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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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. 00-96
	)	
Broadcast Signal Carriage Issues	)	
	)	
	)	

To: The Commission

JOINT COMMENTS OF THE ABC, CBS, FOX, AND NBC TELEVISION NETWORK AFFILIATE ASSOCIATIONS

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SUMMARY

Congress and the Commission have long recognized that local television stations provide uniquely valuable service to the public by delivering a mix of local and national programming selected by local licensees in response to the needs and interests of their stations' communities. When it enacted SHVIA, Congress reaffirmed its commitment to this principle, stating in the Conference Committee Report that it "reasserts the importance of protecting and fostering the system of television networks as they relate to the concept of localism." Congress made explicit that it "structured the copyright licensing regime for satellite to encourage and promote retransmissions by satellite of local television broadcast stations to subscribers who reside in the local markets of those stations." By granting satellite carriers a compulsory copyright license to provide "local-into-local" service, Congress sought to safeguard local broadcasters' ability to serve the programming desires, tastes and needs of their local communities, and to ensure the public's access to local television service whether they receive this service by satellite, by cable, or over the air.

The Commission should keep these overarching objectives in mind as it implements the local carriage requirements in SHVIA. The Commission must ensure that satellite carriers who enjoy the benefits of SHVIA's local-into-local copyright license meet the carriage obligations established by the statute. The requirements imposed on satellite carriers in most instances should parallel the cable rules, although there are a few areas in which technical differences between satellite and cable technologies or statutory nuances require a different result. Specifically, the Commission should adopt local signal carriage rules for satellite that:

- establish satellite must-carry/retransmission consent election procedures that are similar to the cable procedures, but that (1) provide for satellite elections on different years than the cable elections and (2) require satellite carriers to notify local stations 90 days before beginning local-into-local service;

- provide a definition of "local market" that generally is consistent with the cable rules;
- define "good quality signal" in a manner consistent with the cable rules, but clarify that SHVIA does not permit satellite carriers to refuse carriage to a local television station based on signal quality disputes;
- implement the non-duplication provisions in a manner that preserves localism to the maximum extent possible, in accordance with the basic goals of SHVIA;
- ensure that all local broadcast stations, whether carried through must-carry or retransmission consent, are positioned on contiguous channels in the satellite line-up;
- include non-discrimination requirements modeled after the requirements applicable to open video systems;
- require satellite carriers to carry the same local station content as cable operators;
- assure that retransmitted local broadcast stations are not materially degraded as compared to non-broadcast satellite signals;
- prohibit satellite carriers from requesting or receiving any compensation from stations carried pursuant to the must-carry requirements; and
- include remedial and enforcement provisions that reflect the Commission's broad authority to implement and enforce the local carriage requirements of SHVIA.

By adopting satellite carriage rules consistent with the above positions, the Commission will implement SHVIA in accordance with Congress's intent to promote localism and increase parity and competition between satellite and cable.

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JOINT COMMENTS OF THE ABC, CBS, FOX, AND NBC TELEVISION NETWORK AFFILIATE ASSOCIATIONS

The ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the Fox Television Affiliates Association, and the NBC Television Affiliates Association (collectively, "Network Affiliates"), by their attorneys, hereby submit these comments in response to the Commission's *Notice of Proposed Rule Making* ("*Notice*"), FCC 00-195, released June 9, 2000, in the above-captioned proceeding. Network Affiliates represent more than 800 local television stations throughout the nation that are affiliated with one of the four major television networks.

Network Affiliates urge the Commission to adopt local broadcast signal carriage rules for satellite carriers that serve the congressional intent behind the Satellite Home Viewer

Improvement Act of 1999 ("SHVIA")[1] – namely, to increase competition between satellite and cable while preserving the bedrock principle of localism by bringing to satellite subscribers the local television stations in their market. To accomplish this goal, Congress established a scheme that contemplates parity between the local carriage obligations of satellite and cable providers, while recognizing that slight differences between these obligations may be appropriate for technological or policy reasons. Therefore, where distinctions between satellite and cable are not significant, the satellite and cable carriage rules for broadcast signals should mirror each other. In cases where there are relevant differences between services or the controlling statutes, the Commission should take these into account as it implements SHVIA's mandates. In either case, the Commission should keep in mind the overarching policy goals Congress expressed in SHVIA of promoting localism through the local-into-local carriage regime and enhancing competition in the market for video programming services.

I. THE PROCEDURES FOR ELECTING MUST-CARRY OR RETRANSMISSION CONSENT IN THE SATELLITE CONTEXT SHOULD MIRROR THE CABLE ELECTION PROCEDURES.

The signal carriage provisions added to the Communications Act (the "Act") by SHVIA allow local commercial broadcast stations to choose to be carried by a satellite carrier pursuant to a retransmission consent agreement or, commencing in 2002, by invoking must-carry rights, provided the satellite carrier avails itself of the statutory copyright license to provide at

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[1] *See* Consolidated Appropriations Act for 2000, 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 licensing and carriage of broadcast signals by satellite carriers, codified in Titles 17 and 47, United States Code).

least one local station in the market.[2] The purposes behind the must-carry obligations under the Cable Act and SHVIA are the same: to promote localism and ensure that subscribers have access to their local television stations.[3] Therefore, Congress intended that the rules for must-carry in the satellite context should in most cases mirror the cable must-carry regulations, which reflect a carefully crafted and time-tested process by which broadcast stations and multichannel video programming distributors can establish workable carriage plans.[4]

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[2] *See* 47 U.S.C. §§ 325(b) & 338(a); Joint Explanatory Statement of the Committee of Conference on H.R. 1554, 106th Cong., 145 Cong. Rec. H11792, H11795 (Daily ed. Nov. 9, 1999) ("Conference Report") (explaining the direct correlation "between the benefits of the statutory license and the carriage requirements imposed by the Act").

