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

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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 REPLY COMMENTS OF THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS THE PUBLIC BROADCASTING SERVICE AND THE CORPORATION FOR PUBLIC BROADCASTING

Marilyn Mohrman-Gillis
Vice President, Policy and Legal Affairs
Lonna M. Thompson
Director, Legal Affairs
Andrew D. Cotlar
Staff Attorney
Association of America's Public Television Stations
1350 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

Kathleen Cox
Senior Vice President Policy, General Counsel and Corporate Secretary
Robert M. Winteringham
Staff Attorney
Corporation for Public Broadcasting
401 9th Street, N.W.
Washington, D.C. 20004

Gregory Ferenbach
Senior Vice President and General Counsel
Public Broadcasting Service
1320 Braddock Place
Alexandria, Virginia 22314

August 4, 2000

No. of Copies rec'd 0+9
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EXECUTIVE SUMMARY

Public Television welcomes the growth and burgeoning promise of DBS as a means of increasing access to local public television stations, as well as public television programming generally, to still more Americans. Viewing DBS in a similar light, Congress required of satellite carriers reasonable and tailored must carry obligations as part of the statutory package that extended to it highly valuable compulsory copyright privileges. Congress entrusted the implementation of this carefully balanced mix to the Commission. Yet, now in the agency's rule making proceeding to flesh out these requirements, satellite carriers generally[1] seek to crimp and shrink their obligations in direct contravention not only of the spirit of Congress's directives, but also of their letter.

First, EchoStar's and DirecTV's arguments for drastic limits on the number of public television stations they must carry beginning in 2002: (a) dramatically overstate without justification the extent of DBS capacity that would be devoted to local station carriage by the sensible carriage requirements included in the Act, (b) confuse DBS's must carry requirements with its set-aside obligations, and (c) would frustrate Congress's mandate for the public's access to local public television services.

Second and more generally, the satellite carriers would impose an overreaching set of burdens on the must carry rights of local noncommercial educational television stations, including an impermissibly narrow interpretation of what portion of stations' signals DBS operators would have to carry and remedial procedures that would burden, even to the point of nullifying, the substantive rights that SHVIA affords all stations.

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[1] *But see* Comments of Local TV on Satellite, LLC at 8-9 ("LTVS Comments").

These proposed abridgements would have a particularly devastating effect on public television stations that are handicapped by limited resources and the absence of statutory retransmission consent rights.

A reading of the Act that is faithful to its language and objectives and that is grounded in the realities of DBS channel capacity, the practicalities of signal carriage, and the need to avoid procedural complexities and delays compels the Commission to reject the satellite carriers' arguments. While the Commission may need to balance the public's stake in access to noncommercial television service with reasonable projected capacity constraints of EchoStar and DirecTV, it should above all be true to the letter and clear intent of SHVIA, which provides that the benchmark for carriage of local stations should be what cable carries. Only in the very narrow instance where this is not technically feasible should the Commission deviate from this standard.

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To: The Commission

JOINT REPLY COMMENTS OF THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, THE PUBLIC BROADCASTING SERVICE, AND THE CORPORATION FOR PUBLIC BROADCASTING

The Association of America's Public Television Stations ("APTS"),[2] the Public Broadcasting Service ("PBS"),[3] and the Corporation for Public Broadcasting ("CPB")[4] (collectively referred to as "Public Television") hereby submit these reply comments to the Commission's Notice of Proposed Rule Making in the above-captioned proceeding,[5] seeking comment on proposals to implement the "must carry" provisions of the Satellite Home Viewer

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[2] APTS is a nonprofit organization whose members comprise the licensees of nearly all of the nation's 353 noncommercial educational television stations. APTS represents public television stations in legislative and policy matters before the Commission, Congress, and the Executive Branch and engages in planning and research activities on behalf of its members.

[3] PBS is a nonprofit membership organization of the licensees of the nation's public television stations. PBS distributes national public television programming and provides other program-related services to the nation's public television stations.

[4] CPB is a private, nonprofit corporation created and authorized by the Public Broadcasting Act of 1967 to facilitate and promote a national system of public telecommunications. *See* 47 U.S.C. § 390 et. seq.

Improvement Act of 1999 ("SHVIA").[6] The initial comments filed by Public Television comprehensively covered most of the issues raised in the NPRM.[7] With these reply comments, we focus on just four issues that appeared to stir up the most controversy. Only one of these issues – DBS carriage of noncommercial educational television ("NCE") stations – is distinctly a Public Television issue. The other three issues – the burdens on must carry rights (such as an inconveniently placed local receive facility and an overly-stringent "good quality signal" standard), the signal content eligible for must carry, and the establishment of a remedial process for carriage disputes – are common to all broadcasters. They are, however, of special significance to NCE stations because NCE stations are typically among the most financially stressed, and they have no retransmission consent rights, which facilitate negotiations and trade-offs outside of the must carry context. As a result, rules which burden the exercise of must carry rights or limit the efficacy of carriage will be more sorely felt by NCE stations.

I. The Satellite Carriers Propose Formulas For NCE Station Carriage That Have No Legal Foundation, Are Contrary To The Plain Language And Intent Of SHVIA, And Bear No Relationship To DBS Capacity In 2002

In their comments, both EchoStar and DirecTV argue for drastic limits on the number of NCE stations they will be required to carry in 2002.[8] There is no foundation for such limits – not in the language or legislative history of SHVIA, not in the cable rules on which SHVIA is

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

[6] Pub. L. No. 106-113, 113 Stat. 1501, Appendix I (1999).

