution Systems (“MMDS”).⁵ Indeed, the National Basketball Association argued in its comments that it would be “unfair, illogical and harmful to sports teams, leagues and fans” to require OVS systems to blackout a sports program that a satellite distributor to was permitted to show in the same geographic region.⁶ However, this same “unfair” situation could occur with a small cable system, an MMDS or a SMATV system. It would be no more fair to force the C-band industry to comply with rules that are not economically or technically feasible while other competing distribution systems are exempt.

A. Satellite Exclusivity Rules “Similar” to the Cable Exclusivity Rules Would Include a C-band Exemption

All of the commenters supporting the application of the Commission’s exclusivity rules to the satellite industry cite the importance of establishing “parity” between the cable and satellite industries, and the need for “similar” or in some cases even the “same” rules as cable. However, none of these commenters advocate any exemption for the satellite carriers that would be “similar” to those in the cable rules, such as the Commission’s exemption for small cable systems due to economic hardship. While all of the network and sports representatives argue that the Commission cannot take economic hardship or technical feasibility into consideration when applying these rules to the satellite industry, such an approach would not provide the congressionally mandated “parity” with the cable rules.

⁵ *In the Matter of Definition of a Cable Television System*, 5 FCC Rcd 7638 (1990); *In the Matter of Amendments of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 4 FCC Rcd 2711 (1989).

⁶ Comments of the National Basketball Association at 4.

In SHVIA Congress specifically directed the Commission to develop exclusivity rules “as similar as possible to that applicable to cable services.”⁷ Because the cable rules exempt small systems with less than 1000 subscribers in a community unit, any satellite rules should also exempt carriers that serve a limited number of subscribers in an equivalent geographic area. The same economics are faced by the satellite carrier serving a small number of C-band subscribers as the small cable operator serving a small number of cable subscribers. Moreover, without similar exemptions, it is likely that satellite carriers such as UVTV and C-band distributors such as SNG will cease their distribution of superstations altogether, causing the loss of programming to hundreds of thousands of subscribers. This result is entirely inconsistent with congressional intent of SHVIA guaranteeing access to broadcast television programming.⁸

The rights holders that argue against any exemptions for the satellite industry use the argument that the satellite carriers have millions of subscribers and should not be able to “exploit” any such exemption.⁹ This argument could only address DBS satellite carriers, as the entire C-band industry serves only 1.6 million subscribers total, and only a fraction of those subscribers receive the superstation and network programming that would be subject to the exclusivity rules. Any exemption granted to the C-band industry could not be considered an “exploitation,” but merely “parity.”

⁷ H.R. Rep. No. 106-464, 106th Cong., 1st Sess. 103 (1999).

⁸ H.R. Rep. No. 106-464, 106th Cong., 1st Sess. 103 (1999). Moreover, in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), as in previous cases, protection of the program owners was counterbalanced by the societal interest in expanding “public access to freely broadcast television programs.” (*Sony*, 464 U.S. at 454, citing *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 508 n. 12 (1983)).

⁹ Comments of the NAB at 9; Comments of the Office of the Commissioner of Baseball at 12.

B. The Arguments Presented in the Comments of the Network and Sports Representatives Are All Directed to the DBS Satellite Carriers

DBS has been the driving force behind much of what has been taking place in the satellite industry over the past two years. It was the growth of DBS that led the National Association of Broadcasters (“NAB”) to sue PrimeTime 24 over the delivery of network stations to “served” subscribers. It was the contribution of DBS’ large subscriber numbers to the total number of subscribers that lost and were in danger of losing their network programming as a result of the *NAB v. PrimeTime 24* litigation that led Congress to implement the SHVIA. In fact, most of SHVIA was designed specifically for the DBS industry and its technological capabilities. Therefore, it is no surprise that all of the network and sports representatives focused almost entirely on the DBS industry, ignoring the C-band industry almost entirely, with only one unsupported reference by Office of the Commissioner of Baseball, and one incomplete reference by the National Football League (“NFL”).¹⁰ But despite its fleeting reference to C-band, the NFL goes on to discuss how it should be technically feasible for the satellite industry to comply with blackout rules since they “can effectively blackout in the context of the delivery of local

¹⁰ Baseball claims that a C-band subscriber can view over 1,000 telecasts of major league baseball games played outside that subscriber’s market, although the C-band industry does not distribute baseball’s “MLB Extra Innings” package, nor do the majority of C-band subscribers receive distant network services. Comments of the Office of the Commissioner of Baseball at 4. The NFL simply states that its “NFL Sunday Ticket” package has been available to C-band subscribers and that the NFL has complied with the sports blackout rule in such distribution. The NFL goes on to advocate the need for all of the exclusivity rules, but fails to address the technical and economic difficulties it would have itself if it had to comply with the numerous blackout restrictions that would be required by the syndex and nonduplication rules. Comments of the NFL at 8. Indeed, the ease of compliance for the NFL is exemplified by their ability to place each game on a separate tier that can be authorized or deauthorized well in advance of the game without disrupting other programming. For the superstations, each program throughout the day is on the same tier and the authorization and deauthorization would necessarily require the deletion of programming before and after the protected program.