[3] *See* Conference Report at H11792 ("[T]he Conference Committee reasserts the importance of protecting and fostering the system of television networks as they relate to the concept of localism. It is well recognized that television broadcast stations provide valuable programming tailored to local needs, such as news, weather, special announcements and information related to local activities."); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified at 47 U.S.C. §521 *et seq.*), §§ 2(a)(9)-(12) (the "Cable Act"); *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, *Memorandum Opinion & Order*, 9 FCC Rcd 6723, 6731 (1994) ("*Cable Carriage Memorandum Opinion & Order*") ("The must-carry rules . . . are intended to ensure that local stations are available to cable subscribers.").

[4] *See, e.g.*, Conference Report at H11792 ("[T]he Conference Committee believes that promotion of competition in the marketplace for delivery of multichannel video programming is an effective policy to reduce costs to consumers. To that end, it is important that the satellite industry be afforded a statutory scheme for licensing television broadcast programming similar to that of the cable industry."); *id.* at H11793 ("Because terrestrial systems, such as cable, as a general rule do not pay any copyright royalty for local retransmissions of broadcast stations, the [local-into-local statutory copyright] license does not require payment of royalties."); *id.* at H11795 ("The procedural provisions applicable to [satellite must-carry] (concerning costs, avoidance of duplication, channel positioning, compensation for carriage, and complaints by broadcast stations) are generally parallel to those applicable to cable systems."). As noted below, however, there are certain distinctions between SHVIA and the Cable Act, which the Commission should respect when establishing satellite signal carriage rules.

The Commission asks for comment regarding how the must-carry provisions will work together with SHVIA's retransmission consent provisions.[5] In the cable context, stations may elect carriage pursuant to must-carry or retransmission consent on October 1 of every third year, beginning in 1996, to take effect three months later, on January 1 of the following year.[6] Stations that do not make an election in markets in which at least one station is carried via the compulsory license will be deemed by default to have chosen must-carry status, and new stations may make an election no more than 60 days before launching service and no later than 30 days after, to take effect 90 days later.[7] The Commission should adopt a similar regime for choosing between retransmission consent and must-carry in the satellite context, so that stations may elect carriage on a satellite system pursuant to must-carry or retransmission consent on October 1 of every third year, beginning in 2001, to take effect three months later, on January 1 of the following year.

Thus, the three-year cycle for electing carriage on a satellite system will be offset from the triennial election cycle for cable carriage. As Network Affiliates explained in detail in the Commission's SHVIA retransmission consent proceeding, staggered election cycles for satellite and cable reflect the plain language of SHVIA, which requires the Commission to begin the first three year cycle for satellite must-carry/retransmission consent elections for local-into-

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[5] *See In re Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, Notice of Proposed Rulemaking*, FCC 00-195, CS Docket No. 00-96, ¶ 11 (rel. June 9, 2000) ("*Notice*").

[6] *See* 47 C.F.R. 76.64(f).

[7] *See id.*

local service on January 1, 2002.[8] This should be less burdensome for stations, as it will not require them to negotiate with cable and satellite carriers simultaneously. Staggered elections also will be less burdensome for the Commission, which will not be faced with complaints arising from both the satellite and cable must-carry/retransmission consent elections at the same time.[9]

The Commission asks what it means for a satellite carrier to "carry upon request" a broadcast signal and whether it should require satellite carriers to "notify all local broadcast television stations, in writing, of their carriage rights once any local station in a particular market is being carried."[10] When the Commission implemented the must-carry provisions of the Cable Act, pursuant to which all qualified local stations were eligible for carriage pursuant to the must-carry regime regardless of whether the cable operator availed itself of the statutory copyright license, it required that a cable operator notify only those local stations that might *not* qualify for must-carry status of this fact before the must-carry regulations took effect.[11] This is an example of a situation in which there are relevant differences between cable and satellite. Because, pursuant to SHVIA, a satellite carrier's must-carry obligations are triggered only when the carrier decides to avail itself of the local-into-local statutory copyright license, it is appropriate in this context for the carrier to notify local stations if it decides to rely on the license. Otherwise,

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[8] *See* Joint Reply Comments of the ABC, CBS, Fox, and NBC Television Network Affiliate Associations in *In re Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, CS Docket No. 99-363 (filed Mar. 3, 2000).

[9] *See id.* at 2-6.

[10] *Notice* ¶ 11. When broadcast stations first received must-carry rights with respect to cable systems, the FCC required the cable operator to contact all local stations to inform them in writing of issues relating to their carriage rights. *See* 47 C.F.R. § 76.58.

local broadcasters may not know whether they are eligible for must-carry on a satellite system. Therefore, the Commission should require a satellite carrier to inform all local broadcast stations in writing of their rights pursuant to must-carry at least 90 days before the must-carry provisions take effect on January 1, 2002 (or by October 1, 2001), provided the operator knows by that date that the must-carry provisions will apply in that market.[12] If stations in a particular local market do not have must-carry rights when these SHVIA provisions take effect on January 1, 2002, but circumstances change such that later these stations acquire such rights, then the satellite carrier should be required to notify all stations in the local market of their must-carry rights at least 90 days before the date on which it plans to begin local-into-local service in the market. Election of must-carry status by a local station should, in and of itself, be considered a request for carriage under SHVIA.

II. THE COMMISSION SHOULD ADOPT A DEFINITION OF LOCAL MARKET THAT IS CONSISTENT WITH THE CABLE RULES.

SHVIA defines a local market in the new compulsory copyright license for local-into-local as the DMA in which the station is located and, for commercial stations, all commercial stations licensed to a community in the same DMA in the same local market.[13] A station's local market also includes the county where its community of license is located. The Act defines DMA as "the market area, as determined by Nielsen Media Research and published

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[11] *See* 47 C.F.R. § 76.58(d); *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, *Report & Order*, 8 FCC Rcd 2965, 2973 (1993) ("*Cable Carriage Report & Order*").