[7] *See* Joint Comments of the Association of America's Public Television Stations, the Public Broadcasting Service, and the Corporation For Public Broadcasting ("Public Television Comments").

[8] *See* Comments of DirecTV, Inc. at 38-40 ("DirecTV Comments"); Comments of EchoStar Satellite Corp. at 2-6 ("EchoStar Comments"); *but see* Comments of Local TV on Satellite, LLC at 8-9 ("LTVS Comments").

modeled, and not in any FCC or congressionally-based notion of localism. Contrary to the express goals of Section 338(a),[9] which are to ensure carriage of all local stations in markets where any local stations are carried, the limits suggested by EchoStar and DirecTV would allow carriers to avoid providing local NCE signals in the markets those carriers serve. Rather, they would be able to carry only a single NCE signal across an entire region. This type of carriage is not in keeping with SHVIA's goals of preserving localism[10] and access to local public television stations.[11] It is not consistent with the effort to harmonize the cable and satellite must carry rules.[12] Moreover, it far exceeds the only limitation on local NCE station carriage contemplated by SHVIA, which is a limitation on the carriage of duplicative local signals.[13] Finally, the carriers' approach, which is defended on the basis of limited capacity, blinks at the dramatic capacity increases planned by both EchoStar and DirecTV – capacity increases which neither carrier mentions in its comments.

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[9] 47 U.S.C. § 338(a).

[10] *See* Joint Explanatory Statement of the Committee of Conference on H.R. 1554, 106th Cong., 145 Cong. Rec. H11792 (Daily ed. Nov. 9, 1999) ("Conference Report") ("[T]he Conference Committee reasserts the importance of protecting and fostering the system of television networks as they relate to the concept of localism.").

[11] *See* Public Television Comments at 4-8; H.R. Rep. No. 102-628, at 69 (1992) ("The government has a compelling interest in ensuring that [public television] services remain fully accessible to the widest possible audience without regard for the technology used to deliver these educational and information services.").

[12] *See* Conference Report at H11792 ("[I]t is important that the satellite industry be afforded a statutory scheme for licensing television broadcast programming similar to that of the cable industry."); Comments of the National Cable Television Association at 1-2 ("NCTA Comments").

[13] *See* 47 U.S.C. § 338(c)(1).

A. The Various Formulas Proposed By The Satellite Carriers Would Not Result In The Carriage Of Local Stations

EchoStar proposes that "no more than 2% of a satellite carrier's total channel capacity (*i.e.*, 6 channels nationwide for a system of 300 channels [covering 30 markets]) should be devoted to local noncommercial station carriage."[14] DirecTV proposes that "the threshold for must carry NCE stations should require DBS carriers only to carry a number of NCE stations that would bring the total number of noncommercial educational channels (defined to include national educational channels) available in a local market to a maximum of four percent of the local must carry channels offered by the satellite carrier in the market."[15]

Before addressing the legal weaknesses of the carriers' proposals, Public Television directs the Commission's attention to what these formulas would mean in the real world. Under EchoStar's proposal, the carrier would be required to carry only six NCE stations in today's world, even though it is already providing almost 30 markets with local commercial stations. In tomorrow's world, under the reasonable assumption that Ku-band local spot beaming capabilities will allow a carrier to provide local signals at a ratio of 4.5 local channels to 1 national channel, the number of local NCE stations carried would be 27. This means that if EchoStar provides local-into-local service to an additional 60 markets, for a total of 90 markets, the public in at least 63 of those markets would lack access to a local NCE station.[16] No matter how the calculations are done, the end result is that EchoStar's proposal would allow it to refuse carriage to *any* NCE station in most of the markets in which it carries local commercial stations.

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[14] EchoStar Comments at iv.

[15] DirecTV Comments at 39.

DirecTV's proposal has the same effect, although worse. DirecTV wants to limit carriage of NCE stations in each market such that the capacity devoted to such carriage is less than four percent of the capacity devoted to local must carry stations. DirecTV is already serving about 30 markets with the four major network affiliates under retransmission consent agreements. Assuming there are, conservatively, another five commercial and three noncommercial stations eligible for carriage in the largest markets being served and that the five commercial stations choose to exercise their must carry rights, DirecTV's four percent cap would result in the carriage of *no* NCE station (4% of 8 is .32). In fact, unless there were 25 must carry stations available in a local market, no NCE station would be carried.

Where do these numbers – numbers that would result in the carriage of not a single NCE station in most markets – come from? The carriers suggest two origins: (1) that capacity constraints dictate such limitations in order to provide parity with cable systems and (2) that the DBS public interest set-aside of four percent capacity serves as a cap for local NCE station carriage. Each of these arguments is addressed below.

B. The DBS Commenters Depict A Burden On Capacity That Would Not Exist Today And Certainly Will Not Exist in 2002

The satellite carriers do not deny that SHVIA imposes NCE must carry obligations on DBS that are as nearly like cable operators' obligations as possible. In SHVIA, Congress directed the Commission to prescribe regulations limiting carriage of multiple local NCE stations, *provided that* "[t]o the extent possible, such regulations shall provide the same degree of

[16] Although Public Television has asserted that EchoStar will be adding substantially to its capacity, *see* Public Television Comments at 20-21, the carrier itself does not mention these capacity increases and, in fact, capacity increases play no part in its argument about NCE station carriage.

carriage by satellite carriers of such multiple stations as is provided by cable systems under section [615 of the Communications Act]."[17]

