

**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)	

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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INTRODUCTION AND EXECUTIVE SUMMARY

Since December 1999, the satellite industry has been selling to millions of subscribers the most popular television programming in America, such as “Survivor,” “Ally McBeal,” “Who Wants to Be a Millionaire,” and “ER.” Although this programming costs huge sums to produce, and although the satellite companies charge customers \$5 to \$6 a month to receive it, the satellite industry has paid not a nickel in copyright fees for these shows.

Selling this local TV station programming has been a bonanza for the satellite companies. According to Eddy Hartenstein of DIRECTV, “[o]ver 50% [of new customers] are signing up [for local-to-local] now at activation. . . . In some markets, we’re significantly over 50%.”¹ DIRECTV has achieved this phenomenal success even though “we’ve just barely begun to market local signals.”² The ability to offer local TV stations has strengthened the carriers’ already strong hand in their competition with the cable industry: as Mr. Hartenstein explained, “local channels have played, and will continue to play, a huge role in driving sales.”³ In those markets in which DIRECTV is offering local-to-local service, it is “seeing about a 20% improvement above those markets where we aren’t yet delivering local signals.”⁴ EchoStar tells the same story: just this week, EchoStar CEO Charlie Ergen told the press that “[a] key reason for EchoStar’s higher-than-expected subscriber growth in the second quarter . . . was the

¹ *Dishing it Up With Eddy*, Cable World, 2000 WL 12303096 (June 5, 2000).

² *Id.*

³ *Satellite Show Daily Forum*, Satellite Business News (Aug. 2, 2000) at 6.

⁴ *Id.* As Mr. Hartenstein has stressed, the SHVIA was “a landmark milestone for the satellite industry” enabling satellite carriers to “offer consumers a truly competitive offering to cable television.” *Satellite Show Daily Forum*, Satellite Business News (Aug. 2, 2000) at 6.

popularity of channels carrying . . . local-to-local.”⁵ Thanks in part to the opportunities created by local-to-local retransmissions, a new entrant, BellSouth, plans to build a new satellite firm from scratch to compete with DIRECTV and EchoStar.

In short, the ability to offer local stations with no copyright liability whatsoever is a rich gift by Congress to the satellite industry. On an interim basis, to provide carriers with an opportunity to adapt, Congress provided compulsory copyright licenses for individual stations through the end of 2001. Starting in January 2002, however, the permanent provisions become effective, and satellite carriers are provided package licenses. That is, carriers who elect not to obtain the necessary copyright licenses in the marketplace are nonetheless granted the ability to carry, on a copyright-free basis, all TV broadcast signals within any broadcasting market. The purpose of the package license -- and, necessarily, the overriding objective of the Commission’s regulations implementing that license -- is to provide a compulsory copyright license to satellite carriers without changing the underlying market forces affecting broadcast stations, and without harming stations’ ability to provide free television to the tens of millions of Americans who do not subscribe to costly cable or satellite services.

The comments of the satellite industry reflect a desire to have the Commission administratively “amend” the Act to give the industry a sweet, one-sided deal that Congress properly balked at giving. What the Satellite Home Viewer Improvement Act (“SHVIA”) actually *says* is this: satellite carriers that wish to use the local-to-local compulsory license “shall carry upon request the signals of *all* television broadcast stations located within [the] local

⁵ *EchoStar CEO Says Customer Service Back on Track*, Dow Jones News Service (Aug. 2, 2000),

market.” 47 U.S.C. § 338(a)(1) (emphasis added). Ignoring Congress’ definitive mandate, the satellite industry asks the Commission to replace the word “all” with the word “some.”

The satellite industry invites the Commission to employ legal legerdemain to achieve that improper transformation. DIRECTV, for example, asks the Commission to require every local station to spend thousands of dollars *each month* delivering its signal by a dedicated fiber feed to the satellite carrier’s local receive facility -- *even if the station delivers an over-the-air signal to that facility of the same high quality that cable systems receive under the Commission’s rules*. DIRECTV also asks the Commission to allow it to exclude large numbers of local stations as “duplicative” based on a *national* channel delivered by a carrier, even though Congress said that a carrier could decline carriage only based on duplication between two *local* stations. That theory would, among other things, enable satellite carriers to wipe out the carriage rights of every WB and UPN (now Paramount) station in the United States simply by carrying a single WB station and a single Paramount station nationally.

For its part, BellSouth asks the Commission to permit it to override the package license provision by allowing it to delay carrying local stations for indefinite periods based on “circumstances beyond its control” and “negotiation of necessary logistics.” BellSouth’s proposal amounts in substance to defiance of the will of Congress.

DIRECTV offers still another backdoor technique to subvert the package license: a proposal to allow carriers to punish certain stations (of the carrier’s choosing) by excluding them from large parts of the local market, while delivering other local stations to the entire market. For example, the DIRECTV proposal would allow it to discriminate against certain Salt Lake City stations by delivering them only to viewers within 60 or so miles around Salt Lake City, while retransmitting other Salt Lake City stations to viewers throughout the state of Utah.

The Commission should reject these satellite industry proposals -- and many similar ones discussed below -- as inconsistent with the unambiguously expressed will of Congress. The satellite industry tried and failed to have Congress adopt a statute that would give the satellite industry its dream regime: a permanent, zero-royalty compulsory license that it could use to cherry-pick a few stations in each local market. The Commission cannot and should not provide carriers what Congress consciously decided -- for sound policy reasons -- not to give them. Instead, the Commission should adopt regulations that:

- require carriage throughout the local market of all stations in that market that request it;
- give equal treatment to all local channels in pricing, packaging, and treatment in program guides;
- ensure that all stations (whether carried under retransmission consent or otherwise) are carried on contiguous channels;
- ensure that viewers need not purchase new equipment in order to view stations that insist on carriage under the SHVIA;
- impose the same “good quality signal” standard long applied to cable systems, and prevent satellite carriers from using “quality” complaints as a stalling mechanism;
- ensure that carriers retransmit all local TV stations with at least the same technical quality as the other channels they transmit.

In addition, as NAB and DIRECTV both recommend, the Commission should postpone issuance of regulations implementing the digital signal carriage requirement. NAB believes that the Commission will be in a much better position to do so during 2001, when satellite technology (including spot beam satellites) will be further evolved and the Commission will have issued regulations about digital must-carry for cable.

Although recognizing that the Commission has no authority to adjudicate the constitutionality of statutes it has been directed to administer, the satellite industry nevertheless argues that the package licenses in SHVIA are unconstitutional. That is nonsense. The Act does not limit carriers' speech in any way, and carriers remain free to offer any programming for which they acquire the necessary rights in the marketplace. Rather than restricting any speech, the Act gives carriers a hugely valuable, but optional, gift: the ability to deliver highly valued local TV programming without negotiating or paying for it. Congress did choose to configure that gift so that its use by satellite carriers would not undermine local broadcasting markets -- and thereby endanger the continued viability of free, over-the-air television. But that does not change the fact that the compulsory license is a transfer of rights from copyright owners to carriers, not a restriction of any kind.

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The National Association of Broadcasters ("NAB")⁶ hereby submits its reply comments in response to the Commission's May 31, 2000 Notice of Proposed Rulemaking ("*Notice*") in the above-captioned matter.

