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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:	)	
	)	
Broadcast Signal Carriage Issues	)	CS Docket No. 00-96
	)	
Retransmission Consent Issues	)	CS Docket No. 99-363

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REPORT AND ORDER

Adopted: November 29, 2000 **Released: November 30, 2000**

By the Commission:

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I. INTRODUCTION

1. Section 338 of the Communications Act of 1934 ("Act"), adopted as part of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA")[1] requires satellite carriers, by January 1, 2002, "to carry upon request all local television broadcast stations' signals in local markets in which the satellite carriers carry at least one television broadcast station signal," subject to the other carriage provisions contained in the Act. Until January 1, 2002, satellite carriers are granted a royalty-free copyright license to retransmit television broadcast signals on a station-by-station basis, subject to obtaining a broadcaster's retransmission consent. This transition period is intended to provide the satellite industry with time to begin providing local television signals into local markets, otherwise known as "local-into-local" satellite service. In this *Report and Order*, we adopt rules to implement the provisions contained in Section 338.

2. In a separate proceeding, the Commission has implemented new amendments to Section 325 of the Act per the instructions set forth in the SHVIA.[2] Good faith negotiation regulations and the prohibition on retransmission consent exclusivity are among the requirements the Commission has already adopted.[3] However, the Commission deferred adopting rules concerning the satellite retransmission consent/mandatory carriage election cycle until we considered all of the rules necessary for a local broadcast station to gain carriage on a satellite carrier under both Sections 325 and 338 of the Act. Thus, we adopt herein, election cycle rules and related policies for satellite broadcast signal carriage.

[1]Pub. Law 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999). *See* Appendix F. The Commission adopted the *Notice of Proposed Rulemaking* to implement Section 338 on May 31, 2000. *See Implementation of the Satellite Home Viewer Improvement Act of 1999—Broadcast Signal Carriage Issues*, Notice of Proposed Rulemaking, 15 FCC Rcd 12147 (2000)(hereinafter, "*Notice*").

[2]*See Implementation of the Satellite Home Viewer Improvement Act of 1999—Retransmission Consent Issues*, Notice of Proposed Rulemaking, 14 FCC Rcd 21736 (1999); *Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 (2000).

[3]*See* 47 C.F.R. §76.65.

II. BACKGROUND

3. In the SHVIA, Congress amended the Communications Act and Copyright Act to permit satellite carriers to provide the signals of local broadcast stations to subscribers residing in the broadcaster's market. Commencing on January 1, 2002, satellite carriers that provide local-into-local retransmission of broadcast stations pursuant to the statutory copyright license[4] must "carry upon request the signals of all television broadcast stations within that local market . . ."[5] The SHVIA requires the Commission to issue rules implementing this carriage requirement within one year of the SHVIA's enactment on November 29, 1999. In establishing such a deadline, Congress implicitly recognized that sufficient time was needed for satellite carriers to comply with the carriage requirements prior to January 1, 2002. Congress has indicated that the satellite carriage requirements should be comparable to the cable carriage requirements, noting in particular, paragraphs (3) and (4) of Section 614(b) and paragraphs (1) and (2) of Section 615(g), presently found in Title VI of the Act.[6]

4. In *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues* ("*Broadcast Signal Carriage Order*"),[7] the Commission implemented the cable broadcast signal carriage provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[8] This statute amended the Act to provide television stations with certain carriage rights on local market cable television systems. Sections 614 and 615 of the Act contain the cable television "must carry" requirements for commercial and noncommercial television stations, respectively.[9] Section 325 contains retransmission consent requirements pursuant to which cable operators may be obligated to obtain the consent of commercial broadcasters before retransmitting their signals. Within local market areas, defined by Nielsen Media Research's Designated Market Areas ("DMAs"), commercial television stations may elect cable carriage under either the retransmission consent or mandatory carriage requirements. Noncommercial television stations have a right to mandatory carriage under the Act, but do not have statutory retransmission consent rights.

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[4]*See* 17 U.S.C. §122(a) (*as amended by* §1002 of the SHVIA). Section 122 of the Copyright Act is attached as Appendix I of the *Report and Order*.

[5]47 U.S.C. §338(a)(1) (*as amended by* §1008 of the SHVIA).

[6]47 U.S.C. §338(g). The legislative history states that the procedural provisions applicable to Section 338 (concerning costs, avoidance of duplication, channel positioning, compensation for carriage, and complaints by broadcast stations) generally parallel to those applicable to cable systems. *See* Joint Explanatory Statement of the Committee of Conference on H.R. 1554, 106th Cong. ("Conference Report"), 145 Cong. Rec. H11795 (daily ed. Nov. 9, 1999).

[7]*Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues,* Report and Order, 8 FCC Rcd 2965 (1993)("Must Carry Order"). The Commission later clarified the broadcast signal carriage requirements. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues,* Order, 8 FCC Rcd 4142 (1993) ("*Clarification Order*").

[8]Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[9]47 U.S.C. §§534 and 535; 47 C.F.R. §76.56. The Act's cable carriage provisions are found at Appendices G and H, attached to this *Report and Order*.

5. It is important to note that the satellite carriage requirement is different from the cable carriage requirement. Under Sections 614 and 615 of the Act, television stations can insist on carriage on a cable system even if the cable operator does not carry any local signals. Under Section 338 of the Act, the Commission cannot require satellite carriers to carry television stations in markets where they do not offer local-into-local service. There are other distinctions between cable operators and satellite carriers that must be noted as well. For example, a satellite carrier has a general obligation to carry all television stations in a market, if it carries one station in that market through reliance on the statutory copyright license, without a specific statutory reference to a channel capacity cap, while a cable system with more than 12 usable activated channels is required to devote no more than one-third of the aggregate number of usable activated channels to local commercial television stations that may elect mandatory carriage rights.[10] Satellite carriers also provide video programming on a national basis through a space-based delivery facility while cable operators provide video service on a local basis through a terrestrial delivery facility.

6. To understand the circumstances surrounding the implementation of Section 338, it is also necessary to discuss current satellite delivery of television broadcast stations and how subscribers access broadcast programming. We focus on DBS operators because they are currently providing local-into-local service. First, to obtain local television signals for local distribution, DBS operators receive the signals over-the-air, or have arrangements with local stations to deliver their signals by other means, to a receive facility in or near the stations' television market. Presently, a local exchange carrier's facility is used as a collection point for local television station signals.[11] Once received, the satellite carrier converts the analog television broadcast signals into digital data bitstreams. The digitized television signals are then sent, using a fiber optic line or other means, to the satellite carriers' programming facility, or group of facilities, where they are then uplinked to the appropriate satellite. These satellites, orbiting around the equator at 22,300 feet at various locations above the United States, contain transponders[12] that are used to retransmit local television station signals and other programming to subscribers' homes in a certain television market.[13]

7. Satellite television subscribers must buy or rent a small parabolic "dish" antenna, which is mounted on or near the home, to receive the satellite delivered signals. Satellite subscribers must also purchase or rent a set top box that converts the incoming digital signal to an analog format so that programming is viewable on the television receiver. Subscribers pay a subscription fee to receive both local television station signals and other programming services. While each television station carried by a satellite carrier occupies transponder capacity, a subscriber cannot purchase and view packages of non-

[10] 47 U.S.C. §534(b)(1)(B).

[11] This location is known as the point of presence ("POP").

[12] A transponder is that portion of a satellite used for reception and retransmission of a signal or signals in a certain bandwidth. Each satellite located at one of the three prime continental United States ("CONUS") orbital slots is capable of broadcasting on 32 frequencies. Through the use of digital compression technology, each frequency is currently capable of delivering approximately ten distinct channels of video programming to a subscriber's dish. Thus, each prime CONUS orbital slot is presently capable of delivering approximately 320 channels of traditional video programming. *See Satellite Broadcasting and Communications Association, et. al., v. FCC*, Complaint for Declaratory and Injunctive Relief, at 14 (filed in the context of SBCA's court challenge to the constitutionality of Section 338, noted in more detail below).

[13] DBS operators use the 12 GHz frequency band (12.2-12.7 GHz).

local television station signals. Satellite carriers package video programming, including bundles of local television station signals, into different tiers of service. Services are also available on an a la carte basis where a single channel or program is sold separately.

8. Satellite carriers organize programming according to channel neighborhoods where certain genres of programming, such as sports or music, are grouped together. Presently, local-into-local television stations carried under retransmission consent are found together in such neighborhoods.[14] As of November 27, 2000, DirecTV offers local-into-local service in 38 television markets whereas Echostar offers such service in 34 television markets.[15]

III. EXECUTIVE SUMMARY

9. This *Order* implements carriage rules for satellite carriers pursuant to Section 338. The decisions are summarized as follows:

- **Commencing Carriage.** We find that commercial television stations must make an election between retransmission consent and mandatory carriage every three years for both satellite carriers and cable operators. The first satellite election cycle, however, will be for four years, to align it with the cable election cycle beginning in 2006. Under the SHVIA, a television station, in a market with local-into-local service, must request carriage. We find that for the first cycle, commercial television stations must request carriage by making an election by July 1, 2001, for carriage to commence on January 1, 2002. We further find that commercial television stations must request carriage by making an election, for all cycles thereafter, by October 1st of the year preceding the new election cycle. Noncommercial educational television stations must request carriage on the same dates as commercial television stations, even though they are not subject to an election cycle. We establish separate timeframes for commencing carriage when a new television station begins service or when a satellite carrier commences new local-into-local service.