Implicit in the Commission's question about how to limit DBS carriage of *duplicative* NCE stations is the expectation that DBS carriers will be obligated to carry at least one NCE station in any market in which they provide local commercial station service.[18] The only open question is how *many* local NCE stations they will be required to carry in a market. The Commission's expectation is supported by Section 615 of the Communications Act, under which all cable systems must carry at least one local NCE station (even if this amounts to 8.3% of the total channel capacity)[19] and most systems must carry at least three NCE stations.[20] This expectation is also supported by the findings contained in the 1992 Cable Act, where Congress stressed the government's "substantial interest in making *all* nonduplicative local public television services available on cable systems."[21] Although Congress and the Commission are focused only on limiting DBS carriage of *duplicative* NCE stations, that is not the basis of the satellite carriers' position here. They scarcely discuss the relationship of signal duplication to their carriage limitation proposals. Rather, they propose formulas that would eliminate their obligation to carry even a single local NCE station in many markets.

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[17] 47 U.S.C. § 338(c)(2).

[18] *See* NPRM ¶ 28.

[19] Under the existing analog must carry rules, a cable system with 12 or fewer stations is required to carry one NCE station. If a 12-channel cable system retransmits the signal of one local NCE station, that NCE station represents 8.3% of its capacity. *See* 47 U.S.C. § 535(b)(2)(A).

[20] *See* 47 U.S.C. §535(b) & (e). 47 U.S.C. § 535 is the codification of Section 615 of the Communications Act.

[21] Cable Television Consumer Protection and Competition Act of 1992, Pub.L. 102-385, 106 Stat. 1460 (codified at 47 U.S.C. §521 *et seq.*), Section 2(a)(7) ("Cable Act").

The carriers contend that, notwithstanding the statutory directive, DBS carriage obligations cannot approximate cable carriage obligations in any local market because DBS local capacity is extensively constrained. EchoStar illustrates this contention with a fallacious calculation of the NCE carriage burden on Time Warner's Manhattan system, which it then erroneously extrapolates to the top 30 markets. Counting analog and digital channels together, EchoStar calculates the NCE carriage burden on the Manhattan cable system as 1.5% of its total capacity. Since the must carry obligation currently applies only to the analog channels, the assumption of a 200-channel denominator (comprised of analog and digital channels) for the calculation of a 1.5% burden on the cable operator is incorrect. The three NCE stations constitute four percent of the 77 analog channels provided by the Manhattan cable system. Whatever the actual burden, however, the salient point is that the Communications Act provides that the burden may approach 8.3% of a cable system's capacity.[22]

EchoStar then incorrectly assumes that if Time Warner's Manhattan system is carrying three NCE stations, so are all the other systems in the top 30 markets – that NCE carriage levels in Nashville (the 30th-ranked market) are the same as in New York (the top-ranked market). In fact, according to our calculations, only in seven of the top 30 markets are there cable systems carrying three NCE signals.[23] Under existing carriage rules, Time Warner's cable systems in the top 30 markets are currently carrying, on average, 1.64 NCE channels. To replicate current cable system carriage in these markets, EchoStar would have to devote 50 – not 90 – of its current 300

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[22] *See* 47 U.S.C. § 535(b)(2)(A).

[23] In only 13 of the 84 television markets served by Time Warner are three stations carried. *APTS Calculations and Specialized Data Analysis*; search of Warner Communications database performed by Data by Design Division at Warner Communications (2000).

channel capacity for local-into-local service to carriage of NCE stations in the top 30 markets, and that is before taking into account the rapid expansion of DBS channel capacity.

As Public Television showed in its initial comments, satellite carriers will have far more than 300 channels of capacity with which to provide local-into-local service in 2002.[24] By 2002, with the advent of Ku-band spot-beam technology, improved compression technology, and the addition of more transponder space and more spot beams at Ka-band, satellite capacity is expected to be more than ten times what it is today.[25] Public Television does not presume to know the satellite carriers' plans for all this capacity. Those are business decisions that are not relevant to the policy decision before the Commission: balancing the burden of NCE station carriage on carriers versus the public's interest in accessing local NCE signals. In initial comments, Public Television presented calculations showing that it was feasible and not unduly burdensome for carriers to provide access to all local signals in all markets.[26] The comments of LTVS support the conclusion that full carriage is feasible.[27]

Assuming that EchoStar converts just 18 of its 50 CONUS (Continental United States) DBS frequencies for spot beams, the total channel capacity for local-into-local signals would jump to 729. Factoring in the additional 288 national channels would bring the carrier's total capacity to approximately 1017 channels.[28] Furthermore, since EchoStar need only carry 50

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[24] *See* Public Television Comments at 19-22.

[25] *See id.* at 19-20.

[26] *See id.* at 20-22.

[27] *See* LTVS Comments at 8 ("Non-carriage of the NCE stations would threaten their ability to continue to exist and to serve their local communities. Each NCE station functions with a unique purpose and programming, owing, in part, to the diversity of those entities holding the licenses for NCE stations.")

[28] *See* Public Television Comments at 20; Association of Local Television Stations, "Estimated Number of Must Carry Stations Per Market" (2000). Currently each DBS frequency can carry approximately nine (continued...)

NCE channels to match the local cable systems in the top 30 markets, EchoStar would have to devote a modest 5% of its Ku-band capacity – not 33% – for NCE stations in these markets. Once Ka-band spot beam capacity is factored in, the percentage of channels devoted to local-into-local NCE service would be far less.