In the Satellite Home Viewer Act ("SHVIA"), Congress for the first time created a compulsory license that allows satellite carriers to deliver local TV stations in their local markets on a copyright-free basis. To ensure that this license did not result in distortions of the local broadcasting markets where satellite carriers chose to avail themselves of the offer, because such distortions would threaten the availability of free, over-the-air, television, Congress provided this new compulsory license only on a "package" basis. That is, the license permits satellite carriers to retransmit the copyrighted broadcast signals of all of the local TV stations in any particular market. The Commission's task in this proceeding is to flesh out the practical implementation of the "market-by-market" license adopted by Congress.

⁶ NAB is a nonprofit incorporated association that serves and represents America's radio and television broadcast stations and networks.

Contrary to the claims made by satellite carriers, there is no constitutional impediment to the package license regime that Congress adopted. Far from impairing anyone's First Amendment rights, Congress simply created an option that (starting in 2002) will provide carriers with the extraordinary convenience of not having to negotiate for the necessary copyright permissions for every program on every local channel that they carry. Congress was not required to grant carriers this property right at all, much less on a cherry-picking, station-by-station basis. Congress chose to offer the compulsory license on a market-by-market basis, following a brief transition period. The Constitution gives carriers no basis for quibbling about the scope of the gift that Congress has bestowed on them.

Certain members of the satellite industry propose a variety of ways to attempt to subvert the package license provided by Congress and transform it into a station-by-station compulsory license. These proposals are inconsistent both with the statutory text and with Congress' purpose of ensuring that the license it confers will not undermine the full availability of free television. The Commission should reject these crude proposals to undermine the Act that Congress actually passed. Instead, it should implement the proposals by NAB -- which are echoed by many other commenters, including several satellite carriers in some cases -- to fairly implement the package license embodied in the SHVIA.

I. NEITHER THE SHVIA NOR ANY REGULATIONS UNDER CONSIDERATION VIOLATE THE CONSTITUTION

The Commission should proceed to implement regulations and policies based on Congress's purposes in enacting the SHVIA, including section 338, without concern about any

alleged constitutional constraints, because none are implicated by the statute Congress enacted.⁷ Contrary to the claims made by the Satellite Broadcasting & Communications Association (“SBCA”), the SHVIA is not an unconstitutional "taking," a violation of the First Amendment, or invalid under the Copyright Clause. To begin with, the SHVIA is not a "taking" at all; it is a "giving." The SHVIA grants satellite carriers a royalty-free statutory license to override the normal rights of copyright owners by retransmitting copyrighted programming, under specified circumstances. The license covers retransmission of broadcast signals only to households within the local market in which the broadcast station is licensed, and after January 1, 2002, only on a market-by-market basis. 17 U.S.C. § 122(a), 338(a). That is, carriers that prefer not to acquire the necessary rights in the marketplace will nonetheless have the option of carrying all of the stations in any specific local market through a compulsory license.

Nothing is taken away from satellite carriers. They remain free to carry any programming they acquire the rights to or create. The statutory license merely offers them additional rights if they are interested.

The satellite carriers' grievance is that they wanted *more*, that the government's gift is not as big as they hoped. That, however, is not a complaint cognizable under the Takings Clause. The Takings Clause limits governments' ability to take "private property"; it does not require governments to subsidize industries on demand.

For similar reasons, the SHVIA raises no First Amendment concerns. The First Amendment is implicated only when governments restrict or burden speech. The SHVIA does neither. The satellite carriers' comparisons to the Cable Act's must-carry provisions disregard the

⁷ Moreover, as the satellite carriers concede, the Commission has no authority to weigh the statute's constitutionality. SBCA Comments at 13; DirecTV Comments at 3. Statutes are

fundamental difference between the two statutes. The Cable Act requires cable operators to carry some number of broadcast signals. The SHVIA does not require satellite carriers to carry *any*. It simply provides carriers with an optional means of acquiring rights to use property that does not belong to them in addition to those they would otherwise have.⁸

SBCA's claim that the SHVIA is subject to strict scrutiny is laughable. SBCA Comments at 10. SBCA simply reasserts the same arguments that failed to persuade the Supreme Court in *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*) and *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*). SBCA's fallback position that the SHVIA would not meet the *O'Brien* scrutiny applied to cable must-carry – applied because that law actually *imposed* an obligation – mischaracterizes those decisions. The Court's conclusion that the law was needed was not premised on finding that cable operators had committed anti-competitive acts. *See Turner II*, 520 U.S. at 194 (must-carry need not be justified as a measure to prevent anticompetitive behavior); *cf.* SBCA Comments 10. The Court's found the law justified because cable systems have gateway control over the programming reaching their subscribers, cable operators would refuse to carry significant numbers of broadcasters, and noncarriage would reduce the range of free television available. *Turner II*, 520 U.S. at 197, 200-206; *id.* at 226, 228 (Breyer, concurring); *Turner I*, 512 U.S. at 656-57.

presumed constitutional. *Oklahoma v. United States*, 161 F.3d 1266, 1269 (10th Cir. 1998).

⁸ The only restrictions on their freedom to distribute the speech of their choice are those imposed on any would-be distributor of another's speech by the Copyright Act, 17 U.S.C. §§ 102(a), 106. The satellite carriers do not challenge these provisions, and could not succeed if they did. *See Harper & Row v. Nation Enterprises*, 417 U.S. 539 (1985) (rejecting argument that First Amendment requires a larger exception to copyright than Congress provided); *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989) (shaping of statutory license to further communications policy is not subject to even intermediate scrutiny under the First Amendment).

Satellite carriers, if provided a station-by-station statutory copyright license, would pose the same problem. It is undisputed that satellite carriers, if granted a station-by-station license, would not carry the full range of broadcast stations, but would carry mostly network affiliates. *See* SBCA Comments 5 (explaining that carriers now carry only network affiliates and a few independent stations and defending that choice). If subscribers received network programming from their satellite carrier, along with hundreds of other programming choices, they could not be expected to undertake the effort and expense of installing an antenna or subscribing to cable to gain access to the remaining smaller broadcast stations in their area. Thus, under a station-by-station license, satellite carriers would effectively remove their subscribers from the potential audience for broadcasters they choose not to carry, posing the risks to free television that Congress has consistently sought to avoid.

The satellite carriers' additional complaint, that Congress inexplicably subjected them to more onerous burdens than were imposed on cable when its purpose was to encourage competition between the two industries, is disingenuous. As the carriers are the first to point out, satellite technology is different from cable technology, a difference Congress is entitled to take into account. *See Turner I*, 512 U.S. at 661. Had Congress imported the one-third cap applied to local cable systems in designing the statutory license for satellite carriers, it would have sabotaged its goal of minimizing the impact of the license on local broadcast markets, because most broadcasters in each market would be denied carriage and therefore denied access to potential viewers.

Finally, SBCA's saber rattling that the SHVIA exceeds Congress's power under the Copyright Clause is without consequence. Whether Congress acted under its copyright power or its commerce power is immaterial. *See, e.g., United States v. Moghadam*, 175 F. 3d 1269, 1280-

82 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1529 (2000) (upholding protection of live performances under Commerce Clause regardless of whether permitted by Copyright Clause). Congress's power to fashion compulsory copyright licenses, or any other subsidy, is limited only by affirmative constraints on its authority – none of which are imposed by the Copyright Clause, which authorizes Congress to determine which limited monopolies will promote the useful arts.