- **Market Determinations.** Under the SHVIA, Nielsen's 1999-2000 publications determine market areas at the commencement of the first election cycle. We find, however, that a satellite carrier may use future Nielsen publications to add counties to markets where it provides local-into-local service. A television station's local market for satellite carriage purposes is generally determined by the location of its city of license. In the cases where the station's city of license is located in a county outside the local market, but Nielsen has assigned the station to that market, it may assert carriage rights in the market to which it was assigned. We also find that the Commission cannot modify a television market under Section 338 as it is authorized to do so under Section 614(h) in the cable carriage context.

- **Receive Facilities.** The SHVIA establishes the "local receive facility" as the point in a market where a carrier collects the signals of local television stations before retransmitting them via satellite. The local receive facility, in essence, functions like a cable operator's principal headend. Under the

[14]Both Echostar and DirecTV are carrying the local ABC, NBC, CBS, and Fox network affiliates. These satellite carriers are also carrying other stations in certain markets, such as WPIX in New York and KTLA in Los Angeles.

[15]Television markets with local-into-local satellite service currently provided by DirecTV and Echostar are noted in Appendices D and E. *See* http://www.dishnetwork.com (Echostar) and http://www.directv.com (DirecTV) (as of November 27, 2000).

SHVIA, a satellite carrier determines the location of the local receive facility in each market it provides local-into-local service. We interpret the SHVIA to permit satellite carriers to construct another facility, one that may be outside the local market, if 50% of the broadcasters in the relevant market agree to the location of such a facility. It should also be noted that the SHVIA requires television stations to pay for the costs of providing a good quality signal to any receive facility. We adopt rules for defining a good quality television station signal comparable to the rules established in the cable context. Notably, a satellite carrier does not have an obligation to carry a television signal that does not meet the Commission's good quality signal standard, until the time when the television station pays to cure the signal strength deficiency.

- **Duplicating Signals.** Under the SHVIA, a satellite carrier is not required to carry duplicative signals of television stations in the same market unless the stations at issue are network affiliates licensed to communities in different states. We adopt a duplication definition for commercial television stations that mimic the definition established in the cable carriage context. We also interpret the SHVIA's duplication provisions to mean that a satellite carrier is not obligated to carry two of the same network affiliates, even if their signals do not duplicate.

- **Noncommercial Television Stations.** We find that a satellite carrier must carry all non-duplicative noncommercial educational television stations in a market where local-into-local service is provided. We also find that a satellite carrier cannot satisfy its public interest set aside obligations through the carriage of noncommercial television stations.

- **Channel Positioning.** We implement the SHVIA's requirement that a satellite carrier must carry all local television stations in a contiguous manner on its channel line-up. The SHVIA also requires the Commission to establish rules prohibiting non-discriminatory treatment of television stations carried under the copyright compulsory license. We find that a satellite carrier must treat television stations that elect mandatory carriage in the same manner on its electronic program guide as it does stations that elect retransmission consent. We also find that a satellite carrier must offer television stations that elect mandatory carriage to subscribers on comparable price terms as it offers television stations that elect retransmission consent.

- **Content to be Carried.** The SHVIA requires the Commission to apply the cable carriage content requirements to satellite carriers. Given this directive, we implement rules requiring a satellite carrier to carry the primary video and accompanying audio of local television stations. We also implement rules requiring satellite carriers to carry all program-related material contained in a television station's vertical blanking interval, unless carriage of such data is technically infeasible.

- **Material Degradation.** The SHVIA requires the Commission to apply the material degradation principles established in the cable carriage context to satellite carriers. Given this directive, we find that a satellite carrier must provide the same degree of picture quality to television stations that elect mandatory carriage as it provides to television stations that elect retransmission consent.

- **Compensation.** We implement the SHVIA's directive prohibiting satellite carriers from requesting compensation in return for carriage.

- **Digital Television.** The Notice of Proposed Rulemaking in this proceeding raised several questions regarding the carriage of digital television signals by satellite carriers. The broadcasting industry generally supported satellite digital carriage requirements while the satellite industry opposed any digital carriage requirements. We refrain from addressing the merits of such requirements and state

that the satellite digital carriage issues will be addressed at the same time the Commission considers cable digital carriage issues.

- **Remedies.** The SHVIA provides the United States District Courts with exclusive jurisdiction to remedy a satellite carrier's failure to carry a local television station. However, the SHVIA also provides that the Commission shall order the satellite carrier to take appropriate remedial action if it fails to meet its obligations under Section 338. We interpret the SHVIA to require a television station to seek remedies for non-carriage by a satellite carrier under the statute in the court system. However, a television station that seeks remedial action and a carriage order under our rules may file a complaint with the Commission. We also interpret the SHVIA to allow the Commission to adjudicate satellite carriage complaints for each substantive topic enumerated in Section 338, including the content-to-be-carried and material degradation provisions.

IV. SATELLITE BROADCAST SIGNAL CARRIAGE

A. Constitutional Matters

10. Questions have been raised relating to the constitutionality of Section 338. The satellite industry argues that Section 338's carriage requirements are unconstitutional for several reasons. The Satellite Broadcasting and Communications Association ("SBCA") submits that mandatory carriage violates the First Amendment, by infringing on a carrier's editorial control in selecting programming, as well as the Takings Clause of the Fifth Amendment, by depriving the carrier of valuable spectrum without just compensation.[16] SBCA additionally argues that, by linking a statutory copyright license to a requirement to engage in certain speech, Congress has exceeded its authority under the Copyright Clause of the Constitution.[17] Echostar agrees and also asserts that Section 338 does not provide the Commission with any ability to salvage it from unconstitutionality, nor does the Act give the Commission any opportunity to alleviate the statutory burdens.[18]

11. The National Association of Broadcasters ("NAB") argues that the Act does not limit a satellite carriers' speech in any way, and carriers remain free to offer any programming for which they acquire the necessary rights in the marketplace.[19] It argues that the compulsory license is a transfer of rights from copyright owners to carriers, not a restriction of any kind. According to NAB, the SHVIA

[16]SBCA Comments at 10. We note that subsequent to the issuance of the *Notice* in this proceeding, SBCA, DirecTV and Echostar filed a civil complaint on September 20, 2000, in the United States District Court for the Eastern District of Virginia, Alexandria Division, claiming that Section 338 is unconstitutional. The Commission, the United States Copyright Office, and the United States of America were named as defendants. Similar to their comments filed in this proceeding, the satellite industry argues that Section 338 violates the Free Speech and Free Press clauses of the First Amendment, the Takings and Due Process clauses of the Fifth Amendment, as well as the Copyright clause of the Constitution. We note that the U.S. District Court for the Southern District of Florida has found that the SHVIA is constitutional under the First Amendment. *See CBS v. Echostar*, Case No. 98-2651-CIV-NESBITT, Order Granting Motion for Preliminary Injunction (S.D. Fla., Sept. 29, 2000)("In effect, Echostar seeks to 'make commercial use of the copyrighted works of others. There is no first amendment right to do so.'") *citing United Video, Inc. v. FCC*, 890 F.2d 1173, 1191 (D.C. Cir. 1989).

[17]SBCA Comments at 3.

[18]Echostar Comments at ii.

[19]NAB Reply Comments at vii.

gives satellite carriers a royalty-free statutory license to override the normal rights of copyright owners by retransmitting copyrighted programming, under specified circumstances.[20] Paxson states that the Supreme Court has concluded that the cable carriage requirements satisfy the intermediate scrutiny test under *O'Brien* because they advance the important government interests of preserving the benefits of free over-the-air broadcasting and promoting the widespread dissemination of information from a multiplicity of sources.[21] According to Paxson, the same government interests are protected and promoted through comparable carriage requirements on the satellite industry.[22]

12. In the legislative history accompanying this section, Congress noted its belief that the carriage requirements are constitutional under the First Amendment:

> The conferees believe that the must carry provisions of this Act neither implicate nor violate the First Amendment. Rather than requiring carriage of stations in the manner of cable's mandated duty, this Act allows a satellite carrier to choose whether to incur the must carry obligation in a particular market in exchange for the benefits of the local statutory license. It does not deprive any programmers of potential access to carriage by satellite carriers. Satellite carriers remain free to carry any programming for which they are able to acquire the property rights. The provisions of this Act allow carriers an easier and more inexpensive way to obtain the right to use the property of copyright holders when they retransmit signals from all of a market's broadcast stations to subscribers in that market. The choice whether to retransmit those signals is made by carriers, not by the Congress. The proposed licenses are a matter of legislative grace, in the nature of subsidies to satellite carriers, and reviewable under the rational basis standard.[23]

The Conferees also noted that they were "confident that the proposed license provisions would pass constitutional muster even if subjected to the *O'Brien* standard [intermediate First Amendment scrutiny] applied to the cable mandatory carriage requirement."[24]

13. We observe that Congress enacted Section 338 to preserve free over-the-air broadcasting, promote a multiplicity of voices, and promote fair competition between video providers. The SHVIA furthers these important government interests by establishing provisions ensuring that satellite carriers treat all local television stations seeking carriage in a fair manner. The goals, and the means to further them, are similar to those Congress enacted in 1992 when it promulgated the cable carriage provisions in the 1992 Cable Act.[25] With regard to the arguments raised by SBCA, we find that the claims it raises, excepting the Copyright Clause claim, are similar to those the cable industry raised against the constitutionality of Sections 614 and

[20] *Id.* at 3.

[21] Paxson Reply Comments at 1-2.

[22] *Id.*

[23] *See* Conference Report at H11795.

[24] *Id.*

[25] Congress established cable carriage requirements in Sections 614 and 615 of the Act to: (1) preserve the benefits of free, over-the-air local broadcast television; (2) promote the widespread dissemination of information from a multiplicity of sources; and (3) promote fair competition in the market for television programming. *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445, 2469 (1994)("Turner I").