signals.”¹¹ *The C-band industry does not deliver local signals because it does not have the technical capability to do so.*

Even the NAB, an entity that has dealt extensively with the C-band industry with respect to the “unserved” household restriction, only mentions DirecTV and EchoStar by name in its comments, and only argues that the Commission “should not allow *DBS companies*, which have millions of subscribers, to exploit any exemption for firms with fewer than 1,000 subscribers.”¹² In a similar fashion, Tribune Broadcasting Company, states “Congress fortunately left relatively few open questions concerning application of the program exclusivity rules to the growing DBS industry.” It makes no such statement regarding the declining C-band industry. If the C-band industry’s continued delivery of unrestricted superstation and network programming posed a significant threat to the value of these commenters’ programming, then they would have asserted such in their comments.

C. The Blackout Methodologies Recommended by the Network and Sports Commenters Are Not Technically Feasible in the C-band Industry

Although many of the sports representatives merely stated that such blackouts could be done, without providing any guidance as to how they could be done, there were suggestions and recommendations made by several of the commenters as to how such exclusivity rules could be implemented. Some commenters, such as the NAB and the Association of Local Television Stations (“ALTV”), recommend using “geo-coding” to determine a subscriber’s geographic

¹¹ Comments of the NFL at 8.

¹² Comments of the NAB at 9 (emphasis added).

location.¹³ It is true that C-band satellite distributors currently use geo-coding software to determine whether a *new* network subscriber lives in a Grade A or Grade B contour for the “unserved” household requirement.¹⁴ However, the software does not tell the satellite distributor whether the subscriber lives within a 35 or 55-mile radius of any particular point, and the satellite distributors are not licensed to use such software for such a purpose. To do such would require the satellite carriers and/or their distributors to obtain licensing agreements from one of the companies that provides such “geo-coding” software, then to design a program that would conform to any new exclusivity rules, and then to implement such a system. Such a process would require great expenditures of both time and money. Further, such a system can only be used to “geo-code” *one subscriber at a time*. As explained in the initial comments of both TV Guide and SBCA, using such a process for any of the exclusivity rules would not necessarily result in the deletion of the protected programming, and is likely to delete substantial amounts of unprotected programming that the subscriber is actually entitled to view.

Some of the other commenters suggest using a zip code method for blacking out subscribers.¹⁵ This methodology presents many of the same issues as the geo-coding. First, there is the issue of determining what zip codes are encompassed within the specified geographic area. Then, there is the issue of blacking out the programming to subscribers within those zip codes for the limited time periods that would be required. Again, as explained in the initial comments of both TV Guide and SBCA, it is not currently technically possible for satellite

¹³ Comments of the NAB at 3; Comments of ALTV at 7-8.

¹⁴ A “new” network subscriber would be any subscriber who had not received a secondary transmission of a C-band service of a network station before October 31, 1999, in accordance with 17 U.S.C. § 119(a)(2)(B)(iii).

¹⁵ Comments of the Office of the Commissioner of Baseball at 13; Comments of the Motion Picture Association of America, Inc. at 4.

carrier (UVTV), the C-band distributor or General Instrument's Access Control Center to accommodate these blackouts for the C-band industry.¹⁶

D. Exemption from the Exclusivity Rules Would Not Result in Harm to the Rights Holders or Stations

If the Commission determined that the C-band industry could be exempted under a regulation similar to the small cable system exemption, there would be no harm to either the rights holders or the local stations. Very few commenters even discussed the syndicated exclusivity rules and the network nonduplication rules.¹⁷ Of those commenters, the Motion Picture Association of America, Inc. ("MPAA") was by far the strongest advocate of the importance of the syndex rules.

In its comments, MPAA argues that syndex rules are necessary to protect the value of the rights holders' syndicated programming. However, it has already been established through several copyright proceedings that, in reality, syndicated exclusivity adds no additional value to the rights holders' programming and therefore does not call for any special protective rules. During the rate adjustment proceedings for the satellite carrier compulsory license in 1997, the rights holders attempted to argue that because the satellite carriers were not subject to the syndex rule, the \$0.035 differential between non-syndex proof superstations such as KTLA and WPIX and "syndex proof" superstations such as WGN that was established in the 1992 copyright

¹⁶ Comments of TV Guide at 11-13.