II. SPECIFIC ISSUES RAISED BY THE COMMISSION

NAB here responds to the comments filed by other parties on the issues set forth by the Commission in its *Notice*.

A. Carriage Obligations and Definitions

1. Procedural Matters

a. Notice to stations

As almost all commenters (including satellite industry commenters) recognize, a requirement that carriers notify local stations of their rights under the package license adopted by Congress will impose only trivial burdens on the satellite industry while minimizing disputes about what the parties knew and when they knew it. *See, e.g.*, Comments of Local TV on Satellite (“LTVS Comments”) at 6-7 (“the satellite carrier should be obligated to notify all stations in the . . . market . . . [about] the opportunity to elect carriage”); Comments of BellSouth Corporation and BellSouth Entertainment, Inc. (“BellSouth Comments”) at 7 (“Following the cable rules, the DTH provider would start the process by giving notice of intent to carry local signals into the market to all potentially eligible stations”); NAB Comments at 2; Joint Comments of the ABC, CBS, Fox, and NBC Television Network Affiliates Associations (“Network Affiliates Comments”) at 5-6; Comments of the Association of Local Television

Stations, Inc. (“ALTV Comments”) at 37-41. This Commission should adopt this consensus position.

Although the Commission requires similar notifications by cable systems to local stations in many instances, there is a special reason why notification is essential here: local stations have a right to carriage *only* if the carrier wishes to rely on the Section 122 compulsory license to obtain the necessary copyright clearances to carry another local station.⁹ Even if a satellite carrier is carrying another local TV station in the market, a different station has no way of knowing whether the carrier is relying on the compulsory license or, instead, on private licensing agreements. (Nothing in Section 122 requires a carrier to tell *other* stations that it is carrying a station under the compulsory license.) Absent express notification from the satellite carrier, therefore, a station cannot know whether it is entitled to carriage.

While two satellite carriers (BellSouth and LTVS) have no objection to the simple requirement that they give stations advance notice of their rights, DIRECTV and EchoStar do criticize that requirement. DIRECTV, Inc. Comments at 11-12; EchoStar Comments at 12. But neither DIRECTV nor EchoStar can credibly argue that a simple notification procedure imposes any serious burden. And the carriers ignore the fundamental point just discussed: that a station has no way of knowing whether the carrier is relying on the compulsory license or on voluntary copyright licenses.

As discussed in detail in the Reply Comments being filed by the Network Affiliates today, DIRECTV offers a Catch-22 procedure about notice. According to DIRECTV, stations should be required to prove to the carrier that they deliver a good quality signal to the carrier’s

⁹ See Network Affiliates Comments at 5-6.

local receive facility -- but could not possibly do so because the carrier would have no obligation to tell the station where the receive facility is located. DIRECTV Comments at 27-28. The Commission should ignore this indefensible proposal and require carriers to tell stations as part of their initial notice whether the carrier contends there is a signal quality problem. If a carrier contends that there is such a problem, the station needs to know that as quickly as possible so that the station can work with the carrier to resolve it (if there is a legitimate problem).¹⁰

BellSouth proposes that the Commission set a trap for unsuspecting stations, as follows: a carrier could send stations a letter proposing to use a receive facility located outside the local market -- potentially thousands of miles away -- and then rely on the station's *silence* after a short period as consent to that facility. BellSouth Comments at 7. The Commission should reject this "negative option" procedure, which suffers from the same obvious flaws in this as in any other context.

BellSouth advances another unfair proposal as well: that after telling a station that it plans to commence service, and after the station has made substantial investments in ensuring that it delivers a good quality signal to the carrier's receive facility, the carrier can change its mind and not carry any stations in the local market at all. BellSouth at 7-8. If a carrier changes its mind after giving notice to local stations of the carrier's intent to begin carrying stations in the market, the carrier should be required to reimburse stations for all expenses incurred in

¹⁰ As discussed below, supposed signal quality problems do not, and should not, give the carrier an excuse to postpone compliance with the package license obligation in the Act. Of course, if there is any issue about signal quality, satellite carriers, like cable systems, should be required to "cooperate with the television station to resolve [any] problem." See *Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965 ¶ 101 (1993).

attempting to deliver a good quality signal to the carrier's designated receive facility. In addition, as is true for cable systems, a carrier should be entitled to change the location of its receive facility only for good cause.¹¹

b. Carriage requests by stations

The comments reflect a consensus that carriage requests by stations should be in writing to minimize disputes. *E.g.*, DirecTV Comments at 11; ALTV Comments at 38-42. Several parties advanced the sensible proposal that a station's election of carriage (rather than retransmission consent) should be construed as a "request for carriage" under Section 338(a)(1),¹² and the Commission should accept that proposal. EchoStar's suggestion that the Commission should avoid issuing rules about these procedural issues (EchoStar Comments at 12) makes no sense: everyone will be better off if the Commission establishes clear rules of the road rather than leaving the parties to engage in needless disputes about procedural matters.

c. New satellite carriers and new broadcast stations

Both DIRECTV and LTVS raise the possibility that a carrier might be allowed to refuse to carry new stations that go on the air after the carrier has begun serving a particular market. DIRECTV Comments at 12; LTVS Comments at 9-10. The Act does not allow a carrier to do so: it requires a carrier to "carry upon request the signals of *all* television broadcast stations located within that local market." 47 U.S.C. § 338(a)(1) (emphasis added).

¹¹ "In general, a cable operator may change its choice of principal headend only for good cause (e.g., where the system adds communities that necessitate redesignation or relocation of its headend.) An operator making any subsequent changes in its principal headend must notify all stations carried on its system pursuant to the must-carry rules at least 60 days before the change takes place, and include the new designation in its public file." *Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965 ¶ 10 (1993).

DIRECTV's technical objection to carrying new stations -- that it may lack capacity on its spot-beam satellite -- is without merit. Carriers can and do carry local stations on their national, CONUS-beam satellites; indeed, DIRECTV is today delivering scores of stations in that way.¹³ Assuming that spotbeam satellites become operational in the next couple of years, the carriers' CONUS satellites will still be active and operational. Although a carrier may in the future prefer to rely principally on spot-beam satellites to carry local stations, there is no reason carriers cannot continue to use capacity from their existing CONUS satellite to deliver certain local channels in the few markets in which that might be necessary. (Of course, as a practical matter, there are likely to be very few newly licensed TV stations over the next few years in any event.¹⁴) If a carrier needs to deliver one or two stations in a local market on its principal national beam, rather than on a spotbeam, customers should still be able to view the new channels without buying additional equipment, since all customers presumably have dishes and receivers capable of receiving programming from the national satellite.

d. Timing of carriage

The Act requires a carrier to retransmit *all* local stations *simultaneously* under Section 122. 47 U.S.C. § 338(a)(1); ALTV Comments at 38-42 (setting forth detailed schedule for

¹² See Network Affiliates Comments at 6; ALTV Comments at 37; NAB Comments at 3.