615 of the Act in 1992. In the *Turner* cases, the Supreme Court found that the Act's cable carriage provisions were constitutional.[26] In this matter, we defer to Congress's determination that Section 338 is lawful.[27] Thus, notwithstanding the satellite industry's court challenge, our task in this proceeding is to implement the statutory directives set forth in the SHVIA.

B. Commencing Satellite Broadcast Signal Carriage

14. Satellite carriers have had the right to retransmit local television stations without first obtaining retransmission consent, and without a mandatory carriage obligation, for a six month period from November 29, 1999 to May 28, 2000. Beginning on May 29, 2000 and continuing until December 31, 2001, satellite carriers may carry local television stations on a station-by-station basis if a retransmission consent agreement has been reached. As of January 1, 2002, satellite carriers will have an obligation to carry all local television stations seeking carriage in any market in which they provide local-into-local service.[28] This requirement is not absolute as satellite carriers generally need not carry duplicative television stations in the same market.[29] In addition, a television station in a market where local-into-local service is provided must submit a request to the satellite carrier to gain carriage.[30] Commercial television stations must make an election between retransmission consent and mandatory carriage when requesting carriage.[31] Noncommercial television stations do not have to make an election because they do not have retransmission consent rights. However, a noncommercial television station and a satellite carrier may enter into a voluntary carriage agreement apart from the requirements contained in the Act.

15. We find that Section 338 provides a satellite carrier with two options for carrying local television broadcast signals. If a satellite carrier provides its subscribers with the signals of local television stations through reliance on the statutory copyright license, they will have the obligation to carry all of the commercial television signals in that particular market that request carriage.[32] If a satellite

[26] *Id.*; *Turner Broadcasting System, Inc. v. FCC*, 117 S.Ct. 1174 (1997)("Turner II"). We note that the Court found that the cable carriage provisions were constitutional under the First Amendment. However, the Court did not consider whether these same provisions were constitutional under the Fifth Amendment's Takings and Due Process clauses.

[27] *See Johnson v. Robinson*, 415 U.S. 361, 368 (1974)(administrative agencies should presume that implementing statutes are constitutional and refrain from questioning their legality).

[28] 47 U.S.C. §338(a)(1). It is important to note that any television broadcast station provided by a satellite carrier within that station's local market under the statutory copyright license in Section 122(a) is treated as a local station for purposes of Section 325 (retransmission consent) and 338 (mandatory carriage). The satellite carriage of a "superstation" in its local market would likely trigger the Section 338 obligations. The term "superstation" means a television broadcast station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier. 17 U.S.C. §119(d)(9)(A).

[29] *Id.* at §338(c)(1) and (2).

[30] *Id.* at §338(a)(1).

[31] 47 U.S.C. §325(b)(3)(C)(1).

[32] This requirement is subject to the other limiting provisions in Section 338, such as the one concerning duplicative programming.

carrier provides local television signals pursuant to private copyright arrangements, the Section 338 carriage obligations do not apply. In this context, we note that a retransmission consent agreement, in most instances, is not analogous to a private copyright arrangement. Retransmission consent permits an MVPD to retransmit a station's signal, but it does not generally grant copyright clearance for the program content carried by that station. To obtain private clearances for material carried by a particular station, the copyright holders of each of the programs, advertisements, and music aired by that station must consent to the retransmission. In some cases, however, a television station may have permission from the copyright holders to provide clearances on their behalf. We therefore conclude that unless the retransmission contract clearly provides for all copyright clearances, a carrier retransmitting television stations electing retransmission consent would be subject to the compulsory license and be required to carry all other local market television stations under the provisions set forth in Section 338.

1. Election Cycle

16. In *Implementation of the Satellite Home Viewer Improvement Act of 1999—Retransmission Consent Issues*, Report and Order, the Commission promulgated good faith and anti-exclusivity requirements per the provisions amending Section 325 of the Act.[33] Retransmission consent and mandatory carriage election cycle requirements for satellite carriers were discussed in the *Notice* in that docket. The *Retransmission Consent Notice* requested comment on whether the Commission should employ the same rules and procedures the Commission adopted in response to the 1992 Cable Act or adopt a different election cycle with different procedures to implement Section 325(b)(3)(C)(i).[34] The *Notice* in this proceeding sought comment on how the carriage provisions of Section 338 would work with the revised Section 325 provisions regarding retransmission consent.[35] Because the issues of retransmission consent and mandatory carriage are intertwined, we believe that a coherent election regime is best effectuated by consolidating the election cycle record from that proceeding with the instant proceeding and determining the unresolved issues here.

17. The SHVIA amended Section 325 to provide that no cable system or other multichannel video program distributor shall transmit the signal of a broadcasting station, or any part thereof, except: (A) with the express authority of the originating station; (B) pursuant to Section 614, in the case of a station electing to assert the right to carriage by a cable operator;[36] or (C) pursuant to Section 338, in the case of a station electing to assert the right to carriage by a satellite carrier.[37] The SHVIA also amended Section 325(b) by adding new paragraph (3)(C)(i), which directs the Commission to adopt regulations which shall "establish election time periods that correspond with those regulations adopted under subparagraph (B) of this paragraph...."[38]

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[33] *See Implementation of the Satellite Home Viewer Improvement Act of 1999—Retransmission Consent Issues Notice of Proposed Rulemaking*, 14 FCC Rcd 21736 (1999); First Report and Order, 15 FCC Rcd 5445 (2000).

[34] *Retransmission Consent Notice*, 14 FCC Rcd at 21741-42.

[35] *Notice*, 15 FCC Rcd at 12152-53.

[36] 47 U.S.C. §325(b)(1)(B).

[37] 47 U.S.C. §325(b)(1)(C).

[38] 47 U.S.C. §325(b)(3)(C). Subparagraph (B) of existing Section 325(b)(3) provides that: "the regulations required by subparagraph (A) shall require that television stations, within one year after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992 and every three years thereafter, make an election (continued...)

18. Section 325(b)(3)(C)(i) instructs the Commission to establish regulations and procedures governing the election process for retransmission consent and mandatory carriage that correspond, as much as possible, with existing Section 325(b)(3)(B) of the Act. We find that the length of the first election cycle shall be for a four-year period commencing on January 1, 2002 and ending December 31, 2005. We believe that a four-year timeframe is necessary to align the election cycles among satellite carriers and cable operators so that local television stations would be making retransmission consent/mandatory carriage elections for cable and for satellite on the same cycle.[39] This conclusion is also consistent with many commenters that advocated a synchronized cycle.

19. ALTV, for example, proposed an alternative that would ultimately synchronize the cable and satellite cycles, but by beginning with a one-year cycle, followed by a three year cycle.[40] We find that a four-year cycle is less burdensome for both broadcasters and satellite carriers. We note that certain broadcast interests argue against parallel election cycles because it would be overly burdensome to simultaneously negotiate carriage among cable operators and satellite carriers.[41] We do not believe that the need to negotiate with the limited number of satellite carriers will place an undue burden on broadcasters. We also believe that simultaneous election cycles most effectively equalizes the obligation for satellite carriers and cable operators negotiating retransmission consent.

20. Echostar and DirecTV also favor synchronizing the cable and satellite cycles but note that regulations developed for the cable industry would not sufficiently take into account the distinctive aspects of retransmission consent/mandatory carriage elections for the satellite industry.[42] EchoStar urges the Commission to give satellite carriers at least six months between new retransmission consent/carriage election dates and their respective effective dates.[43] We agree that a satellite carrier needs ample time to commence carriage prior to the first election cycle because of the logistics of adding hundreds of local television stations to its channel line-up. We therefore provide satellite carriers with six months, from

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(....continued from previous page)
between the right to grant retransmission consent under this subsection and the right to signal carriage under section 614. If there is more than one cable system that serves the same geographic area, a station's election shall apply to all such cable systems." 47 U.S.C. § 325(b)(3)(B). The regulations are codified in Section 76.64 of the Commission's rules. *See* 47 C.F.R. § 76.64(f)(1).

[39]For example, the next cable election must be made by October 1, 2002 and will take effect on January 1, 2003. The subsequent cable election must be made by October 1, 2005, to take effect on January 1, 2006, which will allow for synchronization between cable operators and satellite carriers on this particular date.

[40]ALTV Retransmission Consent Comments at 3. NAB agrees that an election procedure similar to that applicable in the cable context should be adopted. NAB Comments at 3. Other broadcasters agree that the first election cycle should commence on January 1, 2002 but offer differing views on the length of the initial election period. *See* Network Affiliates Retransmission Consent Reply Comments at 5-6; Network Affiliates Comments at 4; ALTV Comments at 38.

[41]Network Affiliates Retransmission Consent Reply Comments at 3-5. *See also* LTVS Retransmission Consent Comments at 2.

[42]EchoStar Retransmission Consent Reply Comments at 2-4; DirecTV Retransmission Consent Comments at 2.

[43]EchoStar Retransmission Consent Reply Comments at 2; DirecTV Retransmission Consent Comments at 2.

July 1, 2001 to December 31, 2001, to complete the carriage process.[44] The election cycle and notification timeframes established for the first cycle, as described more fully below, are designed to accommodate the initial implementation of Section 338. After satellite carriers commence carriage on January 1, 2002, the rationales for extended timeframes no longer apply. Thus, the second election cycle, and all cycles thereafter, shall be for a period of three years (e.g. January 1, 2006 through December 31, 2008).

21. In terms of procedure and timing for the second election cycle and all subsequent cycles, commercial television broadcast stations should make their election by October 1st for the election cycle beginning the following January 1st. Satellite carriers shall have 90 days prior to the new election cycle, beginning October 1st and ending December 31st, to negotiate retransmission consent agreements. These are the same timeframes as those established under the cable election rules.[45] If a satellite carrier begins providing local-into-local service in a new market during an election cycle, the carrier and the commercial television stations in that market have 90 days to complete their retransmission consent discussions. In this situation, the election cycle starts at the date a satellite carrier begins local-into-local service and ends on the date the cycle ends under our rules.