C. The DBS Must Carry Rules Are Designed To Ensure Access To Local Broadcast Signals, While The DBS Set-Aside Rules Have An Entirely Different Purpose

In its comments, EchoStar proposes a national cap on its local public television must-carry obligations as a percentage of its national, noncommercial educational set-aside. It asks the FCC to require satellite carriers "to devote no more than 2% of channel capacity to carriage of local NCE stations as part of the existing 4% capacity set-aside requirement for noncommercial programming of an informational and educational nature."[29] DirecTV and BellSouth also request that the DBS carriage obligations of local NCE stations be capped by the four percent set-aside requirement.[30] The Commission should flatly reject the DBS industry's attempt to use the national public interest set-aside requirement to limit its local NCE must carry obligations.

The carriers' attempt to cap their must carry requirements by their public interest obligations confuses two separate statutory schemes: (a) the DBS set-aside for national, noncommercial educational programming, designed primarily to satisfy DBS public interest obligations, and (b) the local DBS must-carry obligations, triggered only when a DBS service provider offers local channels to its subscribers pursuant to the compulsory license. The two

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video channels. Spot beam technology increases capacity of a particular frequency by a factor of approximately 4.5 due to frequency reuse over the United States.

[29] EchoStar Comments at 5.

[30] *See* DirecTV Comments at 39-40; Comments of BellSouth Corp. and BellSouth Entertainment, Inc. at 24 ("BellSouth Comments").

statutory schemes operate entirely separately and serve distinct purposes, as can be plainly seen in the clear language, legislative history, and subsequent interpretation of the set-aside provision. What should be paramount as the Commission considers this issue is that under no circumstances should the *national* public interest requirement with respect to programming be construed so as to limit a carrier's obligations with respect to *local* stations.

Section 25 of the 1992 Cable Act[31] and the FCC's implementing regulations[32] require DBS program service providers to reserve four percent of their channel capacity exclusively for noncommercial, educational, and informational programming. DBS program service providers must make this set-aside "channel capacity available to national educational programming suppliers, upon reasonable prices, terms, and conditions."[33] The Commission has prescribed rules that impose an initial one-channel limitation on each qualified program supplier.[34]

Although a local NCE station may qualify as a "national educational programming supplier" for the purposes of the set-aside, the focus is on national – not local – educational programming service. The pool of eligible entities encompasses more than just public television licensees and includes "other public telecommunications entities and public or private

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[31] *See* Cable Act § 25, codified at 47 U.S.C. §335.

[32] *See* 47 C.F.R. §100.5(c); *see also Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992; Direct Broadcast Satellite Public Interest Obligations, Report & Order*, 13 FCC Rcd 23254 (1998) ("*DBS Order*").

[33] 47 U.S.C. §335(b)(3). The definition of a "national educational programming supplier" includes "any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions." 47 U.S.C. §335(b)(5)(B).

[34] *See* 47 C.F.R. §100.5(c)(4) ("A DBS operator cannot initially select a qualified programmer to fill more than one of its reserved channels except that, after all qualified entities that have sought access have been offered access on at least one channel, a provider may allocate additional channels to qualified programmers without having to make additional efforts to secure other qualified programmers."); *see also DBS Order*, 13 FCC Rcd at 23302.

educational institutions."[35] Allowing satellite carriers to fill up that capacity with local NCE stations would frustrate the purpose of the set-aside, which is to provide subscribers with educational programming that has a national focus. Furthermore, under the set aside provision, DBS carriers are entitled to receive a reasonable fee for carriage. In contrast, SHVIA forbids satellite carriers from demanding payment for carriage under the must carry regime.[36] These differences underscore the distinct purposes served by the two statutory schemes.

Unlike the DBS local must carry obligations, the purpose of the set-aside is to satisfy a DBS service provider's public interest obligations. These obligations are exacted in exchange for the use of the public spectrum and are national in scope. This is made quite clear by the plain language of the statute, which conditions DBS licenses on the satisfaction of the set-aside.[37] The legislative history states that the purpose of the set-aside is to "define the obligation of direct broadcast satellite service providers to provide a minimum level of educational programming."[38]

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[35] 47 U.S.C. § 335(b)(5)(B). Although both the statute and the FCC allow local, noncommercial educational stations to qualify for the set-aside, the FCC has interpreted the scope of "national" to include local, regional, or national domestic nonprofit entities that qualify under its definitions and that "produce noncommercial programming designed for a *national audience*." *DBS Order*, 13 FCC Rcd at 23293 (emphasis added).

[36] *See* 47 U.S.C. § 338(e) ("A satellite carrier shall not accept or request monetary payment or other valuable consideration in exchange either for carriage of local television broadcast stations in fulfillment of the requirements of this section or for channel positioning rights provided to such stations under this section, except that any such station may be required to bear the costs associated with delivering a good quality signal to the local receive facility of the satellite carrier.").

[37] *See* 47 U.S.C. §335(b) ("The Commission shall require, as a condition of any provision, initial authorization, or authorization renewal for a provider of direct broadcast satellite service providing video programming, that the provider of such service reserve a portion of its channel capacity, equal to not less than 4 percent nor ore than 7 percent, exclusively for noncommercial programming of an educational or informational nature.").

[38] Cable Television Consumer Protection and Competition Act of 1992, Conf. Rep. No. 102-862, at 222 (1992); *see also DBS Order,* 13 FCC Rcd at 23281.