¹³ See *Dishing It Up with Eddy*, Cable World, 2000 WL 12303096 (June 5, 2000) (DIRECTV plans to put up local stations in 35 markets "on the cluster of satellites where all the other services are"); DIRECTV web site, <<http://www.directv.com/howtoget/howtogetpages/0,1076,224,00.html>> (visited August 31, 2000) (listing 25 markets in which DIRECTV today delivers local stations to viewers "with any DIRECTV system," *i.e.*, through transmission on the principal CONUS satellite).

¹⁴ The Commission is no longer accepting new applications for NTSC stations, and is not likely to grant more than a modest number of pending analog applications in the top 50 or 60 markets that DIRECTV and EchoStar plan to serve. Nor is the Commission likely to approve many additional digital stations in those markets. As a result, the carriers should have little

notices). Despite the clarity of the statutory language, BellSouth argues that carrier should be allowed to begin carrying retransmission consent stations and then wait three months -- and in some cases, for an indefinite longer period -- before beginning to deliver the remaining stations in the market. BellSouth Comments at 9-10. Startlingly, for example, BellSouth argues that carriers should be able to cite amorphous “circumstances outside of [its] control” or “negotiation of necessary logistics” as a reason not to carry local stations. *Id.* But the Act gives satellite carriers no right to rely on such self-serving excuses: if a satellite carrier is not prepared to carry all local stations at all times when it carries any local stations, it must forego use of the Section 122 compulsory license to carry any of them. In other words, the Act simply does not (after the end of 2001) grant carriers a compulsory license to carry individual stations -- whether for three days, three months, or otherwise -- but only a license to carry all of the stations in the market.

difficulty in delivering the small number of additional stations that may go on the air in the markets they serve.

e. **The “consistent election” issue**

In its Comments, BellSouth belatedly addresses an issue on which the Commission has already sought -- and received -- extensive comments and reply comments in another proceeding (CS Docket No. 99-363): whether TV stations should be required to make the same election between retransmission consent and mandatory carriage as to all MVPDs in the local market. NAB, along with many other parties, made filings on that issue in February and March 2000 in Docket No. 99-363. In its First Report & Order in that Docket, the Commission noted these comments and stated that it would adopt implementing rules “in a separate order within the time limit established by Congress.” 15 FCC Rcd. 5445 n.4 (released Mar. 16, 2000).

NAB hereby incorporates its Comments and Reply Comments in Docket No. 99-363 on this issue. As set forth in those filings, the SHVIA does not call for, and the Commission lacks the authority to impose, a requirement that stations make the same election for all MVPDs in their market.

2. Definitions

NAB and LTVS agree with the Commission’s tentative conclusion that satellite stations are entitled to carriage under the Act as “television broadcast stations.” LTVS Comments at 11. DIRECTV, however, urges the Commission to exclude satellite stations, because (in DIRECTV’s view) they will always “substantially duplicate” another station in the market. DIRECTV Comments at 13-14. Although in some cases satellite stations may indeed fall within the “substantial duplication” rule, there is no need to exclude all satellite stations from coverage under Section 338(a)(1). Rather, the same “substantial duplication” rules (and exceptions) should apply to satellite television stations as to any other stations. *See* LTVS Comments at 11

(“regulations should require satellite carriers to carry [satellite television] stations . . . unless they substantially duplicate another station in the local market.”) For example, if a satellite station is either licensed to a community in a different state, *see* 47 U.S.C. § 338(b)(2), or is in a different DMA from the “mother station,” it would be entitled to carriage under the package license provisions regardless of any claimed duplication.

B. Market Definitions

1. Market Modification

As the Commission pointed out in its NPRM, in the cable context, Congress specifically provided for market modification procedures in Section 614(h)(1)(C) of the 1992 Act. The Commission has issued regulations implementing that provision and has adjudicated many market modification disputes between cable systems and local television stations.

In the SHVIA, by contrast, Congress did not expressly provide for a market modification procedure. Congress defined the term “local market” generally as the Nielsen-defined Designated Market Area. 47 U.S.C. § 338(a)(1) (mandatory carriage of all stations in “local market”), § 338(h)(3) (defining “local market”).

Whether or not the Commission has the authority to adopt a *balanced* market modification procedure such as that applicable in the cable context, it clearly could not adopt DIRECTV’s proposal to adopt a *one-way* market modification procedure that would solely benefit satellite carriers. DIRECTV Comments at 17-23. Under that grossly unfair proposal, the Commission could *remove* stations from a particular market at the request of a satellite carrier, but could never engage in any market modification requested by a station. *Id.* The Commission should swiftly reject this “heads I win, tails you lose” proposal.

2. The Commission Should Reject DIRECTV's Proposal to Exclude Certain Stations From Much of the Local Market

DIRECTV asks the Commission's blessing to twist the SHVIA to permit it to retransmit certain stations selected by DIRECTV within a much smaller area than the other stations in the same market. DIRECTV Comments at 23-24. DIRECTV's proposal has nothing to do with saving channel capacity, since it will need to devote satellite space to the station in any event. Rather, DIRECTV's objective is purely punitive: to shrink the coverage areas of certain stations solely to make carriage by DIRECTV less attractive to those stations. The Commission should reject this proposal, which would hand satellite carriers a truncheon with which they could pummel the package license that Congress thought it had enacted.

DIRECTV contends that the Act "does not specify that a broadcaster's carriage rights extend through the DMA in which the broadcaster is located." DIRECTV Comments at 23. But in fact, the language and structure of the Act make clear that "carry all" means carriage throughout the local market. That is, the geographic scope of the mandatory carriage obligation is precisely the same as the scope of the compulsory license granted by Congress -- namely, the "local market," which generally means the DMA.

Congress' intention on this score is perhaps most dramatically illustrated by the Act's provisions about "substantial duplication," which are premised on the requirement that a station be carried throughout the local market. Section 338(c)(1) allows carriers (subject to certain exceptions) to decline to carry a particular station if (a) it "substantially duplicates" another local station that is offered by the satellite carrier or (b) is an affiliate of the same network as another local station offered by the satellite carrier and is in the same state as that station. Similarly, Section 338(h)(7) excludes translator stations from the definition of "television broadcast

station,” thereby relieving satellite carriers of any obligation to carry translators. *These provisions would make absolutely no sense if carriers could decline to carry stations throughout the local market.*

Consider, for example, how the DIRECTV proposal would play out in the Salt Lake City local market, which encompasses nearly the entire state of Utah as well as several counties in other states. The stations in Salt Lake City serve the entire DMA over-the-air through a carefully planned series of satellite and translator stations. *See, e.g., Warren Publishing, Television Factbook*, at B-267 through B-278 (2000 ed.) (listing hundreds of translators in Utah). If the Commission were (mistakenly) to adopt DIRECTV’s radical proposal, satellite carriers would be able to:

- single out any Salt Lake City station of the DBS company’s choice to be limited to the Grade B contour of its principal tower, which covers only a small portion of the Salt Lake City DMA;
- refuse to carry any translator that retransmits the Salt Lake City station, since translators are excluded from the definition of “television broadcast station”; and
- refuse to carry any satellite station that retransmits the Salt Lake City station, on the grounds that the satellite station “substantially duplicates the signal of another local commercial television station which is secondarily transmitted by the satellite carrier within the same local market” (Section 338(c)(1)).