[12] This requirement will not burden satellite carriers because they will already be carrying local stations in many markets well before January 1, 2002, and will therefore know that must-carry requirements will apply in those markets. Broadcasters need to know of their eligibility for must-carry in advance of January 1, 2002, so that carriage of their signals can commence on that date.

in the 1999-2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates or any successor publication."[14] The Commission asks how often it should update the Nielsen Directory of reference.[15] In the cable context, the market is updated triennially,[16] and the same time period should apply to satellite as well. The Commission notes that the cable industry is required to rely on 1997-98 Nielsen publications to determine local markets until January 1, 2003,[17] and asks "whether satellite carriers and cable operators should be required to use the same annual Nielsen market publications so that both may rely on the same market definition, and thus have virtually the same carriage obligations."[18] As noted above, Network Affiliates believe that cable and satellite must carry/retransmission consent cycles should be staggered. And as the Commission has previously explained, "updated market designations [should be used] for each election cycle to account for changing markets."[19] SHVIA statutorily requires that local markets for satellite must-carry purposes initially be defined based on the 1999-2000 Nielsen data.[20] Therefore, the 1999-2000 Nielsen data should be used when stations make their initial satellite carriage elections in October 2001 to take effect on January 1, 2002, in those markets where satellite carriers provide local-into-local service and

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[13] *See* 17 U.S.C. § 122(j); 47 U.S.C. § 338(h)(3).

[14] 17 U.S.C. § 122(j)(2)(C).

[15] *See Notice* ¶ 14.

[16] *See* 47 C.F.R. § 76.55(e)(2).

[17] *See Notice* ¶ 14. Pursuant to the FCC's rules, the 2001-02 Nielsen data will be used to determine local markets for purposes of the October 1, 2002 must carry/retransmission consent election for local commercial stations. *See* 47 C.F.R. § 76.55(e)(2).

[18] *Notice* ¶ 14.

[19] *In re Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules, Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 6201, 6220 (1996).

should continue to be used until the next election cycle. As in the cable context, this Nielsen information should be updated triennially for subsequent election cycles. While this results in different Nielsen publications being used for satellite and cable elections, this approach is most appropriate in light of the Commission's policy of using the most up-to-date Nielsen information available to determine carriage requirements.

III. THE DEFINITION OF "GOOD QUALITY SIGNAL" SHOULD BE CONSISTENT IN THE SATELLITE AND CABLE CONTEXTS.

Section 338(b)(1) of the Communications Act states that a television broadcast station shall bear the costs of delivering a good quality signal to the satellite carrier's designated local receive facility or to an alternative facility acceptable to at least half of the stations desiring carriage in the local market.[21] The Commission requests comment on the definition of a "local receive facility," on what constitutes a "good quality signal," and related issues, including the "costs of delivering a good quality signal."[22]

A satellite carrier's local receive facility is the technical equivalent of a cable system's headend – it is the place at which the service provider takes broadcast signals and sends them to its own system in a format that allows it to distribute these signals to its subscribers. However, in contrast to cable headends, which usually are located at close intervals in multiple locations throughout the area served by a cable system, satellite carriers generally have a single uplink facility that they use to send television signals to their satellites.[23] Therefore, to be carried on a satellite carrier's system, local broadcast signals must be transmitted to this national uplink

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[20] *See* 17 U.S.C. § 122(j)(2)(C).

[21] *See* 47 U.S.C. § 338(b)(1).

[22] *Notice* ¶¶ 18-22.

[23] *Notice* ¶ 18.

facility. Recognizing that requiring each broadcaster to bear the cost of getting its signal to this national facility would be prohibitively expensive, Congress defined a "local receive facility" in SHVIA as "the reception point *in each local market* which a satellite carrier designates for delivery of the signal of the station for purposes of retransmission."[24] In its *Notice*, the Commission seeks comment on Congress's definition of "local receive facility."[25]

Network Affiliates agree that the congressional mandate in Section 338(h)(2) generally requires the broadcaster to be responsible for transmitting a good quality signal to the local receive facility, while the satellite carrier in turn must be responsible for carrying the signal from the local receive facility to the national uplink facility.[26] Congress no doubt recognized that the must-carry rights granted to broadcasters would be illusory at best if broadcasters had to absorb enormous costs to exercise those rights by sending their signals to a satellite carrier's national uplink facility. Certain broadcasters will face unique challenges even in reaching the local receive facilities, however, including broadcasters located in very large DMAs in the western United States. The Commission needs to be aware of these particular circumstances and recognize that these unique burdens require appropriate accommodations so that some stations will not bear unreasonable costs to transmit a good quality signal to their local receive facility.[27]

One solution the Commission might find workable is suggested by the rules governing cable carriage of noncommercial educational television stations: the Commission

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[24] 47 U.S.C. § 338(h)(2) (emphasis added).

[25] *See Notice* ¶ 18.