In satisfaction of this public interest obligation, the DBS provider must "lease its capacity to national educational programming suppliers."[39]

Adjudicative bodies in two subsequent proceedings have also determined that the DBS set-aside was designed to satisfy the DBS public interest requirements on a national scale. For instance, in upholding the constitutionality of the set-aside, the U.S. Court of Appeals for the District of Columbia Circuit stated that the DBS carriers' obligation to set aside capacity for nationally available educational programming was "a condition of their being allowed to use a scarce public commodity."[40] And in an administrative adjudication determining that EchoStar had violated this obligation by segregating its public interest programming on a satellite that only a portion of the country could receive, the Commission itself held that EchoStar must reserve four percent of its channels at *each* of its full-CONUS orbit locations exclusively for its public interest set-aside because this obligation applied on a national, not a local or regional scale.[41]

Unlike the set-aside obligation, the DBS local must carry obligation is designed to ensure regulatory parity between DBS and cable, to preserve the principle of localism in broadcasting,

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[39] *Id.*

[40] *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 976 (D.C. Cir. 1996).

[41] *See American Distance Education Consortium Request for Expedited Declaratory Ruling and Informal Complaint, Declaratory Ruling and Order*, 14 FCC Rcd 19976 (1999) ("*ADEC Order*"); *EchoStar Satellite Corporation, Notice of Apparent Liability for Forfeiture*, DA 00-622 (Mar. 22, 2000) (assessing a forfeiture of $11,000 for EchoStar's failure to reserve four percent of its national channel capacity for use by qualified noncommercial educational programmers). In rendering this decision, the Commission quoted its *DBS Order*, where it stated that "the public interest programming provided for in this order must be made available to *all* of a DBS provider's subscribers without additional charge," *ADEC Order*, 14 FCC Rcd at 19980 (quoting *DBS Order*, 13 FCC Rcd at 23285) (emphasis added), that "public interest obligations are designed to expand programming choices for consumers in *all* areas of the United States," *id.* (quoting *DBS Order* at 23356) (emphasis added), and that its expectation was that public interest programming "will contribute to enhanced viewing opportunities for consumers throughout the United States." *Id.* (quoting *DBS Order* at 23356). The Commission also stated that in establishing DBS in 1982, the service was offered to provide "unique public benefits on a national scope . . . and that the primary coverage area for DBS is national." *Id.* (quoting *DBS order* at 23278).

and to ensure the public's local access to local public television stations on a market-by-market basis.[42] Moreover, unlike the set-aside, must carry obligations are tied to use of the compulsory copyright license in local markets, not to use of the DBS spectrum.[43] In their attempt to conflate the issues by mixing the separate statutory schemes, the DBS carriers are reading into Section 338 a provision they had hoped Congress would adopt -- but plainly did not -- a provision subsuming NCE must carry obligations in the set-aside obligation.

If the Commission were to determine that it is consistent with Congress's intent for local NCE stations to be counted toward a satellite carrier's four percent set-aside obligation, it should do so only under two conditions. First, a DBS operator desiring to count its carriage of local NCE stations toward the four percent set-aside obligation must forego payment for carriage. Second, the set-aside should not be applied as a cap that would limit a DBS carrier's local NCE must carry obligations. Any other interpretation would severely limit the public's access to local television stations in contravention of the clear statutory language of SHVIA.

D. EchoStar's Suggestion That The Must Carry Rules Are Unconstitutional Should Be Rejected

In its comments, EchoStar states its belief that Section 338(a) is unconstitutional, although it does not ask the Commission to rule on this issue.[44] Congress thoroughly considered and explained the constitutionality of the DBS must carry requirements and noted that "the conferees are confident that the proposed license provisions would pass constitutional muster

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[42] *See* Conference Report at H11795.

[43] *See id.*

[44] *See* EchoStar Comments at i-iii.

even if subjected to the *O'Brien* standard applied to the cable must carry requirement."[45] This confidence is justified.

As an initial matter, there is good reason to believe that a court reviewing the DBS must carry requirements would *not* subject Section 338(a) to the intermediate level of scrutiny that the Supreme Court applied in its review of the cable must carry provisions.[46] The U.S. Court of Appeals for the District of Columbia Circuit has already held that the DBS public interest requirements, set forth at 47 U.S.C. § 335(b)(1), "should be analyzed under the same *relaxed* standard of scrutiny that the court has applied to the traditional broadcast media."[47] This is because DBS, like terrestrial broadcasting, is subject to spectrum scarcity, and therefore the government has a freer hand in imposing on First Amendment rights.[48] But even if a court were to analyze the DBS must carry requirements under the *O'Brien* intermediate scrutiny standard, they would, as the Conference Report suggests, easily survive judicial inquiry.[49] The cable must carry rules were upheld on First Amendment grounds in *Turner Broadcasting Systems., Inc. v. FCC* even though the rules did not link carriage obligations to the exploitation of a statutory compulsory copyright license. The drafters of SHVIA carefully avoided not only any *violation* of First Amendment rights, but also any *implication* of those rights. EchoStar has not presented a colorable claim that the SHVIA must carry provisions are unconstitutional. The Commission should proceed to adopt and implement the must carry directive and allow EchoStar to make its case in the courts, if it chooses to do so.

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[45] Conference Report at H11795 (citing *United States v. O'Brien,* 391 U.S. 367 (1968)).

[46] *See Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180 (1997).

[47] *Time Warner Entertainment Co.*, 93 F.3d at 975 (emphasis added).

[48] *See id.* (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969)).