The net result would be a nearly total destruction of the package license principle: a carrier would be able to use the Section 119 compulsory license to deliver “favored” local stations to everyone in the state of Utah, while limiting “disfavored” stations to a few dozen miles around Salt Lake City.

The same unconscionable abuse could easily occur in New Mexico, where virtually the entire state falls within a single DMA, Albuquerque-Santa Fe. In New Mexico, as in Utah, most

of the state is served over-the-air by a network of translators and satellite stations -- which the DBS companies would decline to carry, citing the provisions described above. Again, DIRECTV or EchoStar could single out particular stations to be “punished” by limiting them to a radius of 50 or 60 miles around Albuquerque, thereby depriving all other New Mexico viewers of those stations.

While Utah and New Mexico are perhaps the most dramatic examples of the mischief that satellite carriers could make through their misreading of the Act, many other local markets extend well beyond the Grade B contour of the principal transmitter of the local stations. The local Washington, D.C.-Hagerstown, Maryland market, for example, includes counties in Pennsylvania and West Virginia that are far beyond the Grade B contour of the principal transmitters of the Washington stations.

Congress plainly did not intend to give satellite carriers the unilateral power to destroy the package license regime by singling out “disfavored” stations to be given a shrunken coverage area, thereby wreaking havoc with intramarket competition. Rather, the only logical reading of the Act is that the area in which the package license obligation applies is coextensive with the area covered by the new Copyright Act compulsory license, namely the “local market.” *Compare* 17 U.S.C. § 122(a) (compulsory license extends throughout “local market”) *with* 47 U.S.C. § 338(a)(1) (carriage obligations for stations in the “local market”).

That conclusion is buttressed by other provisions of the SHVIA, which make clear that Congress would not tolerate discrimination by satellite carriers between stations carried under retransmission consent and stations that insist on carriage under Section 338(a)(1). It would do violence to congressional intent to conclude that satellite carriers cannot discriminate against certain local stations in channel positioning or price, but *are* allowed to engage in wholesale

discrimination by delivering those stations to a much smaller geographic area than the other local stations. The Commission should reject DIRECTV's discriminatory and market-meddling proposal.

3. Updating of Nielsen DMA Lists

The SHVIA requires the Commission to use the 1999-2000 Nielsen DMA lists for the initial election by stations between retransmission consent and carriage under the package license. As the Network Affiliates point out, that means that the 1999-2000 lists are the correct ones for use in the fall of 2001. Network Affiliates Comments at 7. The Commission should update the Nielsen DMA definitions for the next satellite election cycle. The Commission should not play games in this area by picking and choosing different Nielsen lists for different markets, as BellSouth puzzlingly suggests. BellSouth Comments at 12-13.

C. Delivery of a Good Quality Signal to a Local Receive Facility

1. Satellite Carriers Cannot Refuse to Carry Local Stations Based on Complaints about Signal Quality

As explained in NAB's Comments, satellite carriers operating under the SHVIA, unlike cable systems operating under the 1992 Cable Act, do not have the option of holding a station's carriage hostage during a dispute about a good quality signal. NAB Comments at 5-7. And even if the Commission had the power to allow carriers to do so, it should decline that invitation, since a litigious satellite carrier could, as a practical matter, unilaterally postpone the effective date of the package license regime for long periods by dragging out Commission and court enforcement proceedings. See NAB Comments at 7-9.

Requiring carriage while a “good quality signal” dispute is being adjudicated is entirely consistent with the natural business incentives here: stations want to deliver a good quality signal so that their programming will be delivered with the best technical quality, while carriers have every incentive to abuse the “good quality signal” issue as an excuse to postpone carriage of signals they would prefer not to carry. See NAB Comments at 7.

The satellite industry filings confirm these improper incentives by making clear that satellite carriers do indeed plan to exploit the signal quality issue to curtail their carriage of local stations as much as possible. DIRECTV makes no bones about this point: it disagrees with Congress’ fundamental policy decision to impose the package license principle, and asks the Commission to undermine that policy decision by imposing a uniquely costly and burdensome set of requirements on local TV stations about delivery of good quality signals. See DIRECTV Comments at 4-5 (demanding much higher standards for delivery of “good quality signals” to satellite carriers than to cable systems as a way to reduce the number of local stations to be carried). The Commission should thwart these efforts to rewrite the Act that Congress drafted.

2. The Commission Should Apply the Same “Good Quality Signal” Standard to Cable Systems and Satellite Carriers

As NAB and many other commenters pointed out in their initial comments, the SHVIA uses the phrase “good quality signal,” which is plainly intended to be synonymous with the phrase “signal of good quality” in the 1992 Cable Act, 47 U.S.C. § 534(h)(1)(B)(iii); 47 C.F.R. §76.55(c)(3). Applying the same standard to satellite as to cable will also help the Commission ensure that the regulatory regimes for all different types of MVPDs are as similar as possible.

Many commenters -- including two satellite carriers -- reached the same commonsense conclusion. BellSouth, for example, “supports the definition . . . traditionally used to define the

quality of signal to be delivered to a cable headed by a local television station.” BellSouth Comments at 19. As BellSouth correctly observes, “[s]ince those signal quality standards have been effective in the cable environment, there is no reason they will not work for satellite.” *Id.*; *see also* LTVS Comments at 16-17; ALTV Comments at 25-27 (“The same definition of a good quality signal should be applied for purposes of both the cable and satellite rules.”); Network Affiliates Comments at 11 (“the definition of a good quality signal in the satellite context should be equivalent to the definition in the cable context.”). As LTVS correctly observes, “[t]he only difference between cable and satellite technology is that TV stations deliver the signal to a cable system headend, whereas in [the] satellite context the signal is delivered to the local receive facility.” The cable standard, the parties agree, is delivery of a signal of -45 dBm for UHF signals and -49 dBm for VHF signals at the input terminals of the signal processing equipment.” Network Affiliates Comments at 11 n.34; *see* 47 U.S.C. § 534(h)(1)(B)(iii); 47 C.F.R. § 76.55(c)(3).

Alone among the commenters, DIRECTV demands that the Commission undermine, if not destroy, the principle of the package license by imposing a criterion for delivery of a “good quality signal” that is *much more demanding than the criterion applicable in the cable context*. DIRECTV Comments at 28. Instead of the long-settled signal quality standard applicable in the cable context -- a standard that stations are free to satisfy with an *over-the-air* signal -- DIRECTV insists that stations “contract with a local telecommunications common carrier to lease a *dedicated TV1-quality fiber circuit* from the broadcast station to the satellite carrier’s local receive facility.” *Id.* at 28 (emphasis added).

DIRECTV assertions about why it supposedly “needs” a higher quality signal than does cable (*id.* at 32) are belied by the comments of two other satellite carriers (LTVS and BellSouth),

which mention nothing of the kind, and instead recommend use of the same standard applicable to cable. Further undermining DIRECTV's unprecedented demand for high-cost direct feeds is the fact that, in the real world, satellite carriers often retransmit TV station signals that they receive over the air and *not* through a direct feed. In 1998, for example, EchoStar began (with no statutory authorization) carrying local stations in more than a dozen markets.¹⁵ EchoStar did not seek consent or cooperation from these stations; instead, it simply picked up the stations' signals over the air and began carrying them. To this day, EchoStar continues to carry some local TV stations simply by picking up their over-the-air signal.