[26] *See id.*

[27] Where there is more than one local receive facility in a particular DMA, each station in the DMA should be free to select which receive facility it will use.

could adopt geographic guidelines for the location of local receive facilities.[28] Such rules might provide that each satellite carrier wishing to avail itself of the compulsory license to carry broadcast signals must have a local receive facility within 50 miles of the reference point of each local station's community of license or within each local station's Grade B contour.[29] This would ensure that smaller stations in more remote locations would not be forced to bear excessive expense to get their signals to a designated receive facility. Because the Grade B contours of stations in most DMAs overlap, this standard would not impose an unreasonable burden on satellite carriers. It would also mirror the judgment of Congress and the Commission in the cable context that 50 miles is a reasonable maximum distance to require local stations to deliver their signals.[30]

SHVIA also permits a satellite carrier to designate an alternative receive facility provided at least one-half of the stations in the market agree to the alternate location.[31] The Commission asks for comment regarding interpretation of this provision.[32] Consistent with the proposal above and as a safeguard to ensure that collocated or clustered stations do not select a regional receive facility that is convenient for them but expensive and inconvenient for other stations in the market, the Commission could consider a requirement such as the following: if one-half the stations in a DMA agree to use a regional receive facility, then the satellite carrier should pay the additional cost of sending each broadcaster's signal more than 50 miles from the

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[28] *See* 47 C.F.R. § 76.55(b).

[29] *See* 47 U.S.C. § 535(l)(2); 47 C.F.R. § 76.55(b).

[30] *See* 47 U.S.C. § 535(l)(2); 47 C.F.R. § 76.55(b); *Cable Carriage Report & Order*, 8 FCC Rcd at 2967-68.

[31] *See* 47 U.S.C. § 338(b)(1).

[32] *See Notice* ¶ 19.

reference point of the station's community of license to the receive facility. This proposal would be appropriate because satellite carriers, who otherwise would be the primary beneficiaries of regional receive facilities, would bear the extra costs of transmitting the signals of local broadcasters (who would otherwise have a right to local receive facilities) to the satellite carrier's distant receive facilities. At the same time, smaller, less centrally located stations would be spared the increased expense of sending their signal to a more distant receive facility they may not have agreed to.

The Commission also requests comment on the definition of a "good quality signal."[33] Network Affiliates believe the definition of a good quality signal in the satellite context should be equivalent to the definition in the cable context.[34] Essentially, the cable regulations require a station to transmit to the cable headend a signal that would be considered good quality if received over-the-air.[35] The station may transmit such a signal over-the-air, or using forms of technology such as microwave or a translator station.

IV. SHVIA DOES NOT AUTHORIZE SATELLITE CARRIERS TO REFUSE CARRIAGE OF A LOCAL STATION BASED ON FAILURE TO DELIVER A "GOOD QUALITY SIGNAL."

In the *Notice*, the Commission suggests that a satellite carrier could refuse to carry a local station because the station has failed to deliver a "good quality signal" to the local receive facility.[36] This is not the case. While cable operators may refuse carriage based on signal

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[33] *Notice* ¶ 20.

[34] According to the Communications Act, a good quality signal is one that "deliver[s] to the principal headend of a cable system either a signal level of -45dBm for UHF signals or -49dBm for VHF signals at the input terminals of the signal processing equipment." 47 U.S.C. § 534(h)(1)(B)(iii); *see also* 47 C.F.R. § 76.55(c)(3).

[35] *See* 47 C.F.R. § 76.55(c)(3).

[36] *See Notice* ¶ 53.

quality, SHVIA *does not* grant satellite carriers the self-help remedy of refusing carriage of local stations based on the quality of the signal provided. SHVIA differs from the Cable Act in this respect, and the Commission must adopt satellite carriage rules that reflect this distinction. Under the Cable Act, a station that fails to meet its obligations with respect to delivering a good quality signal to the cable system's principal headend does not meet the statutory definition of "local commercial television station"[37] and thus, is not entitled to carriage. New Section 338 does not contain a similar exclusion; it provides only that a local station may be required to bear the costs of delivering a good quality signal to the satellite carrier's designated local receive facility.[38] While a satellite carrier presumably may seek enforcement of a local station's obligation to provide or bear costs associated with providing a good quality signal, the carrier is not relieved of its basic obligation under Section 338(a)(1) to carry the local station.[39] Because the satellite carrier's obligation to carry the local station is not contingent on the delivery of a good quality signal, it may not deny carriage to a local station based on signal quality disputes. Rather, it must seek to enforce the local station's obligations at the Commission by, for example, demanding that the local station pay the costs associated with providing a signal of the requisite quality.

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[37] 47 U.S.C. § 534(h)(1)(B)(iii). Section 614(h)(1)(B)(iii) of the Communications Act provides, in relevant part: "Exclusions.– The term "local commercial television station" shall not include – . . . a television broadcast station that does not deliver to the principal headend of a cable system either a signal level of -45dBm for UHF signals or -49 dBm for VHF signals at the input terminals of the signal processing equipment, if such station does not agree to be responsible for the costs of delivering to the cable system a signal of good quality or a baseband video signal." *Id.*.

[38] *See* 47 U.S.C. § 338(b)(1).

[39] *See* 47 U.S.C. § 338(a)(1).

V. THE COMMISSION MUST ENSURE THAT ITS SUBSTANTIAL DUPLICATION RULES PRESERVE LOCALISM TO THE MAXIMUM EXTENT POSSIBLE.

Section 338(c)(1) of the Communications Act provides that a satellite carrier need not carry the signal of a local station that substantially duplicates the signal of another local station carried by that carrier in the same market or the signal of more than one local station affiliated with a particular network unless the two affiliates are licensed to communities in different states.[40] The Commission correctly observes that SHVIA's requirements are similar to the requirements in the Cable Act relating to duplicating signals.[41] In the cable context, the FCC has adopted a 50 percent standard for substantial duplication. In other words, two stations substantially duplicate each other if they simultaneously broadcast the identical episode of the same program series at the same time.[42] In the satellite context, defining "substantial duplication" with reference to a 50% test is also appropriate. Therefore, the FCC should adopt a definition which provides that two stations substantially duplicate each other if they simultaneously broadcast the identical episode of the same program series at the same time for at least 50% of each broadcast day. At the same time, however, the Commission should remain aware that this definition, when strictly applied, may deprive some communities in larger DMAs from any truly local television service at all. This loss of local service would disenfranchise significant segments of the public and contravene Congress's intent in SHVIA to "protect[ ] and foster[ ] the system of television networks as they relate to the concept of localism."[43]

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[40] *See* 47 U.S.C. § 338(c)(1).