¹⁷ MPAA, ALTV and Tribune Broadcasting Co. all address the syndicated exclusivity and network nonduplication and the need to balance the public's access to superstations with the protection of rights holders in their comments. Comments of the MPAA at 3; Comments of ALTV at 5; Comments of Tribune at 2. While the application of these rules would have no bearing on the NFL, it also stated that such rules are needed. Comments of the NFL at 10.

proceedings should remain intact.¹⁸ However, the 1997 Copyright Arbitration Royalty Panel (the “CARP”) refused to recognize such value after testimony by Ms. Marsha Kessler, a representative of the MPAA, which stated that she believed “wholeheartedly” in MPAA President’s Mr. Jack Valenti’s 1992 testimony that syndex was “a slenderized piece of worthlessness.”¹⁹ The CARP noted that the copyright owners claimed that the lack of syndex protection warranted an upward increase in the license fee for non-syndex cleared superstations. The CARP stated: “We tend to agree conceptually. However, the copyright owners failed to adduce any quantifying evidence to justify an adjustment.”²⁰ The final copyright order adopted the CARP’s decision, and syndex-proof superstations were assigned the same copyright royalty rate under the satellite compulsory license as other superstations.²¹ A C-band exemption would not diminish the value of the rights holders’ programming interests.

Similarly, the sports industry has argued that sports blackout rules are necessary to promote attendance at games and preserve grants of program exclusivity made to the rights holders. However, NFL concedes in its comments that none of its games are shown on the superstations subject to this rulemaking, and the Office of the Commissioner of Baseball concedes that out of 322 games in the 1999 season, only 73, less than 25%, qualified for sports blackout protection. When this “need” for blackout is compared against the small size of the C-band superstation market, and the burden and expense of developing a system capable of

¹⁸ *In the Matter of Rate Adjustment for the Satellite Carrier Compulsory License*, Docket No. 96-3 CARP-SRA, Report of the Panel, August 28, 1997 (“CARP Report”) at 39.

¹⁹ *Id.*; Hearing before the Copyright Arbitration Royalty Panel in the Matter of: Satellite Rate Adjustment, Docket No. 96-3 CARP-SRA at 1197-1198.

²⁰ CARP Report at 39.

²¹ Rate Adjustment for the Satellite Carrier Compulsory License, Final Rule and Order, 62 Fed. Reg. 55742 (1997); rates codified at 37 C.F.R. pt. 258.

tracking, administering, and actually deleting programming (or reauthorizing programming that was deleted in advance), it is simply not justified. As to blackouts on network stations, it is clearly economically prohibitive, and C-band networks should be exempt on that basis alone. In addition to the economic burden, C-band subscribers were granted an exemption by Congress to continue to receive their C-band delivered network programming without regard to the “unserved” household provision.²² Congress would not have granted such an exemption in one section of the SHVIA only to have the Commission take it away under the provisions of another.

III. IF THE COMMISSION DETERMINES THAT IT CANNOT EXEMPT THE C-BAND INDUSTRY, THEN IT SHOULD AT LEAST DELAY APPLICATION OF THE EXCLUSIVITY RULES TO THE C-BAND INDUSTRY

Even if the Commission determines that it cannot provide an exemption for the C-band industry based on the record before it, it should, at a minimum, delay the application of any satellite exclusivity rules to the C-band industry while it seeks further comments regarding how such rules can be made feasible, both technically and economically. As explained in detail in the comments of the SBCA, this type of further rulemaking is not unheard of, and is certainly warranted in this situation. Without the full exemption, a further rulemaking would be the only way to guarantee the continued provision of superstation and network signals to C-band subscribers.

²² 17 U.S.C. § 119(a)(2)(B)(iii) (1999). The rationale underlying the “unserved household” provision was to protect the local broadcast affiliate from losing viewers to an imported distant signal of the same network. Eliminating the “unserved household” restriction for C-band is essentially a congressional directive to not impose network non-duplication rules that would essentially administratively reimpose the “unserved household” restriction.

IV. CONCLUSION

For all of the above reasons, TV Guide urges the Commission to exempt the C-band industry from any satellite programming exclusivity rules, or at a minimum conduct a further rulemaking to determine how application of any program exclusivity rules could be feasibly applied to the C-band industry.

Respectfully submitted,



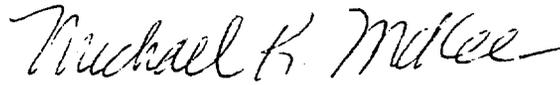
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February 28, 2000

CERTIFICATE OF SERVICE

I, Judith A. Easterday, hereby certify that a copy of the foregoing Reply Comments were served by hand delivery this 28th day of February, 2000 on the following:

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