The practical effect of demanding costly "TV-1" fiber circuits would be to impose a bar so high that many stations would be unable to leap over it. If the Commission were (mistakenly) to heed DIRECTV's advice, the very stations *least* able to pay for such costly technology -- those insisting on carriage -- would be required to do so to protect their rights to be carried by satellite carriers. DIRECTV apparently hopes that stations will *not* be able to pay these exorbitant costs, so that the stations will forfeit their right to carriage. *See id.* at 4-5.

The Commission should reject any proposal to impose a punitive, newly invented standard for good quality signal on stations seeking to enforce their right to carriage under the

¹⁵ *EchoStar Beams Local-into-Local*, Broadcasting & Cable (Jan. 12, 1998) ("In Charlie Ergen's brassiest move thus far, EchoStar Communications Corp. last week began beaming broadcast affiliates' local signals into their respective markets."); *EchoStar Makes Local TV Accessible*, Washington Times (Jan. 16, 1998) ("Echostar Communications Corp. today will start beaming local television stations into Washington via satellite -- the first such service offered in the United States.")

SHVIA.¹⁶ Such a new standard would work to defeat both Congress' specific directive to regulate the satellite industry in a manner comparable to cable and its general goal of protecting free television by ensuring that *all* local stations -- not just a few top stations cherrypicked by satellite carriers -- can reach local audiences.

3. The Satellite Industry Has Misunderstood the SHVIA's Provisions About Receive Facilities Outside of the Local Market

The SHVIA permits a satellite carrier to designate a local receive facility outside of the local market only if a majority of the local stations insisting on carriage agree to it. 47 U.S.C. § 338(b)(1). The comments filed by satellite companies reflect several distinct misreadings of this statutory provision, the first of which, curiously, is needlessly harmful to the satellite industry's interests.

First, DIRECTV assumes that stations could designate an out-of-market receive facility on their own, without the consent of the satellite carrier. See DIRECTV Comments at 29 (discussing possibility of "agreement by broadcast television stations to select a site other than the local receive facility designated by the satellite carrier"); *id.* at 30-31 (proposing standards for site that stations might seek to impose on carrier). Neither NAB nor, to our knowledge, any other party ever contemplated that stations could unilaterally select a non-market site and force a carrier to construct a receive facility there. Rather, as NAB and other commenters stated, the Act contemplates *negotiations* in which a carrier attempts to persuade more than half of the stations

¹⁶ Of course, if a station *chooses* to offer a dedicated fiber feed to a satellite carrier's local receive facility, it can certainly satisfy the "good quality signal" requirement in that way. But, as in the cable context, that is not the *only* way to deliver a good quality signal. See *Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2991 (1993). Indeed, because of the location of a particular receive facility, in some cases the best way to deliver a good quality signal to the satellite carrier may be through the over-the-air signal of a satellite station or translator.

insisting on carriage to agree to deliver a good quality signal to a particular location outside the local market.

Second, DIRECTV states that “Congress . . . placed the burden on television broadcast stations to agree upon an ‘acceptable’ alternative [receive] facility.” DIRECTV Comments at 28. This claim is wrong in the opposite direction: just as stations could not unilaterally select a non-market site without the consent of the satellite carrier, stations have no duty to agree to a non-market facility. The Act simply provides that a station must bear the costs of delivering a signal to a non-market facility only if a majority of the local stations have agreed on that facility. 47 U.S.C. § 338(b)(1). There is no compulsion, just an opportunity for voluntary agreement.

Third, as NAB pointed out in its Comments, the SHVIA makes unmistakably clear that a carrier may not require a station to deliver a good quality signal to a non-local receive facility unless more than half of the stations insisting on carriage agree. NAB Comments at 11-12. Many commenters recognized this same point. See ALTV Comments at 31-33; Network Affiliates Comments at 10-11; LTVS Comments at 15-16. Nevertheless, BellSouth urges the Commission to give satellite carriers “maximum latitude and discretion . . . to designate either an in-market or out-of-market reception point.” BellSouth Comments at 16. But it is precisely because Congress did not wish to give carriers the “latitude” to select an out-of-market reception point -- potentially one hundreds or thousands of miles away -- that it permitted a carrier to do so only if a majority of the local stations insisting on carriage agreed to it.

Fourth, BellSouth also urges the Commission to adopt an unnecessary new regime, never contemplated by Congress, in which stations would be required to negotiate in good faith with carriers over non-market receive points. BellSouth Comments at 16-18. Congress, of course, knows how to require parties to negotiate in good faith -- having done so in another part of the

Act -- but expressly declined to do so here. Nor could such a needless regulatory burden be justified based on parity with cable: stations have no obligation to engage in any comparable “good faith” negotiations with cable. And while requiring negotiations in good faith might sound benign, recent history shows that certain satellite carriers can and will force broadcasters to defend themselves in costly “good faith” proceedings before the Commission whenever the satellite carrier does not get its way in contract negotiations.¹⁷ In this context, moreover, any “good faith” obligation would be hopelessly complex to administer, since a carrier would need to show a lack of good faith negotiations not just by a single station but by *all* of the stations in the market. Congress gave stations the absolute right to refuse to agree to a non-local receive facility, and there is no reason for the Commission to create an administrative jungle about negotiations to waive that right.

4. “Minority” Stations Should Be Allowed to Protest Non-Local Receive Facilities That Would Undermine the Purposes of the SHVIA

In the cable context, the Commission will hear complaints about the designation of a cable headend if that designation would “undermine or evade” the requirements of the must-carry rules applicable to cable systems. *See* 47 C.F.R. § 76.(5)(pp) (definition of “principal headend”). Applying that principle to the satellite context, the Commission should permit “minority” stations to complain about the location of an out-of-market receive facility if the location of that facility would undermine or evade the purposes of the package license regime. *See* NAB Comments at 12. Although the satellite industry asserts that the Commission lacks authority to create such a procedure, *see, e.g.*, DIRECTV Comments at 29-30, the Commission

¹⁷ *See* www.dishnetwork.com (describing multiple proceedings initiated by EchoStar claiming supposed lack of good faith).

has such authority as part of its overall responsibility to issue regulations sensibly implementing the provisions of the SHVA. 47 U.S.C. § 338(g).

D. Duplicating Signals

As DIRECTV acknowledges, the current test for “substantial duplication” is “simultaneous broadcast of identical programming for more than 50 percent of the broadcast week.” DIRECTV Comments at 34. BellSouth urges the Commission to lower the threshold from 50% to 30%, while DIRECTV urges the Commission to adopt a complex new formula designed to enable carriers to block more local stations from carriage. BellSouth Comments at 20-21; DIRECTV Comments at 34-35. The Commission should reject these proposals, which would both undermine the basic package license principle that Congress endorsed and give satellite carriers a needless regulatory advantage over their cable competitors.