[41] *See Notice* ¶ 24; 47 U.S.C. § 534(b)(5).

[42] *See* 47 C.F.R. § 76.56(b)(5); *Cable Carriage Report & Order*, 8 FCC Rcd at 2980-81.

[43] Conference Report at H11792.

Consistent with this congressional objective, satellite carriers should be permitted to refuse carriage of a local station based on "substantial duplication" only where there is an overlap in the Grade B contours of the stations in question. Where there is no Grade B overlap between the stations, the stations' signals should not be deemed to substantially duplicate each other and should be entitled to carriage. In addition, the Commission should exercise its general discretion to effect the congressional intent of preserving localism by being vigilant to cases where this provision is used by satellite carriers to divest entire communities of their local service.

The Commission also asks how it should define a television "network" for purposes of SHVIA.[44] Again, for the sake of convenience, the Commission should define the term "network" consistently in the satellite and cable contexts. Therefore, the Commission should define a "network" as an entity offering "programming on a regular basis for 15 or more hours per week to at least 25 affiliates in 10 or more states."[45]

VI. ALL LOCAL BROADCAST STATIONS MUST BE POSITIONED ON CONTIGUOUS CHANNELS.

Section 338(d) of the Communications Act, as added by SHVIA, requires a satellite carrier to "retransmit the signal of the local television broadcast stations to subscribers in the stations' local market on contiguous channels."[46] The Conference Report explains that this provision is meant "to ensure that satellite carriers position local stations in a way that is convenient and practically accessible for consumers."[47] The Commission asks, however,

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[44] *Notice* ¶ 25.

[45] 47 C.F.R. § 76.55(f).

[46] 47 U.S.C. § 338(d).

[47] Conference Report at H11795.

whether satellite carriers may offer the broadcast signals it carries pursuant to SHVIA's retransmission consent provisions on nonconsecutive channels.[48]

The FCC should follow the mandate contained in SHVIA and require satellite carriers to broadcast all local signals on contiguous channels, whether carried pursuant to SHVIA's must-carry or retransmission consent provisions.[49] Congress's intent, as made clear in the Conference Report, was for local stations to be positioned in a way that is "convenient and practically accessible"[50] for satellite subscribers, regardless of the method of carriage chosen by the local station. Had Congress wanted to allow stations that choose to be carried pursuant to retransmission consent agreements to bargain out of the contiguous channel requirement, it would have made this clear in Section 338(d) of the Communications Act or in Section 339 (the retransmission consent provisions).

VII. THE COMMISSION SHOULD ADOPT SATELLITE NON-DISCRIMINATION RULES THAT ARE MODELED AFTER THE OPEN VIDEO SYSTEM RULES.

Section 338(d) of the Communications Act, as added by SHVIA, also requires a satellite carrier to provide access to local signals "at a nondiscriminatory price and in a nondiscriminatory manner on any navigational device, on-screen program guide, or menu."[51] The Commission seeks comment on what rules it should promulgate to ensure that subscribers have nondiscriminatory access to television stations and whether there are particular rules it

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[48] *See Notice* ¶ 29.

[49] Similarly, all local signals must be carried at the lowest package price, as explained in Part VII, *infra*.

[50] Conference Report at H11795.

[51] 47 U.S.C. § 338(d).

could use as a model.[52] With respect to providing local channels at a nondiscriminatory price, the Commission should look to the analogous statutory requirement that a cable system carry the signals of local broadcast stations on its basic service tier, which is the "tier to which subscription is required for access to any other tier of service."[53] Cable providers must carry local signals on the basic tier at no additional cost to subscribers. Thus, the basic service tier is in effect the lowest-priced service package offered by a cable provider.

SHVIA mandates that local signals be provided "at a nondiscriminatory price."[54] To carry out this congressional directive, and to be as consistent as possible with the cable regulations, the Commission should ensure that all local stations are available on the satellite carrier's lowest priced tier or package of services. All local stations should be included in the same package, and the Commission should require satellite carriers to offer the package that includes local signals at a price that is no more than what they charge for any other package they offer to subscribers. In addition, the Commission should require that the per channel cost of local signals does not exceed the per channel cost of any other station carried on the satellite system. Finally, the Commission should prohibit satellite carriers from thwarting the objectives of SHVIA by requiring subscribers to purchase additional equipment as a condition of receiving local-into-local service. Just as local signals are available to all viewers that subscribe to cable, the Commission's satellite carriage rules should ensure that *all* satellite subscribers in markets that have local-into-local service have access to local signals. This would fulfill SHVIA's goal

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[52] *See Notice* ¶ 30.

[53] 47 U.S.C. § 543(b)(7)(A).

[54] 47 U.S.C. § 338(d).

of promoting localism by making local signals easily accessible to satellite customers, in addition to being similar to the requirement that local stations be carried on a cable system's basic tier.