22. Under the SHVIA, satellite carriers taking advantage of the compulsory copyright license for local signals are required to carry television broadcast stations "upon request."[46] We note that cable carriage under the Act is an immediate right that vests without request. That is why we initially adopted a default rule in the cable context.[47] We find, however, that there can be no default mandatory carriage requirement under Section 338 because a commercial television station must expressly request carriage. Rather, if a commercial television station does not make an election, it defaults to retransmission consent. In this context, we also recognize that carriers need some measure of control in configuring their satellite systems to meet their statutory obligations. Therefore, if an existing television station fails to request carriage by the established deadlines, it is not entitled to mandatory carriage under 338 for the duration of the election cycle. This policy does not apply to new television stations to which different substantive and procedural rules apply.

23. **Consistent Retransmission Consent/Carriage Elections.** Section 76.64(g) requires that broadcasters make consistent retransmission consent/must carry elections between cable operators where franchise areas of cable systems overlap.[48] While the SHVIA does not expressly require such action in the satellite context, in the *Retransmission Consent Notice* we requested comments on whether broadcasters should be subject to a consistent election requirement between satellite carrier and cable operators.[49] Broadcast industry commenters argue that the SHVIA does not require Commission

[44] *See* the Initiating Carriage sub-section, *infra.*

[45] *See* 47 C.F.R. §76.64.

[46] 47 U.S.C. §338(a)(1).

[47] *Must Carry Order*, 8 FCC Rcd at 3002.

[48] 47 C.F.R. § 76.64(g); 47 U.S.C. § 325(b)(3)(requiring that if there is more than one cable system that serves the same geographic area, a station's election shall apply to all such cable systems).

[49] *Retransmission Consent Notice*, 14 FCC Rcd at 21741-42.

expansion of the consistent election requirements to satellite carriers as well as cable systems.[50] DirecTV, on the other hand, argues that a consistent election rule should be adopted to prevent broadcasters from unfairly disadvantaging one MVPD competitor over another.[51] We find that Section 325, amended by the SHVIA, makes no reference to expanding the consistent election requirement to the satellite context, notwithstanding the fact that the obligation was imposed in the cable context. Absent express statutory language to the contrary, we believe that a consistent election requirement between a cable operator and a satellite carrier should not be imposed.

24. While the absence of statutory language guides our determination, we also note that the service area differences between satellite carriers and cable operators also counsels against implementing such a rule. Television broadcast stations elect retransmission consent or mandatory carriage on a system-by-system basis under the cable carriage requirements. There are many cable systems in a television market. Sometimes, a television broadcast station may choose retransmission consent on one cable system, but select mandatory carriage for a system in an adjacent area. A satellite carrier's service area for local-into-local purposes, on the other hand, encompasses television market areas that are substantially broader in scope. When a television station is carried by a satellite carrier, it is either a retransmission consent station or a mandatory carriage station in the local market area. Given these facts, it is difficult to require consistency between the two MVPDs without also requiring a station to make a uniform election for all local market cable systems in order to match the election choice the station made with regard to the satellite carrier.

2. Initiating Carriage

25. In the *Notice*, we discussed the framework and procedural rules that should be established for implementing Section 338.[52] We sought comment regarding the meaning of the phrase "carry upon request" and noted that in the cable context, the Commission initially required the cable operator to contact all local broadcast television stations, in writing, on matters relating to their carriage rights.[53] We asked commenters whether we should adopt a similar rule requiring satellite carriers to notify all local broadcasters, in writing, of their carriage rights once any local station in a particular market is being carried.[54] The *Notice* also pointed out that broadcast television stations requesting mandatory carriage as part of the election process must make such carriage requests in writing.[55] The Commission sought comment on whether similar provisions should be adopted in the satellite carriage context.[56]

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[50]NAB Retransmission Consent Reply Comments at 2-3; ALTV Retransmission Consent Comments at 5-6; Network Affiliates Retransmission Consent Comments at 2; NAB Reply Comments at 12.

[51]DirecTV Retransmission Consent Reply Comments at 3; BellSouth Reply Comments at 3.

[52]*Notice*, 15 FCC Rcd at 12152-53.

[53]*Id.*; 47 C.F.R. § 76.58.

[54]*Notice*, 15 FCC Rcd at 12153.

[55]*Id.*

[56]*Id.*

26. ALTV and others assert that a local television station that elects mandatory carriage under Section 338 should be considered to have requested carriage as well. ALTV argues that the additional requirement of a formal carriage request is unnecessary where a local television station already has notified a satellite carrier of its choice between retransmission consent and mandatory carriage.[57] We agree with ALTV. An election made by the television broadcast station shall be treated as the request for carriage. The procedural policy we adopt here is necessary to reduce the paperwork lag time that would impede satellite carriers from complying with its Section 338 obligations by January 1, 2002.

27. Commenters propose different approaches to the carriage obligations of satellite carriers and the responsibilities of television broadcast stations when local-into-local service is provided in a television market. Broadcasters generally argue that because a satellite carrier's carriage obligations are triggered only when the carrier decides to avail itself of the local-into-local statutory copyright license, it is appropriate for the carrier to notify local stations, in writing, if it decides to rely on such a license.[58] NAB asserts that imposing an affirmative notification requirement on satellite carriers will help prevent disputes about whether parties understood the other's intentions.[59] Conversely, DirecTV asserts that Section 338 places an affirmative burden on television broadcast stations to "request" carriage on the satellite carrier's system. EchoStar similarly contends that broadcasters should be required to contact satellite carriers in the first instance, in writing, to request mandatory carriage because broadcasters have actual notice of the satellite carriers providing local-into-local service in their market.[60]

28. We find that television stations have the burden of initiating satellite carriage. DirecTV and Echostar are the only satellite carriers currently operating and providing local-into-local service. It is reasonable to conclude that a television station has actual notice of the local presence of these carriers since satellite subscribers already have access to certain local television stations and a satellite carrier's programming activities are well publicized.[61]

29. We also find that a television broadcast station must notify a satellite carrier, by July 1, 2001, of its carriage intentions if it is located in a market where local-into-local service is provided.

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[57] ALTV Comments at 37.

[58] Network Affiliates Comments at 5-6; NAB Comments at 2; ALTV Comments at 40; CTN Comments at 3; LTVS Comments at 6-7; and AAPTS Comments at 11.

[59] NAB Comments at 2.

[60] Echostar Comments at 12.

[61] *See* http://www.dishnetwork.com/software/third_level_content/locals/index.asp (for Echostar) and http://www.directv.com/howtoget/howtogetpages/0,1076,224,00.html (for DirecTV). We note that there are 485 full power television stations (379 commercial and 106 noncommercial) in the top 35 television markets as ranked by Nielse Media Research. *See* Appendix J. These are substantially the same markets where DirecTV and Echostar currently provide local-into-local service. We note, however, that Echostar is not providing local-into-local service in: Market #24—Baltimore, Market #27—Hartford-New Haven, Market #33—Milwaukee, and Market #34—Columbus, Ohio. It is providing local-into-local service in Market #36—Salt Lake City, Market #37—San Antonio and Market #50—Albuquerque-Santa Fe. DirecTV is not providing local-into-local service in: Market #27—Hartford-New Haven. It is providing local-into-local service in Market #36—Salt Lake City, Market #37—San Antonio, Market #39—Birmingham (Anniston, Tuscaloosa), Market #40—Memphis, TN, and Market #47--Greensboro-High Point-W. Salem. It plans to provide local-into-local service in Market #34—Columbus, Ohio, Market #43—West Palm Beach-Ft. Pierce, and Market #58—Austin.

Commercial television stations are required to choose between retransmission consent and mandatory carriage on this date. NCE stations must simply request carriage. We believe that a six month timeframe provides satellite carriers with sufficient time to plan for receive facility accommodations and channel line-up changes before January 1, 2002. To facilitate the carriage process, we also find that a satellite carrier must respond to a television station's carriage request by August 1, 2001, and state whether it accepts or denies the carriage request. If the satellite carrier denies the request, it must state the reasons why. In this context, some valid reasons for not commencing carriage of a television station are: (1) poor quality television signal; (2) substantial duplication; (3) non-local station requesting carriage; and (4) the satellite carrier is offering local-into-local service via private copyright agreements. If the television station's request for carriage is rejected, it may file a complaint pursuant to the rules established in the Remedies section, below.

30. With regard to the notification procedure, the request made by the television station must be in writing and sent to the satellite carrier's principal place of business, as listed on the carriers' website or official correspondence. The notification must be sent by certified mail, return receipt requested. A station's written notification should include the name of the appropriate station contact person as well as the station's: (i) call sign; (ii) address for purposes of receiving official correspondence; (iii) community of license; (iv) DMA assignment and (v) affirmative carriage election. These notification elements are necessary to ensure that a satellite carrier has the base information it needs to commence the carriage of local television stations.