The Commission also sought comment about the definition of “television network” for purposes of Section 338(c)(1), which generally allows carriers to retransmit only one affiliate per “television network” per market. Most commenters, including two satellite carriers, agreed that the Commission should use for this purpose the same definition that is already codified in other parts of the SHVIA, namely that a “television network” is one that “offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated broadcast stations in 10 or more States.” 47 U.S.C. § 339(d). *See* BellSouth Comments at 21; LTVS Comments at 20.

DIRECTV, however, opposes that definition, and urges the Commission to redefine the term “television network” to encompass “both the traditional television networks *as well as nationally carried satellite stations.*” DIRECTV Comments at 35-36 (emphasis added).

Whether DIRECTV is referring to nationally carried broadcast TV stations or to nonbroadcast channels does not matter; in either case, DIRECTV's proposal conflicts with the express language of the SHVIA. The provision at issue -- Section 338(c)(2) -- permits a carrier to decline to carry a local station *only* if it substantially duplicates "another *local* commercial television broadcast station" carried by the satellite carrier in the same local market. 47 U.S.C. § 338(c)(2) (emphasis added). The Commission simply cannot read the term "another *local* commercial television broadcast station" to mean a *non-local* TV station or nonbroadcast satellite channel.

The practical significance of this last point is difficult to overstate. Satellite carriers today offer (or could easily offer), throughout the United States, so-called "grandfathered superstations" that are affiliates of the emerging WB and Paramount (formerly UPN) networks.¹⁸ EchoStar, for example, offers WPIX, a WB affiliate in New York City, and WSBK, a Paramount affiliate in Boston, to all of its viewers nationwide.¹⁹ If DIRECTV's theory were to be accepted, EchoStar could wipe out the carriage rights of every WB and Paramount station in the United States simply by continuing to offer WPIX and WSBK. DIRECTV could do the same simply by offering those same stations. Because Congress did not intend for its principle of universal carriage in each market to be sabotaged in this way, it insisted that non-carriage based on duplication be limited to *local* duplication.

The Act contains an exception to the "two affiliates of one network in one DMA" rule when the affiliates are licensed to communities in different states. 47 U.S.C. § 338(c)(1).

¹⁸ See 17 U.S.C. § 119(a)(5)(E) (excluding grandfathered superstations from limitation on delivery of network stations to "unserved households," thereby effectively allowing national delivery of these stations).

DIRECTV quotes the Conference Report about this provision in an effort to limit its application to the two illustrative examples mentioned there, one involving stations in New Hampshire and Boston, Massachusetts, and the other involving stations in New York and Vermont. DIRECTV Comments at 37-38. But there is no conflict between the Act and the Conference Report on this issue: the Act reaches any instance in which two affiliates of the same network are licensed to different states but within the same local market. 47 U.S.C. § 338(c)(1). While these instances are no doubt “unique and limited” (as the Conference Report indicates),²⁰ the Act is not restricted to the particular examples mentioned in the Conference Report. As one commenter points out, for example, there are two NBC affiliates licensed in the Washington, D.C.-Hagerstown, MD local market. Because one NBC affiliate is licensed to the District of Columbia while the second is licensed to Maryland, both stations are entitled to insist on carriage under Section 338.

E. Channel Positioning and Nondiscriminatory Access

The SHVIA requires carriers to retransmit “the signal of the local television broadcast stations in the station’s local market on contiguous channels.” 47 U.S.C. § 338(d). Most commenters recognized that the statutory reference to “local television broadcast stations in the station’s local market” includes *all* stations, including stations that are carried under retransmission consent. *See, e.g.*, NAB Comments at 15-16; ALTV Comments at 10-15.

One satellite carrier, however, takes issue with this straightforward reading of the Act. In its Comments, BellSouth argues that it should be free to place stations insisting on carriage on channels that are noncontiguous with the channels of local retransmission consent stations.

¹⁹ See EchoStar Web site, http://www.dishnetwork.com/software/third_level_content/locals/index.asp (visited Aug. 4, 2000).

²⁰ 145 Cong. Rec. H11795 (daily ed. Nov. 9, 1999).

BellSouth Comments at 24. In short, BellSouth seeks the FCC’s blessing to banish stations insisting on carriage to a forlorn corner of its channel lineup, far away from the most-heavily-viewed stations in the local market.

BellSouth’s proposal cannot be squared with the plain language of Section 338(d), which refers to *all* “local television broadcast stations . . . in the stations’ local market,” not simply to those carried at the station’s insistence. BellSouth’s reading would also work to defeat the basic goal of Section 338, which is to protect free television by ensuring that viewers have easy access to all local stations.

For its part, DIRECTV asks the Commission to rule that it can place local TV channels in a “neighborhood” that “consist[s] of contiguous channels [that are not] necessarily fully employed.” DIRECTV Comments at 40. NAB does not object to this “neighborhood” proposal, provided that:

- the neighborhood includes *all* the local stations, including retransmission consent stations;
- the stations are listed in the same order as their over-the-air channel numbers,
- the neighborhood includes only local TV stations; and
- a viewer will jump past any unused channel numbers when using any navigational device (*e.g.*, from Channel 9 to Channel 20 if there are no local channels in between).

In its Comments, NAB suggested a variety of requirements that the Commission should impose to ensure that satellite carriers comply with the statutory principle of nondiscrimination. NAB Comments at 16-17. For example, the Commission should require satellite carriers to offer all local stations as part of a single package; to charge no more for stations insisting on carriage than for other local channels; and to ensure that subscribers do not need to purchase special

equipment (such as a second dish) to receive the signals of stations insisting on carriage. NAB reaffirms those comments, and notes that both ALTV and Network Affiliates made similar proposals. *See* ALTV Comments at 16-23; Network Affiliates Comments at 15-18 (recommending adoption of rules similar to those applicable to open video systems).

F. Content to be Carried

The SHVIA requires the Commission to adopt regulations that are “comparable” to the statutory requirement that cable systems deliver, to the extent feasible, all “program-related material carried in the vertical blanking interval or on subcarriers.” 47 U.S.C. §§ 338(g), 534(b). The program-related material that is commonly included in the VBI is as follows:

- closed captioning information on line 21;
- parental advisory (V-chip) information on line 21;
- Transmission Signal Identifier (“TSID”) data on line 21;
- Automated Measurement of Lineups (“AMOL”) data on line 22, which is used by Nielsen to measure viewership of particular programs.

In addition, cable systems are now required to retransmit, and satellite carriers should likewise be required to carry, “the primary video [and] accompanying audio.” 47 U.S.C. § 534(b)(3)(A). The phrase “accompanying audio” includes not only the principal audio track but also the Second Audio Program (“SAP”) channel, including, when applicable, Spanish-language audio or the Video Description Service that the Commission has announced it will require to be provided by many stations.

DIRECTV confirms, as NAB anticipated, that it is perfectly capable of delivering line 21 of the VBI through its system, and does not mention any reason for dropping out any of the

program-related data on that line. DIRECTV Comments at 41. In addition, although not discussed in DIRECTV's comments, NAB understands that DIRECTV today is also capable of delivering AMOL (Nielsen rating) data on line 22 for those households that have the relevant type of Nielsen viewing meters. The Commission should require the carriage of this type of program-related data as well, unless the carrier can prove that it is infeasible to do so.