II. The Commission Should Not Adopt The DBS Commenters' Suggestions That Would Unduly Burden The Rights Of Local Stations To Have Their Signals Carried

The satellite carriers have argued for a number of interpretations of Section 338 that would unduly burden local stations' exercise of their must carry rights. DirecTV asks the Commission to gold plate the definition of a good quality signal, thus greatly limiting the number of stations that will be able to provide one.[50] LTVS looks to the Commission to do what Congress refused to do: allow the substitution of a regional for a local receive facility without the agreement of most of the stations in an affected local market.[51] The other carriers recommend undue restrictions on stations' election of regional receive facilities.[52]

A. The Good Quality Signal Requirement Should Not Be Used To Avoid Carriage

DirecTV urges the Commission to require a local must carry station to contract with a local telecommunications common carrier to lease a dedicated TV1-quality fiber circuit from the station to the local receive facility (at a cost of $800-$1500 per month) as a prerequisite to carriage. It states that a "good quality signal" should be strictly defined as a signal with a contribution quality that will facilitate efficient MPEG compression of all channels.[53] Moreover, DirecTV would make the ability to provide such a signal a test of carriage eligibility.[54] Such a requirement would be outlandishly overreaching.

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[49] *See* Conference Report at H11795.

[50] *See* DirecTV Comments at 28.

[51] *See* LTVS Comments at 15-16.

[52] *See* BellSouth Comments at 16-19; EchoStar Comments at 13-14.

[53] *See* DirecTV Comments at 28, 31-33.

[54] *See* DirecTV Comments at 11 (suggesting that DirecTV cannot notify stations of their eligibility for must carry status since it will not know whether they are able to deliver a TV1-quality signal).

The TV1 standard cited by DirecTV is a "short-haul" standard designated for transmission of a signal anywhere from a few feet to approximately 20 route miles -- a distance which is far less than most stations will have to deliver their signal to a carrier's receive facility. It would require a signal-to-noise ratio of 67 dB, which is the highest such ratio in any standard. It requires the signal power to be five million times stronger than the noise power. This is a standard that a broadcaster could achieve only by using fiber-optic capacity all the way from the station to the receive facility. The cable signal to noise ratio standard, by contrast, is 53 dB,[55] which should be adequate for satellite as well. Contribution quality is the quality of a signal in the studio, before it is manipulated for transmission to the public. DBS carriers, like cable operators, are retransmitting a signal that has already been transmitted, not transmitting a contribution quality signal from scratch. That is what the compulsory license gives them -- a right of retransmission. Cable (digital or analog) does not and could not reasonably insist on contribution quality signals and the case should be the same for DBS.

As Public Television stated in initial comments, and as other broadcasters and some carriers like LTVS and BellSouth also urge, a good quality signal should be defined the same way in the satellite and cable contexts.[56] Most of the carriers say that there should be no standard for material degradation because they have an incentive to deliver good quality signals to the home.[57] Stations have similar incentives to deliver a good quality signal to the local

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[55] *See* NAB Engineering Handbook (8th ed. 1992).

[56] *See* Public Television Comments at 15-16; *see also* BellSouth Comments at 19; LTVS Comments at 16-17; Joint Comments of the ABC, CBS, Fox, and NBC Television Network Affiliate Associations at 11 ("Network Affiliates Comments"); Comments of the Association of Local Television Stations at 25 ("ALTV Comments").

[57] *See* DirecTV Comments at 44-45; BellSouth Comments at 25-26; *see also* Comments of Home Box Office at 2-3.

receive facility. But we are not suggesting that there be no standard, simply that the standard conform to the standard for cable.[58]

Public Television supports the positions of ALTV and NAB on the procedural steps that should be required before a carrier may refuse a station carriage for failure to deliver a good quality signal. Specifically, the burden of proving a signal is not of good quality should lie with the carrier, and the Commission should require rigorous and transparent testing. Satellite carriers should be precluded from denying a station carriage until the Commission determines that the carrier has proved that the station has not delivered a good quality signal to the local receive facility. In addition, the local station should be permitted to observe the signal measurement procedures, and an independent engineer should conduct the testing.[59]

While there is no doubt that a local station is obligated to deliver a good quality signal to the carrier, we agree with the other broadcasting entities that this is an obligation on eligible stations and is not a condition of eligibility. DirecTV advances the untenable position that stations that do not meet the good quality signal requirement of Section 338(b) are ineligible for compulsory carriage. It defends its proposal on the grounds that, in contrast to the cable carriage context, the requirement that broadcasters deliver a good quality signal "is statutory and must be satisfied in order for a broadcast station to be eligible for must carry in the first instance."[60] Even if this logic -- that simply because a statute imposes an obligation does not render that obligation a condition precedent to the exercise of statutory rights -- were sound, the facts are wrong. The obligation that NCE stations provide a good quality signal to cable systems is also

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[58] *See* Public Television Comments at 15-16.

[59] *See* NAB Comments at 5-9, 12-15; *see also* ALTV Comments at 24-30.

[60] DirecTV Comments at 31.

statutory, as the Communications Act provides that "*qualified* local noncommercial educational television station[s] [must] deliver to the cable system's principal headend a signal of good quality."[61] Thus, in the cable context, like the satellite context, there is a statutory requirement that NCE stations deliver a good quality signal. In both situations, this obligation is not a condition precedent to the determination of whether or not an NCE station is "qualified" for carriage.