31. **New Local-Into-Local Service.** In the *Notice*, we requested comment on whether separate procedures should be established for new satellite carriers and whether such rules should be similar to those established for cable carriage.[62] Broadcast commenters favor notification requirements for new market entrants.[63] While generally objecting to a notification burden being placed on satellite carriers, DirecTV submits that if one is adopted, the requirement should only apply to markets in which a satellite carrier commences service after January 1, 2002.[64] We find that a new satellite carrier must notify all local television stations in a given market when it plans to provide local service. Similarly, an existing satellite carrier must provide notice when it provides local-into-local service in a new market. We note that requiring carriers to provide notice in these circumstances is less burdensome because there are far fewer television stations to contend with, at the same time, than in markets with existing local-into-local service. We also believe that advance notice in these situations ensures a level competitive playing field in two respects: (1) all local television stations will know, at the same time, when local-into-local service will be provided in a market and (2) all local television stations will be able to exercise their carriage rights at the same time.[65]

32. We therefore adopt procedural provisions that substantially replicate the existing requirements for new cable systems under Section 76.64. However, we craft the rules in a slightly different manner recognizing that satellite carriers provide a national service. The carriage procedures also provide carriers with adequate preparation time while not unduly delaying the provision of full local-

[62] *Notice*, 15 FCC Rcd at 12153.

[63] NAB Comments at 2; ALTV Comments at 41.

[64] DirecTV Comments at 11.

[65] We note that this result would have an adverse economic impact on smaller television stations in the market that are competing against larger stations for satellite subscriber viewership and advertising revenue.

into-local service in a market. We adopt the following guidelines for both new satellite carriers and carriers that offer new local-into-local service for the first time on or after July 1, 2001. First, satellite carriers shall notify local television stations, in writing, at least 60 days before the date it intends to provide new satellite service or intends to enter into a new market. At the same time, the satellite carrier should provide the location of the local receive facility in that particular market.[66] A local television station then must provide its election, in writing, no more than 30 days after receipt of the satellite carrier's notice.[67] If a satellite carrier finds that the television station meets the criteria for carriage under Section 338 and our rules, it shall then have 90 days after the election letter was received to negotiate carriage, resolve local receive facility issues, reconfigure its system and channel line-up, notify subscribers of the change in service, and commence carriage of the local television station.[68] If the satellite carrier finds that the station is not qualified for carriage for any of the reasons stated above, it shall notify the local station in writing of the reason for such refusal within 30 days of the receipt of the station's election. The television station may either accept the satellite carrier's conclusion or file a carriage complaint.

33. **New Television Stations.** Section 338 requires carriage of all local stations in local markets regardless of when such stations begin broadcasting. Given this statutory directive, we find that new television broadcast stations licensed and providing over-the-air service have carriage rights under the SHVIA.[69] Those stations licensed to provide over-the-air service for the first time on or after July 1, 2001 will be considered new television broadcast stations for satellite carriage purposes. We believe it appropriate to require a new television station to make its initial election between 60 days before commencing broadcast and 30 days after commencing broadcast. This requirement is similar to the cable rules regarding new television stations.[70] If the station meets all of the requirements under Section 338 and our rules, the satellite carriers shall commence carriage within 90 days of receiving a carriage request from the television broadcast station or whenever the new television station provides over-the-air service.[71] If the satellite carrier believes that the station is not qualified, it must notify the station of such a determination with 30 days of receiving the election notice. An aggrieved television station may then file a complaint for non-carriage in the appropriate forum under the guidelines established in Section 338.

[66] We note that a satellite carrier's notice of intent should be viewed as conditional in nature as it may decide not to enter into a market based on costs or other considerations. However, once it begins providing local-into-local service by offering any local television station to its subscribers, not carried under a private copyright arrangement, it must fulfill its carriage obligations under Section 338.

[67] A television station's notification letter should contain the same elements enumerated in paragraph 30, above.

[68] *See* Appendix B.

[69] Our finding here applies to new analog television station licensees. The rights of digital television stations will be decided at a later time in a separate proceeding.

[70] *See* 47 C.F.R. §76.64(f).

[71] We note that the same rationales for giving a satellite carrier 90 days to commence carriage in paragraph 32 above, apply in this circumstance.

C. Market Definitions

34. Section 338(h)(3) defines the term, "local market," as having the meaning it has under Section 122(j) of title 17, United States Code.[72] Section 122(j)(2)(A) defines the term, "local market," in the case of both commercial and noncommercial television broadcast stations, to mean the designated market area in which a station is located, and-(i) in the case of a commercial television broadcast station, all commercial television broadcast stations licensed to a community within the same designated market area are within the same local market; and (ii) in the case of a noncommercial educational television broadcast station, the market includes any station that is licensed to a community within the same designated market area as the noncommercial educational television broadcast station."[73] In addition to the area described in subparagraph (A), a station's local market includes the county in which the station's community of license is located.[74] Section 122(j)(2)(C) defines the term, designated market area to mean the market area, as determined by Nielsen Media Research and published in the 1999-2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates or any successor publication."[75]

35. We did not receive comments interpreting these provisions. DirecTV, however, did suggest that the Commission adopt a rule expressly allowing satellite carriers, at their discretion, to limit a television station's carriage coverage area to its predicted Grade B service contour within its DMA.[76] ALTV and NAB respond that DirecTV's proposal is antithetical to the language and purpose of the SHVIA.[77] NAB asserts that 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.[78]

36. We find that the term "local market," as it is used for satellite carriage purposes, includes all counties within a market, as well as the home county of the television station if that county is not physically located in the DMA. We believe that the satellite compulsory license includes not only television stations licensed to a local market, but also extends to stations licensed in one market but assigned[79] by Nielsen to another market. For example, a television station licensed to a community in

[72] 47 U.S.C. §338(h)(3).

[73] 17 U.S.C. §122(j)(2)(A).

[74] 17 U.S.C. §122(j)(2)(B).

[75] 17 U.S.C. §122(j)(2)(C).

[76] DirecTV Comments at 23 (Section 122(j)(2) does not specify that a broadcaster's carriage rights extend throughout the DMA in which the broadcaster is located.)

[77] ALTV Reply Comments at 19; NAB Reply Comments at 14.

[78] *Id.*

[79] Nielsen has established a system to determine which stations are considered "local" for ratings reporting purposes. This is the "market-of-origin" assignment process and involves several statistical calculations based upon viewership and other factors. A television station is generally designated as local in the DMA in which its community of license is located. *See 1997-1998 NSI Reference Supplement* at 47. However, a station may petition Nielsen to change its market-of-origin assignment if both its transmitter and the majority of its Grade B service contour are located in a different DMA than the DMA in which the station's community of license is located. Such (continued...)

Jefferson County, Missouri, which is in the Paducah DMA, but assigned by Nielsen to the St. Louis DMA, would be considered within the St. Louis market under Section 338. In this case, Jefferson County is the home county, and such a county should be treated as part of the St. Louis DMA for satellite carriage purposes. Moreover, since this station is licensed to a community in the Paducah market, it may assert its carriage rights in that market as well, if satellite carriers decide to provide local-into-local service there. If there happens to be another television station licensed to a community in Jefferson County, that station will also be considered in the St. Louis DMA and eligible to assert its right to carriage against a satellite carrier. In addition, if a station is licensed to a community that is inside one DMA, but is assigned to another DMA by Nielsen, the station could assert its right to carriage in the market where its community of license is located. For example, KNTV is licensed to San Jose, CA, which is in the San Francisco DMA, but is assigned by Nielsen to the Salinas-Monterey DMA. In this case, KNTV can assert its carriage rights in the San Francisco DMA because that is where its community of license is located. These interpretations are consistent with the SHVIA's goals of preserving over-the-air broadcasting and providing satellite subscribers with a full complement of local station signals.

37. **Timing of Revisions to Market Definitions.** We sought comment on when to change the reference to the 1999-2000 Nielsen publications to reflect changes in market structure and market conditions. We noted, in the cable context, that the rules account for a market update every three years.[80] We asked whether the rules we implement under this section should be updated on a triennial basis or at another interval. We also noted that cable operators are required to use the 1997-98 Nielsen publications to determine local markets for broadcast signal carriage purposes up until January 1, 2003,[81] yet satellite carriers are obliged to use the 1999-2000 Nielsen publications for carriage purposes. We asked whether satellite carriers and cable operators should be required to use the same annual Nielsen market publications so that both may rely on the same market definition.

38. Our goals here are threefold. We intend to: (1) implement the language of Section 338; (2) establish comparable timelines and requirements for satellite carriers and cable operators; and (3) reduce procedural and administrative burdens. BellSouth argues for an extended period between updates to allow for satellite carriers' difficulties in accessing and tuning the satellite equipment used to transport television signals.[82] ALTV and NCTA argue that the Commission should adopt rules allowing for the use of the same Nielsen data by cable systems and satellite carriers as quickly as practicable.[83] NAB asserts

(....continued from previous page)
a petition must include relevant information on which the petitioning station bases its request for a change in market-of-origin including, but not limited to: (1) community of license; (2) present transmitter location; (3) signal coverage (including FCC coverage maps), audience data from previous measurements, and/or competitive considerations. Nielsen reserves the right to use its best judgement based upon the information available to it in considering whether the change sought by the petition reflects the reality of the market affected. The station's assignment is then made available in Nielsen's *Directory of Stations* publication. *See Definitions of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366 (1999).

[80] *Notice*, 15 FCC Rcd at 12155; 47 C.F.R. §76.55(e)(2).

[81] *Notice*, 15 FCC Rcd at 12155. 47 C.F.R. §76.55(e)(2)(i).

[82] BellSouth Comments at 13 (Commission has the discretion to choose the Nielsen 1999-2000 DMA definition or any subsequently published definition).