With respect to carriage in a nondiscriminatory manner in navigational devices, electronic program guides ("EPG"s), and other menus, Network Affiliates urge the Commission to consider using the rules it has developed for open video systems ("OVS") as a model for presenting information in a nondiscriminatory format. In the 1996 Telecommunications Act,[55] Congress created a new regulatory scheme for open video systems, designed to allow local exchange carriers to provide video programming services via phone lines.[56] The requirements Congress adopted for OVS operators were in keeping with the principles of openness and nondiscrimination present throughout the Communications Act. In particular, an OVS operator is not allowed to discriminate among content providers with respect to carriage on its system or unreasonably to discriminate in favor of itself or its affiliates with respect to information provided to subscribers for purposes of selecting among content available on the system or in the way such information is presented to subscribers.[57] It must also transmit the identification of other providers without change or alteration and include information about other providers in any navigational device, guide, or menu it offers to subscribers.[58]

The Commission should use the OVS regulatory scheme as a model for imposing nondiscrimination conditions on satellite carriers pursuant to SHVIA. The Commission should require satellite carriers to:

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[55] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

[56] *See* Communications Act §§ 651-653 (codified at 47 U.S.C. §§ 571-573).

[57] *See id.* at § 653(b)(1) (codified at 47 U.S.C. § 573(b)(1)).

[58] *See id.*

1. refrain from discriminating among content providers with respect to carriage on their systems;
2. refrain from discriminating in favor of themselves or their affiliates with respect to information provided to subscribers for purposes of selecting among content available on the system or in the way such information is presented to subscribers;
3. transmit the identification of other programming providers without change or alteration; and
4. include information about other programming providers in any navigational device, guide, or menu.

Thus, the OVS regulations can provide a template for preventing program guide discrimination in the satellite context. These rules, which have been effective for OVS, will be equally effective for satellite.

VIII. SATELLITE OPERATORS SHOULD BE REQUIRED TO CARRY THE SAME CONTENT THAT CABLE OPERATORS ARE REQUIRED TO CARRY.

SHVIA requires the Commission to adopt regulations for satellite carriage of local broadcast television stations that are comparable to the requirements on cable operators under section 614(b)(3) of the Communications Act.[59] Section 614(b)(3) requires a cable operator to "carry in its entirety, on the cable system of that operator, the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-

[59] *See* 47 U.S.C. § 338(g); *see also Notice* ¶ 31.

related material carried in the vertical blanking interval or on subcarriers."[60] The Commission should adopt a parallel provision in the satellite context that requires satellite carriers to carry the primary video, accompanying audio, and line 21 closed caption transmissions of local stations, as well as any program-related material that it is technically feasible to carry.

In the *Notice*, the Commission seeks comment as to whether the terms "primary video," "program-related," and "technically feasible" require further explanation in the satellite context.[61] They do not. When the Commission implemented the cable carriage requirements, it defined these terms to the extent appropriate given the changing nature of technology and congressional intent.[62] In light of the congressional mandate that the satellite carriage requirements should be "comparable" to the cable requirements, there is no justification for adopting different interpretations of these terms here. Specifically, the Commission need not adopt a specific definition of "primary video" for the satellite rules. This term has proved self-explanatory and non-controversial as applied to cable carriage of analog signals and should be equally so in the satellite context.[63]

Similarly, the Commission should adopt satellite carriage requirements that incorporate the existing definitions of "program-related" and "technically feasible," which were carefully considered and adopted when the Commission implemented the cable carriage

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[60] 47 U.S.C. § 534(b)(3).

[61] *Notice* ¶¶ 31-33.

[62] *See Cable Carriage Memorandum Opinion & Order*, 9 FCC Rcd at 6732-34; *Cable Carriage Report & Order*, 8 FCC Rcd at 2986.

[63] The discussion here focuses on analog signal carriage requirements. The concept of "primary video" has been subject to considerably more discussion in the digital television context, in light of the capacity for multiplexing.

requirements.[64] Thus, the Commission should adopt the enumerated criteria set forth in *WGN Continental Broadcasting Co. v. United Video, Inc.* ("*WGN*") as its guide for determining whether material is "program-related" and entitled to satellite carriage but, as in the cable context, should recognize that "there will be instances where material which does not fit squarely within the factors listed in *WGN* will be program-related under the statute."[65] The Commission should use the same definition of "technically feasible" as is used for cable, so that satellite carriers are required to carry program-related VBI material where only "nominal costs, additions or changes of equipment are necessary."[66] This approach will ensure true parity between satellite and cable and will ensure that satellite subscribers receive the same local television content as they would receive on a cable system or over the air.

IX. SATELLITE CARRIERS SHOULD ENSURE THAT RETRANSMITTED BROADCAST SIGNALS ARE NOT MATERIALLY DEGRADED AS COMPARED TO NON-BROADCAST SATELLITE SIGNALS.

Section 614(b)(4)(A) of the Communications Act provides that "[t]he signals of local commercial television stations that a cable operator carries shall be carried without material degradation" and required the Commission to "adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal."[67] Congress adopted this requirement to

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[64] *See Cable Carriage Memorandum Opinion & Order*, 9 FCC Rcd at 6732-34; *Cable Carriage Report & Order*, 8 FCC Rcd at 2986.

[65] *Cable Carriage Memorandum Opinion & Order*, 9 FCC Rcd at 6734; *see also Cable Carriage Report & Order*, 8 FCC Rcd at 2986 ("Carriage of information on a stations's [sic] VBI is rapidly evolving: thus, we believe no hard and fast definition can now be developed.").

[66] *Cable Carriage Report & Order*, 8 FCC Rcd at 2986.

[67] 47 U.S.C. § 534(b)(4)(A).

ensure that local broadcast stations were not at a disadvantage as compared to cable programmers carried on the cable system. When it enacted SHVIA, Congress recognized that similar requirements were necessary in the satellite context.[68]

While there are certainly technological differences between satellite carriers and cable operators, the basic premise underlying the material degradation requirement must be consistent: satellite carriers must use good engineering practices and appropriate equipment to guard against degradation of the local broadcast signal received at the local receive facility and delivered to satellite subscribers.[69] The ultimate goal of the Commission's requirements should be to ensure that satellite-delivered broadcast signals are not materially degraded as compared to non-broadcast satellite signals. This is a simple, self-defined test that imposes no additional burdens on the satellite carrier, which is held only to its own standard of quality. If the satellite carrier can distribute other channels at a certain technical level, there is no reason it cannot meet its own requirements as to broadcast programming. There can be no rational argument that broadcast signals cannot be carried at the same level of quality as non-broadcast signals.