BellSouth complains about any requirement that it carry more than closed captioning in line 21. BellSouth Comments at 25. But since BellSouth is still setting up its system, and is not yet in the direct-to-home satellite business itself, *see id.* at 1-2, it can obviously engineer its system to transmit (and enable consumers to receive) all of the program-related material transmitted by stations.

EchoStar argues that it should be entitled to limit itself to the content that it claims it has agreed to carry in retransmission consent agreements. EchoStar Comments at 7. But the issue here is technical feasibility, not comparability to private agreements: unless a carrier can show that it would be unduly costly to transmit particular program-related material, the carrier is obligated to carry that material.

G. Material Degradation

The majority of commenters urge the uncontroversial position that the Commission should adopt regulations to ensure that the technical quality of local stations carried under the package license is no worse than that of other channels -- such as ESPN or CNN -- carried by the satellite carriers. *E.g.*, Network Affiliates Comments at 20-22; ALTV Comments at 34-37; LTVS Comments at 27. Congress directed the Commission to do as much when it required the Commission to issue regulations on signal quality "comparable" to those applicable to cable. 47 U.S.C. § 338(g). Cable systems, in turn, must carry local stations "without material degradation"

and with “no less [quality] than that provided by the system for carriage of any other type of signal.” 47 U.S.C. § 534(b)(4). There can be no serious dispute, therefore, that the Commission is required to issue regulations directing satellite carriers to do the same.

In its Comments, NAB proposed use of three objective criteria -- (a) carrier-to-noise (C/N) ratio, (b) bit error rates (BER), and (c) bit rate allocation for each channel -- that collectively provide a sound method for checking on whether a satellite carrier is “materially degrading” a local station’s signal in comparison to other channels. In addition, NAB proposed that carriers be required to treat TV station programming in the same manner as other programming of the same type -- for example, allocating more capacity to fast-moving sports programming than to slower-moving programming. NAB reaffirms the appropriateness of those standards.

While one satellite carrier, Local TV on Satellite, recognizes that “material degradation” includes “any instance where a broadcast station freezes, tiles or looks ‘dirty’ due to a satellite carrier’s choice of encoding or compression techniques,” LTVS Comments at 27, the objective criteria suggested by NAB are likely to be easier to implement and less likely to lead to disputes than any subjective standard.

Other satellite carriers, however, advocate that the Commission do nothing at all to define “material degradation” or to elaborate on the requirement that retransmitted TV stations have no worse quality than other channels. DIRECTV Comments at 43-45; EchoStar Comments at 7-8; BellSouth Comments at 25-26. The Commission should reject that suggestion, for at least two reasons. *First*, the Act *requires* the Commission to issue regulations comparable to those applicable to cable. *See* 47 U.S.C. § 338(g). Since the Commission has extensive, detailed regulations about material degradation for cable systems, it can scarcely decline to issue any

regulations at all for satellite carriers. *Second*, the satellite industry comments make no effort to conceal the carriers' distaste for the package license granted by Congress, and its determination to use "self-help" whenever possible to prevent stations from exercising their rights to carriage. Given that backdrop, it is particularly important for the Commission to adopt rules that will clearly and objectively define the "comparable" obligations on satellite carriers.

NAB has no objection to the use of reasonable compression techniques by satellite carriers. But the end result of those compression techniques must be that TV stations carried pursuant to Section 338 are given equal treatment with other channels carried by the satellite carrier, rather than being subject to uniquely unfavorable compression methods or other techniques.

H. Digital Television

NAB suggested in its Comments that the Commission defer until next year resolving how Section 338 should apply to carriage of the digital signals of local TV stations. NAB Comments at 21-22. DIRECTV makes essentially the same proposal. *See* DIRECTV Comments at 45 ("DIRECTV urges the Commission to commence a proceeding that will allow for more meaningful comment on these issues"). NAB renews its request that the Commission take that course.

When the Commission does issue rules governing carriage of digital signals by satellite, it should interpret the compulsory copyright license to require carriage of both the analog and digital signals of each station for so long as the station is broadcasting in both formats. The Commission should also find that the license requires carriers to retransmit a station's digital

signal in the same format in which it is broadcast, whether high definition television (“HDTV”) or otherwise. NAB Comments at 21.

NAB believes that -- contrary to the views expressed by the satellite industry -- the Act requires the carriage of both analog and digital signals, and that the Commission has no discretion to follow the satellite industry’s recommendation that the Commission reject dual carriage. *First*, Section 338(a)(1) itself provides a compulsory copyright license only for carriage of “all” television broadcast stations in the local market, which means both analog and digital stations. *Second*, Congress’ goal of protecting the market for free television, and Section 338(g) of the Act, require the Commission to issue regulations that treat satellite carriers and cable operators comparably. As NAB has explained in exhaustive detail in other filings, cable systems are required to carry both analog and digital signals during the transition. In any event, the Commission will be in a much better position to evaluate the matter next year, when the relevant technology will be further developed and the Commission will have issued regulations concerning digital must-carry for cable.

If the Commission does wish to issue interim regulations about satellite carriage of digital signals now, several commenters make the obvious point that carriers should not be able to discriminate among stations in the same local market. That is, if a carrier avails itself of the compulsory copyright license to carry both the analog and the digital signals of a particular station, the license should be understood as requiring it to carry both the analog and the digital signals of all the local stations. *E.g.*, NAB Comments at 22; ALTV Comments at 50.

I. Remedies

Perhaps the most important point about remedies is one discussed above: a carrier may *not* hold a station hostage based on a claim that the station does not deliver a good quality signal to the satellite carrier. Since a dispute over signal quality would not permit a carrier to decline to carry a station, a station's remedy for noncarriage would be in court, for copyright infringement. *See* Section 338(a)(2). At the same time, the parties could resolve any disputes about whether the station had delivered a good quality signal in a separate proceeding at the Commission. *See* Network Affiliates Comments at 25-26.

The Commission plainly does have authority -- indeed, the duty to resolve within 120 days -- disputes not only about the signal quality issue but also substantial duplication, channel positioning, and compensation for carriage. 47 U.S.C. § 338(f)(1). As many parties recognized, the Commission also has ancillary authority to issue regulations about enforcement of the "material degradation" and "content to the carried" provisions. *E.g.*, Network Affiliate Comments at 27-28; NAB Comments at 22.

The initial comments also contain several useful suggestions about the scope of remedies that the Commission may order. There appears to be a consensus that the following are appropriate and logical remedies: (a) an order requiring the satellite carrier to come into compliance immediately, (b) the imposition of forfeitures in appropriate cases for violations by satellite carriers, and (c) consideration of any violations in connection with future licensing proceedings for satellite carriers. *E.g.*, Network Affiliates Comments at 28.

Conclusion

The Commission should adopt strong and readily enforceable regulations for satellite carriers that will ensure -- as Congress intended -- that, after the transition period provided by

Congress, satellite carriers will deliver all local stations in those markets in which they choose to use the new Copyright Act local-into-local compulsory license. The Commission should reject the many proposals by the satellite industry to undermine that objective, and instead craft regulations consistent with Congress' goal of preserving free television and its decision to provide a license that would not sabotage that goal by distorting local broadcast markets.

Respectfully submitted,

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