[83] ALTV Comments at 44; NCTA Comments at 5.

that the 1999-2000 lists are the correct ones for the Commission to use to determine markets for the first election cycle commencing in January 1, 2002.[84]

39. We will require satellite carriers to use Nielsen's 1999-2000 DMA market assignments to initially determine their carriage obligations. Satellite carriers and television broadcast stations have been on notice since November 29, 1999, that the 1999-2000 Nielsen publications will be used for Section 338 purposes. To avoid overburdening satellite carriers, we will not require market boundaries to be updated on an annual basis. However, we do believe that television markets should be updated triennially, for each election cycle, to better reflect new market conditions and viewership patterns.[85] Satellite carriers may, nevertheless, voluntarily adjust markets based upon county additions found in annual editions of Nielsen DMA market assignment publications. On this point, we agree with DirecTV when it states that Section 122(j)(2) allows a local market originally defined in the 1999-2000 Nielsen market assignment to be expanded in accordance with later issues of the relevant Nielsen publications.[86] Satellite carriers may add counties to the markets in which they now provide local-into-local service by referring to the Nielsen 2000-2001 DMA market assignments and future assignments. By adopting this approach, a satellite carrier is able to serve new communities on the basis of each yearly Nielsen DMA market change, if that is what is desirable[87] Counties that are removed from a market in subsequent Nielsen publications should remain in the market for satellite carriage purposes so that satellite subscribers will not lose local-into-local service.[88] This policy fulfills the SHVIA's goal of furthering the availability of local-into-local service and providing effective competition to incumbent cable systems.

40. **Market Modifications.** In the *Notice*, we pointed out that a statutory device exists to expand or contract the size of a local television market for cable carriage purposes and sought opinion on whether the Commission has the authority to implement a market modification mechanism for satellite carriage purposes.[89] Certain broadcast commenters assert that implementing a market modification mechanism is necessary to promote Congress' goal of protecting free television service, placing satellite

[84]NAB Comments at 4-5.

[85]For the second retransmission consent/mandatory carriage election commencing on January 1, 2006, for which elections must be made by October 1, 2005, the Nielsen publications from 2003-2004 should be used. This requirement is consistent with the market update rule developed for cable carriage purposes. *See* 47 C.F.R. 76.55(e)(2)(ii).

[86]DirecTV Comments at 15.

[87]*Id.* at 18.

[88]We note that this approach is intended to ensure that if Nielsen moved a county out of a DMA in which there is satellite local-into-local service into a DMA in which there is no satellite local-into-local service, the satellite subscribers in that county will not lose access to local stations via satellite. If Nielsen moves a county from one DMA that has local-into-local satellite service, a satellite carrier may consider the county to be in both DMAs and provide local-into-local service from both DMAs to subscribers in that county.

[89]*Notice*, 15 FCC Rcd at 12155. Pursuant to Section 614(h)(1)(C), at the request of either a broadcaster or a cable operator, the Commission may, with respect to a particular commercial television broadcast station, include additional communities within its television market or exclude communities from such station's television market. The Commission's inclusion of additional communities within a station's market imposes new carriage requirements on cable operators subject to the modification request, while the grant to exclude communities from a station's market relieves a cable operator from its obligation to carry a certain station's television signal.

and cable on equal terms, and preserve localism by ensuring that satellite carriage markets actually reflect what is truly local.[90] However, BellSouth and DirecTV state that the Commission has no authority to add communities to a broadcaster's television market. They believe that Section 122(j) limits a station's satellite carriage rights to the DMA that includes its community of license.[91] DirecTV argues, however, that the Commission can and should adopt market modification procedures that allow a satellite carrier to remove a station from the market if it can demonstrate that the station does not serve the relevant market.[92] Paxson, in contrast, argues that had Congress intended to grant the Commission market modification authority, it would have explicitly done so in the statute just as it did in the cable context.[93]

41. We find that the Act does not permit the Commission to change the shape of a television market. While we recognize the concerns raised above, we note that the satellite compulsory license is coterminous with the market in which the satellite carrier provides local-into-local service. Without express language in the Copyright Act or the Communications Act, any attempt to establish a market addition policy under our public interest authority would be moot because a satellite carrier cannot retransmit a local television station under Section 338 into another market without subjecting itself to copyright liability under Section 122 of the Copyright Act. In addition, there is no explicit provision providing the Commission with the authority to modify markets in the manner permitted under Section 614(h). Therefore, we cannot establish a market modification policy on our own motion. We note that the Senate version of the SHVIA had, at one point in time, a market modification provision.[94] This subsection was not adopted by Congress. Thus, any attempt by the Commission to implement a market modification regime would run counter to the express intent of Congress.

42. **Coverage.** Satellite carriers are currently developing spot beam technology where programming can be delivered to a discrete geographical location using a specialized satellite.[95] Spot beam satellites have the potential to increase satellite system channel capacity through the re-use of transponders.[96] DirecTV argues that satellite carriers should be permitted to use spot beams, when they are in operation, for local-into-local service even if the beam does not cover the entire market.[97] We will

[90]WFMD Comments at 5; KNTV Comments at 7; and WDBJ Comments at 1.

[91]BellSouth Comments at 12; DirecTV Comments at 15.

[92]DirecTV Comments at 21.

[93]Paxson Comments at 7.

[94]*See* Senate amendments to H.R. 1554 (May 20, 1999)("Section 338. Carriage of Local Television Stations by Satellite Carrier. . . .The mandatory carriage provisions of section 614 and 615 of this Act will apply in a local market no later than January 1, 2002, to satellite carriers retransmitting any television broadcast station in that local market pursuant to the compulsory license provided by section 122 of title 17, United States Code."

[95]*Id.* The coverage area or "footprint" of satellite systems can vary: (1) "global beam" where 1/3 of the earth is covered by a satellite; (2) "regional beam" where a couple of continents are covered by a satellite; (3) "CONUS coverage" which is the satellite footprint over the continental United States; and (4) "spot beam" as described above.

[96]In the *Notice*, we also had questions concerning the phrase "similar technologies to meet their carriage obligations" as it is found in the legislative history surrounding material degradation. We asked what was meant by the term "similar technologies." We specifically sought comment on whether the phrase encompasses satellite spot beams. *Notice*, 15 FCC Rcd at 12167.

[97]DirecTV Comments at 23.

permit carriers to use spot beam satellites in such a manner. We first observe that Section 338 does not require a satellite carrier to serve each and every county in a television market. Rather, it requires that in the areas it does provide local-into-local service, it must carry all local television stations subject to carriage under the statute. In this context, we recognize that there are some markets, such as the Denver DMA encompassing counties in four states, that are geographically expansive. A spot beam may not be able to cover the entire DMA in these instances, and to make the satellite carrier reconfigure its spot beam may deprive it of capacity to serve additional markets with local-into-local coverage.

D. Receive Facilities

43. Section 338(b)(1) states that, "A television broadcast station asserting its right to carriage under subsection (a) shall be required to bear the costs associated with delivering a good quality signal to the designated local receive facility of the satellite carrier or to another facility that is acceptable to at least one-half the stations asserting the right to carriage in the local market."[98] Section 338(h)(2), in turn, defines the term "local receive facility" as "the reception point in each local market which a satellite carrier designates for delivery of the signal of the station for purposes of retransmission."[99] The *Notice* sought comment on the term "local receive facility" and on the parameters under which a satellite carrier may construct and designate a local receive facility.[100] We noted that the statutory language could be read to permit the satellite carrier to establish a regional receive facility that would receive broadcast signals from other markets provided 50% of the relevant broadcasters agreed to the location.[101] We also asked questions concerning the procedures by which a satellite carrier must inform local market television stations of the location of the receive facility, and whether there should be Commission procedures to resolve a broadcaster's complaint if it disputes the receive location selected by the majority of broadcasters.

44. DirecTV agreed with the preliminary statement in the *Notice* that "the most economically feasible means [of delivery of multiple local broadcast signals] is to aggregate signals in each local market at one point and deliver them over the facilities of an interstate telecommunications carrier to the uplink site(s)" and co-locate at such a carrier's switching center.[102] DirecTV provided comments detailing the process needed to establish a local receive facility, a process they have used to create 27 local receive sites to provide service to 27 local-into-local markets served since the SHVIA was enacted at the end of November, 1999.[103] According to DirecTV, the parameters for construction and designation of a local receive facility include: 1) access to multiple long distance common carriers for DS-3 or other high-speed digital fiber circuits; 2) access to at least one local common carrier that can provide TV1 quality digital fiber circuits to most, if not all, television broadcast stations [in the DMA], and/or local DS-3 circuits, microwave, and broadband analog service as local conditions may require; 3) access to

[98] 47 U.S.C. §338(b)(1).

[99] 47 U.S.C. §338(h)(2).

[100] *Notice*, 15 FCC Rcd at 12157.

[101] *Id.* For example, a regional receive facility could serve stations throughout New England, which is comprised of several DMAs.

[102] *See* DirecTV Comments at 25 and *Notice*, 15 FCC Rcd at 12157. *See also* Echostar Comments at 13-14.