As the Commission notes, Congress contemplated that satellite carriers might use "*reasonable* compression, reformatting, or similar technologies to meet their carriage obligations."[70] The term "reasonable" indicates that Congress did not intend to grant satellite

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[68] *See* 47 U.S.C. § 338(g).

[69] *See* 47 CFR §§ 76.62(b) & 76.605; *Cable Carriage Report and Order* at 2990 ("If good engineering practices and proper processing equipment does not meet our technical standards at the subscriber terminals, we will require the cable operator to resolve the problem or identify the reason why it cannot provide the required level of signal quality. . . . Of course, if signal degradation occurs between the cable system's principal headend and the subscriber's terminal, it is the sole responsibility of the cable operator to ensure that it is operating in full compliance with the Commission's technical standards.").

[70] Conference Report at H11795 (emphasis added); *Notice* ¶ 36.

carriers unlimited discretion to manipulate broadcast signals. While we do not object to compression and similar technologies *per se*, satellite carriers should not be permitted to employ compression, reformatting or other technologies that will defeat the purpose of the satellite carriage regime by significantly degrading local broadcast signals so that they appear materially deficient when compared to non-broadcast satellite signals. Moreover, non-broadcast signals should be subject to the same capacity-saving techniques as broadcast stations. In addition, impermissible material degradation should be found where a broadcast television station freezes, "tiles," or looks "dirty" due to a satellite carrier's choice of encoding or compression techniques.[71]

Similarly, Congress intended to permit satellite carriers to use such technologies when necessary "to meet their carriage obligations."[72] When satellite carriage of local broadcast signals in a market can be accomplished without such technologies, they should not be permitted if they cause *any* degradation of the local broadcast signal or otherwise result in a perceptible difference in picture quality between the broadcast and non-broadcast signals delivered by the satellite carrier. Techniques such as "spot beaming" that increase the spectrum available for local-into-local satellite service and reduce the need to use compression technologies are permitted by SHVIA and should be encouraged.[73]

X. THE SATELLITE CARRIAGE RULES RELATING TO COMPENSATION SHOULD PARALLEL THE CABLE CARRIAGE RULES.

Network Affiliates agree that the compensation rules applicable to satellite carriers pursuant to Section 338(e) of the Act should parallel the provisions applicable to cable

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[71] *Notice* ¶ 41.

[72] Conference Report at H11795.

operators.[74] Section 338(e) prohibits satellite carriers from "accept[ing] or request[ing] monetary payment or other valuable consideration in exchange either for carriage of local television broadcast stations in fulfillment of the [must-carry] requirements or for channel positioning rights provided to such stations."[75] Thus, the law prohibits local broadcasters who select mandatory carriage on satellite systems from compensating satellite carriers for such carriage. As in the cable context, broadcasters that elect retransmission consent should be permitted to negotiate conditions of carriage, including payment terms, with satellite carriers.

XI. THE COMMISSION SHOULD EXERCISE ITS FULL AUTHORITY TO ENFORCE THE SIGNAL CARRIAGE OBLIGATIONS OF SHVIA.

In the *Notice*, the Commission seeks guidance regarding the scope of its enforcement authority under SHVIA. In particular, it seeks comment on the interplay between Section 338(a)(2), which it reads as granting the judiciary exclusive authority for resolving disputes based on the "failure to carry" local signals, and Section 338(f), which it reads as granting the Commission authority to resolve complaints based on "unique carriage violations" – namely, violations of the provisions relating to good quality signal, program duplication, channel positioning and compensation.[76] Network Affiliates caution the Commission against adopting an overly-restrictive approach to its enforcement responsibilities under SHVIA. As the federal agency charged with implementing the satellite carriage obligations, the Commission has broad authority to enforce satellite carriers' obligations with respect to the carriage of local broadcast signals.

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[73] *See Notice* ¶ 43

[74] *See Notice* ¶ 49; 47 U.S.C. § 338(e).

[75] 47 U.S.C. § 338(e).

[76] *Notice* ¶ 53.

The Commission seeks comment on "how the Section 501(f) remedial limitation in Section 338(a)(2) relates to the complaint process set forth in Section 338(f)."[77] As explained below, the exclusive jurisdiction referenced in Section 338(a)(2) should be interpreted narrowly to refer only to carriage disputes that hinge solely on (1) whether the satellite carrier is providing local broadcast signals to its subscribers in accordance with the compulsory copyright license established by Section 122 of the Copyright Act and (2) whether the local broadcast station in question is located within the local market at issue. Disputes that extend in any way beyond these limited areas – including disputes relating to material degradation and content-to-be-carried – can be addressed through the Commission's complaint procedures, *even if such disputes involve the failure to carry the local station.*

This approach reflects the structure and language of SHVIA. Section 338(a)(2) provides that "[t]he remedies for any failure to meet the obligations under this subsection shall be available exclusively under section 501(f) of title 17, United States Code,"[78] which provides, in relevant part, that "[a] television broadcast station may file a civil action against any satellite carrier that has refused to carry television broadcast signals, as required under section 122(a)(2), to enforce that television broadcast station's rights under section 338(a) of the Communications Act of 1934."[79] The "exclusive" judicial authority referenced in Section 338(a)(2) is quite narrow. Section 338(a)(1) provides that "each satellite carrier providing, under section 122 of title 17, United States Code, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry

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[77] *Id.*

[78] 47 U.S.C. § 338(f)(2).