B. The Location Of Receive Sites Should Not Be Used To Hinder Delivery Of A Good Quality Signal

Both LTVS and DirecTV have made proposals that would allow satellite carriers to skirt SHVIA's requirements that local receive facilities be truly local and conveniently accessible to local stations that are eligible for carriage. LTVS, for example, asks that carriers be allowed to designate a regional facility when at least 50% of stations asserting must-carry rights *in the region* sign an agreement specifying that facility.[62]

We agree with NAB that regional receive sites should not be selected unless the majority of all stations *in each affected market* (not *over* the affected markets) agree. Any other approach would undoubtedly result in the siting of regional facilities in the largest cities in the region, thus forcing stations in smaller markets or more rural locations within larger markets to transport their signals at great expense. In addition, within each market, a carrier should designate the same local facility for both retransmission consent and must carry stations and should not be allowed to select a facility that would subvert the purpose of the must carry requirement.[63]

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[61] 47 U.S.C. §535(g)(4) (emphasis added).

[62] *See* LTVS Comments at 14-16.

[63] *See* NAB Comments at 9-12.

DirecTV has proposed that local stations be required to notify the carrier at least one full year prior to making effective their selection of an alternative receive site.[64] This is because, according to DirecTV, it takes at least 12 months to establish a local receive facility. At the same time, DirecTV refuses to notify local stations (i) when their must carry rights have commenced (the timing of which the carriers alone control after 2002), and (ii) presumably, of the local receive facility the carrier has chosen.[65] As a result, it could be well after the commencement of their must carry rights that stations would even decide to select an alternative receive facility and then one year after that before they would be carried. While we do understand that carriers need some lead time to arrange for a local receive facility, Public Television believes that the combination of DirecTV's request for a one year period of delay, coupled with its refusal to give stations notice of their must carry rights and related carriage information, is untenable.[66]

As for those stations that do not share the majority view regarding the placement of an alternative local receive facility, Public Television urges the Commission to adopt a complaint process. The carriers object to such a process because SHVIA does not mandate it and because they fear it will result in the creation of additional and expensive local receive facilities.[67] As to the first point, as noted in our original comments in another context, the Commission has the

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[64] *See* DirecTV Comments at 26-27

[65] *See id.* at 11-12, 26-27.

[66] If the Commission does grant DirecTV's request, it should also require a carrier to notify local stations in a market one year prior to the carrier's selection of a local receive facility (something it should be able to do if it must make arrangements that far in advance). In this way, stations can expedite their site selection process and speed provision of local service to the public.

[67] *See* DirecTV Comments at 29-30; LTVS Comments at 15-16.

authority to create remedial processes that are not expressly mandated by statute.[68] In fact, it does so all the time. Given the clustering of television broadcast stations at certain sites in many markets (for example, Mount Wilson in Los Angeles, Sutro Tower in San Francisco, the Sears Tower in Chicago), it is likely that the majority of stations in such markets could agree to an alternative receive facility that could put the few stations in the market that are not collocated at a significant disadvantage.

While NCE stations are sometimes collocated with one or more commercial stations, they are often at some distance from a concentration of other transmitters. NCE stations, particularly those that are part of a state network, are located to cover most efficiently the entire state population, rather than only the most popular markets sought by commercial licensees. The point is that if an NCE station is geographically isolated, and therefore likely to be in the minority in a local receive facility decision, the consequences could be severe. The station might have to expend thousands of dollars every month -- precious membership and governmental funds -- to deliver its signal to the facility. This leads to the second issue, which is whether a complaint procedure would result in additional receive facilities. The answer to such a question is not necessarily. The remedy for a minority station that can prove significant harm from the relocation of a receive facility might be a separate receive facility or a requirement that the carrier share in the cost of delivering the signal to the single facility in the market, at the carrier's option.

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[68] *See* Public Television Comments at 38-39; *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 312 (1963); *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 756 (D.C. Cir. 1977); *American Geneologies, Inc. v. United States Postal Serv.*, 717 F.Supp. 895-898-99 (1989); *In re Application of NYNEX Corp, Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer of Control of NYNEX Corp. and its Subsidiaries, Memorandum Opinion and Order*, 12 FCC Rcd 19985, 20001 n.57 (1997).

III. The Commission Should Assume That It Is Technically Feasible For Carriers To Retransmit VBI Content, And The Burden Should Be On Carriers To Show That It Is Not

Public Television, joined by other broadcasters, urged in initial comments that DBS be required to carry the same television station content that cable systems are required to carry -- that is, the primary video, accompanying audio, closed captioning data, and, to the extent technically feasible, program-related material carried in the VBI.[69] LTVS agrees that it is technically feasible for carriers to provide local stations' VBI material.[70] DirecTV and others argue that it would cost DBS carriers billion of dollars to carry the VBI material, although they do not give technical or other details as to why that is the case.[71] Given that the record shows that there are widely divergent viewpoints on this issue within the DBS community, the Commission cannot accept DirecTV's contention that it is not technically feasible for carriers to retransmit program-related material in the VBI.

It is technically feasible for carriers to carry VBI content. Data carried on the VBI is ancillary data like any other ancillary data and can be carried in the same way. In general, standard analog television pictures are transmitted at a rate of 30 frames per second, with two interlaced fields comprising each frame. Each field begins with a VBI of 21 lines, during which time the picture scanning beam is turned off (blanked) and is moved from the bottom of the screen to its starting position at the top of the screen. There are two VBIs transmitted per frame, one in each field. The placement of data within the VBI is described in terms of the particular

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[69] *See* Public Television Comments at 23-24; ALTV Comments at 43; NAB Comments at 18-19; Network Affiliates Comments at 18-20; *see also* 47 C.F.R. §76.62(e)-(f).

[70] *See* LTVS Comments at 24-26. EchoStar was silent on this matter and we understand they have no difficulty transmitting VBI material.