[103] DirecTV Comments at 25-26.

multiple long distance carriers that can provide a wide area data network up to 256kb/s as well as dial up voice service must also be available; 4) access to building rooftop with connecting conduits to support, where needed, good quality over-the-air television reception, microwave links, and satellite reception; 5) access to a suitable area with connecting conduits to support a satellite downlink antenna; and 6) access to a suitable area to install equipment to support all local collection, compression, monitoring, and transmission equipment. This area must be securable against unauthorized access and have stable power source and HVAC. DirecTV also states that local receive facilities must be planned twelve months in advance.[104]

1. Local Receive Facilities

45. In the definition of "local receive facility" in Section 338(h)(2), the satellite carrier is the entity authorized to designate the placement of a local receive facility.[105] If the satellite carrier designates a local receive facility, the television broadcast stations are required by the statute to bear the costs of delivering a good quality signal to "the designated local receive facility of the satellite carrier."[106] We find that the statute expressly provides that the satellite carrier has the right to determine the location of the local receive facility. We disagree with the proposals offered by AAPTS and Network Affiliates to require a satellite carrier to locate a receive facility either within the Grade B contour or not more than 50 miles from the community of license of each of the local stations in a market.[107] We recognize that in some of the larger DMAs in the western United States, some broadcast stations may be required to provide their signals over hundreds of miles if the receive facility is located beyond a local commercial or non-commercial television station's Grade B signal.[108] We believe this is the reason Congress provided for an alternative receive facility, as discussed below. But, we do not believe it would be consistent with statutory language, which requires the broadcast station to bear the cost of delivering a good quality signal, to require satellite carriers to bear the cost of erecting additional facilities to receive signals from stations that are more than 50 miles away from a designated receive point.[109]

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[104]To establish a receive facility, a satellite carrier must: (1) select a location for the receive facility and negotiate a lease; (2) order and install encoding and other equipment; (3) hire support, maintenance and monitoring staff; (4) make arrangements with local television stations to obtain a signal of sufficient quality; (5) allow television stations to negotiate fiber agreements with telephone carriers and install local fiber links; (6) install, as needed, over-the-air antennas and noise reduction equipment; (7) negotiate a long-haul fiber agreement and install a long haul fiber link; (8) order and install equipment for broadcast/uplink centers; and (9) test each link in the system. DirecTV Comments at 26-27.

[105]47 U.S.C. §338(h)(2). *See, e.g.,* DirecTV Comments at 25; BellSouth Comments at 16.

[106]47 U.S.C. §338(b)(1).

[107]Network Affiliates Comments at 10; AAPTS Comments at 13.

[108]AAPTS Comments at 13 (a television station might have to relay the signal over microwave or fiber at a cost of $30 to $60 per mile per month in order for a local station to deliver a good quality signal to the receive facility).

[109]*See, e.g.,* BellSouth Reply Comments at 14 (Requirement to place a local receive facility within a certain radius of all stations or within their Grade B contours is inconsistent with definition of "local receive facility" as the "reception point in each local market which the satellite carrier designates").

46. With respect to the costs of erecting and maintaining the receive facility itself, we note that in the cable context, the cable operator pays the costs for signal processing at its principal headend.[110] Given that the satellite carrier's local receive facility functions like a headend, and is under the carrier's control, we believe that the satellite carrier has the sole responsibility to pay for the costs of building and maintaining such a facility. We also find that the satellite carrier should pay for the costs of constructing and maintaining an alternative receive facility, as discussed below. This is appropriate particularly if the alternative facility is regional, and the satellite carrier benefits from having fewer facilities to build and maintain.

47. We note that DirecTV and Echostar have already built facilities in a number of television markets where they now provide local-into-local service.[111] While DirecTV states that twelve months is the minimum amount of time necessary to establish a receive facility, we believe that the satellite carriers that are currently providing local-into-local service should not experience any difficulties in carrying local television stations by January 1, 2002 due to buildout issues.[112] In the future, satellite carriers that enter new markets with local-into-local service should be able to fulfill their carriage obligations because Section 338 does not impose carriage obligations until the satellite carrier retransmits at least one local television station, which would necessitate that the carrier have a receive facility in place or under development before the carriage requirement is triggered.

48. We also find, as AAPTS and others suggest, that a satellite carrier should designate the same receive facility for both retransmission consent and mandatory carriage television stations so as to avoid any opportunity to assign less convenient facilities to those stations seeking mandatory carriage.[113]

2. Alternative Receive Facility

49. The definition of local receive facility in Section 338(h)(2) strongly suggests that Congress intended to permit carriers to designate a single point for all local-into-local stations to be received, processed and retransmitted. However, the second clause of Section 338(b)(1) provides that, with respect to the costs of delivering a good quality signal, there may be "another facility that is acceptable to at least one-half the stations" to which the television broadcast station delivers a good quality signal. The *Notice* considered this other facility as a facility outside the local DMA, perhaps a facility serving a regional area. Some commenters agreed that this is the likely meaning of this clause.[114] We note, however, that this is not the only possible meaning of "another facility." As DirecTV suggests, the other facility could be an alternative facility, not necessarily a non-local or regional facility.[115] Most

[110] *See Must Carry Order,* 8 FCC Rcd at 2988.

[111] At the time it filed comments, DirecTV stated it has 27 facilities for 27 markets. DirecTV Comments at 26.

[112] Neither DirecTV nor Echostar stated in the record that the receive facilities they are using for local-into-local now cannot be used to retransmit all of the local television stations in those markets.

[113] NAB also asserts that both retransmission consent and mandatory carriage television stations should use the same local receive facility. NAB Comments at 10.

[114] *Notice*, 15 FCC Rcd at 12157. *See, e.g.* Network Affiliates Comments at 8-10; Echostar Comments at 13-14; and BellSouth Reply at 14.

[115] DirecTV Comments at 28-30; LTVS Comments at 15.

of the comments on this subject assumed that the other facility would be a non-local, regional facility established by a satellite carrier and that is acceptable to at least one-half of the stations asserting the right to carriage.[116] We focus here on this interpretation and the necessary rules to implement it, but we do not foreclose the possibility that the creation of an alternative site, whether local or non-local, can also be consistent with the statutory language. An alternative local receive facility would be one selected after the satellite carrier has chosen its first designated local receive facility.

50. AAPTS states that the consent of at least one local NCE station eligible for carriage in the market should be required before an alternate facility is chosen.[117] Broadcast groups generally assert that non-local receive sites should not be selected unless the majority of stations in each affected market agree to the location of the facility.[118] Echostar argues that it is significantly more burdensome for satellite carriers to seek the agreement of a majority of stations in each locality than the majority of stations in a particular region.[119] ALTV states that a non-local receive facility may be established if half the local stations electing mandatory carriage, rather than retransmission consent, agree to the alternate site.[120]

51. Under our reading of the phrase "that is acceptable to at least one-half the stations asserting the right to carriage in the local market," we find that an alternative receive facility may be established if 50% or more of those stations in a particular market consent to such a site. As the statute uses the term "local," we find that the calculation should be based on the majority of stations entitled to carriage in each affected market, not the aggregate number of stations in all affected markets.[121] Since the "right to carriage" under Section 338 extends, at least initially, to all local television broadcasters, the calculation includes all stations, whether they elect mandatory carriage or retransmission consent. We disagree, in part, with ALTV, which asserts that a non-local receive facility may be established if half the local stations electing mandatory carriage, rather than retransmission consent, agree to the alternate site.[122] Just as we decide that a satellite carrier should include both retransmission consent and mandatory carriage local stations on the same designated local receive facility, we do not distinguish between retransmission consent and mandatory carriage in the determination of an acceptable alternative receive facility. We note, however, that if a satellite carrier has both a designated local receive facility and a non-local or regional receive facility and can accommodate local stations for retransmission into their local markets at either one, the television station may choose whether to deliver its good quality signal to one or the other, and must notify the satellite carrier to which one of the facilities it will deliver its signal.

[116] LTVS Comments at 15; ALTV Comments at 32.

[117] AAPTS Comments at 14.

[118] ALTV Comments at 33; Network Affiliates Comments at 10; NAB Comments at 11.

[119] Echostar Comments at 6.

[120] ALTV Comments at 32.

[121] For example, if DirecTV were to establish an alternative receive facility in Howard County, MD, (which is in the Baltimore DMA) that would serve the Washington, D.C., Philadelphia, and Baltimore television markets, 50% or more of the stations in Washington, D.C. and 50% or more of stations in Philadelphia would have to agree to the site location. A satellite carrier cannot combine the number of Washington, D.C. and Philadelphia stations to reach the 50% threshold.

[122] ALTV Comments at 32.

Each local television broadcast station requesting carriage must bear the cost of delivering its good quality signal to the receive facility.

52. All stations "asserting a right to carriage," either through retransmission consent or mandatory carriage, may participate in the consideration of whether an alternative receive facility is acceptable. We note that television stations that substantially duplicate other local television stations may not ultimately be carried, but should, nevertheless, be counted in the 50% of stations that must find the alternative facility acceptable. For example, if there are 20 stations in a local market that may request carriage, but only 16 that must ultimately be carried, the satellite carrier must notify all 20 stations of a proposed alternative receive site, and at least 10 must find the alternative site acceptable.[123]

53. As several commenters observed, a satellite carrier's local receive facility is the equivalent of a cable system's headend.[124] We do not believe that the statute requires, nor that any party contemplates, that television stations can unilaterally select a site and force a satellite carrier to construct a facility or move its receive facility there.[125] NAB asserts that the Act contemplates negotiations in which a carrier attempts to persuade more than half of the stations eligible for carriage to agree to deliver a good quality signal to a particular location outside the local market.[126] We agree with NAB on this point. If the satellite carrier designates one local receive facility, 50% or more of the local stations may not demand or require that the satellite carrier provide an alternative receive facility.[127] We find that Congress intended that the satellite carrier be part of the negotiation process concerning the establishment of an alternative receive facility. Given the costs and steps involved in creating a receive facility, the satellite carrier is to play a central role in such discussions. Indeed, we expect that in most cases, the satellite carrier will be the initiating party seeking to use a non-local or regional receive facility other than its designated local receive facility and to obtain the consent of at least 50% of the stations asserting the right to carriage.

54. As noted above, the statute assigns costs to the broadcaster when providing the satellite carrier with a good quality signal to either a local or alternative facility. We agree, therefore, with BellSouth that a satellite carrier is not obligated to carry a television broadcast station that refuses to pay for the costs of providing a good quality signal. [128] For similar reasons, we disagree with Network Affiliates' proposal that if the carrier uses an alternative facility, which at least half of the local stations find acceptable, then the satellite carrier should pay the incremental costs of delivering each broadcaster's

[123]New television stations that sign on-the-air during the middle of an election cycle, must deliver their signal to an existing local or non-local receive facility and need not be counted in the 50% coalition until the next election cycle commences.