[79] 17 U.S.C. § 501(f)(2).

upon request the signals of all television broadcast stations located within that local market, subject to section 325(b)."[80] Under Section 338(a)(1), only two considerations are at issue – whether the satellite carrier is availing itself of the statutory local-into-local copyright license and whether the aggrieved broadcast station is located within the relevant local market. Where carriage disputes are based on factors beyond these limited considerations, the Commission should stand ready to exercise its enforcement authority to resolve these disputes.

For example, the Commission in the *Notice* poses the following query: "[I]f a satellite carrier refuses to carry a broadcast station signal because of a signal quality dispute, would the broadcaster pursue its remedy in court, at the Commission, or would both fora be available?"[81] As explained above, SHVIA does not permit satellite carriers to refuse carriage based on the quality of the signal delivered by the local broadcast station. Therefore, this dispute unquestionably could be subject to judicial review because the only relevant legal issues that must be decided to order carriage are whether the carrier has taken advantage of the local-into-local compulsory copyright license and whether the station is located in the relevant market. Nonetheless, since the satellite carrier purports to base its refusal to carry on the broadcaster's failure to provide a "good quality signal," it also rests squarely within the Commission's jurisdiction and expertise, and the Commission should not hesitate to exercise its enforcement authority to order carriage of the local station or other appropriate relief, if warranted by the facts. Similarly, a satellite carrier refusing to carry a local broadcast signal based on claims that the signal is duplicative of another signal carried on the system should be subject to the

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[80] 47 U.S.C. § 338(a)(1).

[81] *Notice* ¶ 53.

Commission's enforcement authority. In cases such as these, the aggrieved local station should be free to avail itself of the Commission's complaint procedures.

New Section 338(f) of the Act establishes the complaint procedures by which local stations may seek to enforce their carriage rights. Specifically, Section 338(f)(1) provides that whenever a local television broadcast station believes that a satellite carrier has failed to meet its obligations under subsections (b) through (e) of this Section 338, such station shall notify the carrier, in writing, of the alleged failure and identify its reasons for believing that the satellite carrier has failed to comply with such obligations.[82] Subsections (b) through (e) of Section 338 concern the requirements regarding a good quality signal, substantial duplication of programming, channel positioning, and compensation for carriage.[83] The satellite carrier then has 30 days to respond to such complaints by either coming into compliance with the carriage requirements or stating its reasons for believing it already complies with such requirements.[84] If the local station disputes the response of the satellite carrier, it may then file a complaint with the Commission "alleg[ing] the manner in which such satellite carrier has failed to meet its obligations and the basis for such allegations."[85] After the complaint is filed, the Commission has 120 days to determine whether the satellite carrier has met is carriage obligations and, if not, "shall order the satellite carrier to take appropriate remedial action."[86]

As explained above, the Commission's authority under the complaint procedures is broad, authorizing the Commission to resolve disputes that involve the full array of carriage

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[82] *See* 47 U.S.C. § 338(f)(1).

[83] *See* 47 U.S.C. § 338(b)-(e).

[84] *See* 47 U.S.C. § 338(f)(1).

[85] *Id.*

issues encompassed by Section 338 of the Act, with a narrow exception for disputes hinging only on whether the satellite carrier is providing local service in accordance with the Section 122 compulsory copyright licenses or whether the local broadcast station in question is located within the relevant market. In the *Notice*, the Commission seeks comment on whether it is appropriate to read the statute to preclude complaints against a satellite carrier for non-compliance with the content-to-be-carried or material degradation provisions, since "SHVIA specifically referenced those issues in Section 338(g) rather than in (b) through (e), as provided in Section 338(f)."[87] The Commission should not read the statute to preclude its consideration of content and material degradation issues through the complaint procedures. Such disputes rest squarely within the Commission's expertise, and Congress's failure explicitly to reference this provision in Section 338(f) likely was a function of drafting Section 338(g) simply to cross-reference the cable provisions; it does not reflect any intent to exclude these provisions from the complaint process. Indeed, excluding such disputes from the complaint procedures would be inconsistent with Section 338(g) itself, which requires the Commission to implement regulations regarding material degradation and content-to-be-carried in the satellite context that mirror those in the cable context.[88] The complaint and special relief procedures in the cable rules allow broadcasters with material degradation or content carriage disputes to bring their disputes before the Commission, and the satellite rules must include comparable provisions.[89] In any event, even if the Commission were to adopt its proposed narrow reading of Section 338(f), it nonetheless

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[86] 47 U.S.C. § 338(f)(3).

[87] *Notice* ¶ 53.

[88] *See* 47 U.S.C. § 338(g).

[89] *See* 47 C.F.R. §§ 76.7 & 76.61.

should include material degradation and content carriage issues in its complaint process under its general authority to administer the Communications Act.

Finally, the Commission seeks comment on how it should interpret the term "appropriate remedial action" for purposes of administering the complaint procedures under Section 338.[90] This term should be interpreted to include, at a minimum, ordering the satellite carrier immediately to come into compliance with the requirements of Section 338 (*e.g.*, requiring the satellite carrier to carry a station entitled to carriage; requiring the satellite carrier to stop materially degrading a station's signal; etc.) and the imposition of forfeitures for any past or continued failure to meet such requirements. In addition, the Commission should take any failure to comply with the local carriage requirements into account when considering license renewals for satellite carriers.

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[90] *Notice* ¶ 52.

XII. CONCLUSION

The Commission must enact satellite carriage requirements for local signals that carry out Congress's intent to protect the public's access to local service. Network Affiliates respectfully submit that the Commission's congressional mandate will best be served by adopting satellite carriage rules consistent with the above.

Respectfully submitted,

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