[71] *See* DirecTV Comments at 41; BellSouth Comments at 24-25.

blanking line used and the field (one or two) in which it occurs.[72] For example, closed-captioning information is transmitted on fields one and two of line 21 of the VBI. Although there are 21 VBI lines, only 10 of these are completely usable for data, and the capacity of each line is approximately 19.2 kbps. Thus, the total maximum usable capacity of VBI in a television signal is 192 kbps. This is a very minimal amount of capacity, as it represents only six percent of what is required to carry a television signal digitally (at approximately three megabits per second). In fact, it is less than the capacity required to carry just one audio channel.

DirecTV claims that it would have to spend billions of dollars to retrofit its system equipment to accommodate VBI data.[73] In fact, DirecTV's systems are already being designed to deliver data. This is a DBS system feature that has been planned since the advent of DBS, as evidenced by the fact that even the first DBS receivers had both a wideband and a low-speed data port. According to DirecTV, "[i]n the future, your program providers may provide data services, which you can access through specific stations using the DIRECTV System receiver's wide band data and low-speed data ports."[74] The functionality which allows DirecTV viewers to access data in this way is the very functionality needed to access VBI data. Furthermore, no DBS carrier has objected to carrying and decoding closed captioning information carried in the VBI.[75] If DBS operators can carry the closed captioning information, then they can carry other program-related material as well. The Commission, of course, need not decide now exactly what type of VBI program-related material it is technically feasible for DBS carriers to provide. It

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[72] *See Permissible Uses of the Vertical Blanking Interval, Notice of Proposed Rulemaking*, MM Docket No. 92-305, 8 FCC Rcd 90 n.1 (1992).

[73] *See* DirecTV Comments at 41.

[74] <<http://www.directv.com/customer_center/yoursystem/manuals/mandel/0,1048,89,00.html>>.

[75] *See* BellSouth Comments at 24-25; DirecTV Comments at 42-43; EchoStar Comments at 7.

need only hold DBS carriers to the same standard to which cable operators are held and place the burden on the carrier to show why it cannot provide the content that would, but for technical infeasibility, be eligible for carriage.

IV. The Commission Should Reject The Cumbersome Remedial Proposal Whereby A Station Might Frequently Have To Litigate In Two Fora

In initial comments, Public Television argued that SHVIA vests the Commission with broad authority to resolve satellite carriage complaints, including complaints about signal quality, station duplication, material degradation, and signal content issues.[76] The initial jurisdiction of the federal courts, by contrast, is limited to questions of whether a station is located within the relevant local market and whether a carrier is complying with the compulsory copyright license.[77] Other broadcasters agreed with us.[78] By contrast, DirecTV and LTVS would have the Commission hear disputes regarding signal carriage issues like signal quality but would deprive the Commission of any remedial power with respect to such disputes. Thus, in the event that a DBS operator refuses to carry a local station because it contends that the station is not providing a good quality signal or is duplicative, the station would have to go first to the Commission for a ruling on the dispute and then to a federal court to seek a remedy.[79] Public Television urges the Commission not to burden stations with this unnecessary and duplicative course of litigation.

As the comments filed in this proceeding suggest, there may be significant amounts of controversy regarding such issues as signal quality, whether or not it is technically feasible for

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[76] *See* Public Television Comments at 35-40; *see also* 47 U.S.C. §338(f)(1).

[77] *See* Public Television Comments at 35; *see also* 47 U.S.C. §338(a)(2); 17 U.S.C. §501(f).

[78] *See, e.g.*, ALTV Comments at 46-48; NAB Comments at 22; Network Affiliates Comments at 24-28.

[79] *See* DirecTV Comments at 49-50; LTVS Comments at 30-33.

carriers to retransmit VBI material, and whether carriers have unduly limited their obligations to carry local NCE stations because of claims of duplication or capacity limitations. Disputes over such issues require swift resolution because they may well result in non-carriage or partial carriage of local broadcast stations, particularly local NCE stations. These are not the issues the copyright law is intended to address. Rather, SHVIA is clear that it addresses the terms of the compulsory copyright license, which go to whether a carrier is making use of the license in a market in which a requesting station is located. If there is a dispute about the compulsory license terms, it must be resolved in federal court. However, if there is a dispute about other matters relating to signal carriage, such as whether or not an *eligible* station is supplying the appropriate signal or the carrier is appropriately transmitting the signal, it should be resolved by the Commission. And it should be *fully* resolved by the Commission to avoid expensive, time-consuming, and burdensome additional litigation -- hardships and delays that would be punitive to a public broadcasting service whose resources are already stretched to capacity.

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In consideration of the foregoing, Public Television urges the Commission to reject the satellite carriers' arguments that would undermine Congress's intent to provide DBS subscribers in local-into-local markets with access to the same local public television stations that can be received over cable.

Respectfully Submitted,

Marilyn Mohrman-Gillis /aLL

Marilyn Mohrman-Gillis
Vice President, Policy and Legal Affairs
Lonna M. Thompson
Director, Legal Affairs
Andrew D. Cotlar
Staff Attorney
Association of America's Public
Television Stations
1350 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
202-887-1700

Kathleen Cox /aLL

Kathleen Cox
Senior Vice President Policy, General
Counsel and Corporate Secretary
Robert M. Winteringham
Staff Attorney
Corporation for Public Broadcasting
401 9th Street, N.W.
Washington, D.C. 20004
202-879-9600

Gregory Ferenbach /aLL

Gregory Ferenbach
Senior Vice President and General Counsel
Public Broadcasting Service
1320 Braddock Place
Alexandria, Virginia 22314
703-739-5000

August 4, 2000