[124]*See, e.g.*, Network Affiliates Comments at 8; ALTV Comments at 24; and AAPTS Comments at 12.

[125]*See, e.g.*, NAB Comments at 21-22; DirecTV Comments at 29; and note 25, *supra.*

[126]NAB Comments at 21-22.

[127]We believe such a result would be comparable to a television broadcast station requiring a cable operator to move its headend or create a new headend to accommodate its signal.

[128]BellSouth Comments at 19 (Television stations in the losing minority of a vote to allow a non-local receive facility may be denied carriage by the satellite provider unless such stations bear the costs to deliver a good quality signal to the out-of-market reception point).

signal if the alternative facility is more than 50 miles from the reference point of the station's community of license.[129]

3. Notification

55. We conclude that a satellite carrier should provide local television stations with information on the location of an existing local receive facility, or where it plans to build a local or alternative receive facility, before the station makes its election. Advance notice of the receive point location is necessary because television stations must make arrangements for delivering good quality signals to the receive site. Advance notice is also desirable to enable the satellite carrier to negotiate with all the local television stations concerning alternative receive facilities. In the event a satellite carrier must select which duplicating station or NCE station to carry from among several that request carriage, nothing in the statute or our rules prevents the satellite carrier from taking into consideration which stations that find the satellite carrier's proposed alternative receive facility acceptable. As described above, we consider this to be a fair subject for negotiation amongst the affected parties.

56. We disagree with DirecTV's argument that satellite carriers not be required to inform local broadcast television stations of the location of the receive facility until after such stations have notified the carrier, in writing, that they wish to be carried pursuant to Section 338, and it has been established that they are otherwise eligible for such carriage.[130] We see no reason to keep the location of existing designated local receive facilities or planned sites a secret. We agree with the suggestion of other commenters that the satellite carrier should designate the local receive facility in its carriage agreements with local television stations or, in the mandatory carriage situation, provide notice to the affected stations as to the location of the local receive facility.[131]

57. Satellite carriers must be afforded a reasonable period of time to finalize arrangements for the location of the local receive facility in order to meet the January 1, 2002 deadline. Any delays by local television stations will work against a satellite carrier meeting its carriage obligations in a timely manner, which ultimately works against the television stations and viewers, as well. Therefore, when a satellite carrier has a designated local receive facility to which local stations seeking carriage must deliver a good quality signal, the carrier must make the location of this facility known by June 1, 2001 for the first election cycle, and at least 120 days prior to the commencement of all election cycles thereafter.[132] The means by which television stations are notified is left to the discretion of the satellite carrier.

58. BellSouth suggests that a carrier should give local television stations 90 days notice before it moves a local receive facility in order to protect the legitimate interests of television stations and to avoid service disruption to subscribers.[133] We agree, in principal, with BellSouth's proposal.

[129]Network Affiliates Comments at 10 (Arguing that satellite carriers are the primary beneficiaries of regional receive facilities and should bear the costs).

[130]DirecTV Comments at 28.

[131]*See, e.g.,* LTVS Comments at 15.

[132]We reject, as unnecessary, DirecTV's argument that any agreement among television broadcast stations may only be made twelve months prior to the election cycle to allow satellite carriers to plan ahead and to prevent broadcasters from garnering votes for an alternate facility throughout the entire period. DirecTV Comments at 29.

[133]BellSouth Comments at 18.

Generally, a satellite carrier may relocate the designated local receive facility every three years coinciding with the election cycle. We believe that satellite carriers should have the flexibility to change their designated local receive facility or alternative facility, and will require 60 days advance notice to all local stations. We are concerned, however, that the relocation of a local receive facility may make it more difficult for some television stations to pay the costs of delivering a good quality signal. Therefore, if a satellite carrier decides to relocate the designated local receive facility during an election cycle, it should pay the television stations' costs to deliver a good quality signal to the new location. With respect to moving the alternative facility, the new location must be acceptable to at least half of the local stations entitled to carriage in the local market. Obtaining such agreement may require more than 60 days notice, and the satellite carrier may find it necessary to plan for a new alternative facility with additional advance notice. A satellite carrier may not require local stations to deliver their signals to a new alternative facility unless and until at least 50% of the stations agree to the new facility.

4. Process

59. The *Notice* requested comment on the process by which broadcast television stations agree to the establishment and location of an alternative receive facility.[134] NAB urges the Commission to establish a complaint process whereby stations in the minority of a determination of an acceptable alternative receive facility can protest if they believe the designation of a non-local receive facility site would undermine or evade the mandatory carriage requirements.[135] BellSouth disagrees with this suggestion because under Section 338(b)(1), the stations' vote decides the issue, and there is no statutory basis for Commission action to review or reverse this process.[136] AAPTS responds by stating the Commission has the authority to create remedial processes that are not expressly mandated by statute.[137]

60. We decline to establish a special complaint standard or process for disputes concerning alternative receive facility disputes. To the extent a television broadcast station believes its right to carriage has been denied because fewer than 50% of the relevant stations agreed to an alternative site, such claims may be raised in a mandatory carriage complaint. If there is no dispute that 50% or more of the local stations that could assert mandatory carriage have agreed to an alternative site, then we see no issue that would require our intervention.

61. We find that the negotiations and arrangements among local television broadcast stations and satellite carriers with respect to agreeing upon an alternative local receive facility are generally

[134] *Notice*, 15 FCC Rcd at 12157.

[135] NAB Comments at 12.

[136] BellSouth Reply Comments at 16 (Congress considered and rejected language that would have prohibited a satellite carrier from designating a receive site to "undermine or evade the carriage requirements ...." citing H.R. 1027, the last sentence to what was enacted as Section 338(h)(2), defining "local receive facility." H.R. Rep. No. 86, 106th Cong., 1st Sess., at 7 (April 12, 1999). Resurrecting that standard in rules, after Congress consciously rejected that standard, would violate Congressional intent). *See also* DirecTV Comments at 30 (Commission should not adopt remedies and procedures that have no basis in the statute).

[137] AAPTS Comments at 19 (satellite carriers object to such a process because they fear it will result in the creation of additional and expensive receive facilities).

intended to be a voluntary process. We also decline to adopt a good faith test to be used in the context of receive point negotiations.[138]

5. Good Quality Signal

62. **Standard.** In the *Notice*, we inquired about the "good quality signal" mandate in Section 338. Under the current cable carriage regime, television broadcast stations must deliver either a signal level of -45dBm for UHF signals or -49dBm for VHF signals at the input terminals of the signal processing equipment, to be considered eligible for carriage.[139] We sought comment on whether the signal quality parameters under Section 614 and the Commission's cable regulations are appropriate in the satellite carriage context.[140]

63. DirecTV states that the Commission should define "good quality signal" as one that will facilitate efficient MPEG compression of all channels. DirecTV proposes that the signal must meet the requirements of GR-338 CORE, TV1 for <20 route miles.[141] It states that the "<20 route miles" specification contains essential elements that are necessary for the digital video compression equipment used in DBS systems.[142] DirecTV also argues that the Commission should require a television broadcast station to 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.[143] We decline to adopt DirecTV's good quality signal proposals for several reasons. First, we believe that the TV1 standard is too rigid a construct. Specifically, a signal-to-noise ratio of +67 dB cannot be easily implemented by most television broadcast stations.[144] Broadcasters do not have to meet such exacting ratios and levels when delivering signals to a cable operator's headend to qualify for carriage. Moreover, as NAB points out, satellite carriers, such as Echostar, have been retransmitting local television signals that they have received over-the-air without much concern about signal quality.[145] We also note that it would be prohibitively expensive for a small television station to lease a dedicated TV1 circuit from a

[138]We note that Section 338 does not contain a "good faith" clause similar to the one contained in the amendments to Section 325. *See* 47 U.S.C. §325(b)(3)(C)(ii). We also reject as unnecessary BellSouth's request for rules prohibiting local television stations from unreasonably withholding consent to a regional receive facility location. BellSouth Comments at 17. *See* ALTV Comments at 8; NAB Reply Comments at 2-3 (arguing that BellSouth's good faith request exceeds the scope of Section 338 and that Congress gave television stations the absolute right to refuse to agree to a non-local receive facility).

[139]47 U.S.C. §534(h)(1)(B)(iii); 47 C.F.R. §76.55(c)(3).

[140]*Notice*, 15 FCC Rcd at 12157.

[141]DirecTV remarks that an equally acceptable standard is ANSI/EIA/TIA-250-C, known as the "Short Haul." DirecTV Comments at 32.

[142]We note that the short haul standard specifies a signal-to-noise ratio of +67dB, not –67dB as stated by DirecTV.

[143]*Id.*

[144]AAPTS comments that 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. AAPTS Reply Comments at 16.

[145]NAB Reply Comments at 20.

telecommunications carrier. It is not our intention to impose inordinate costs on small television stations that would prevent them from being carried by a satellite carrier.

64. We decide to apply the current good quality signal standards applicable in the cable context to satellite carriers, as suggested by ALTV.[146] The standards that have been applied to cable operators have functioned well since the inception of the statutory cable carriage requirements seven years ago. No evidence has been presented suggesting the cable signal quality standard will not prove equally satisfactory in the satellite context. We believe that the application of the current good quality signal standards will provide parties with a workable, tested standard.

65. Christian Television Network ("CTN") argues that the good quality signal standard should not be premised on off-air signal strength, but should turn on the quality of the picture delivered by any means.[147] AAPTS also states local stations that cannot provide a good quality signal to the local receive facility over-the-air should be permitted to deliver the signal in another way.[148] We agree with these commenters that television stations may use any delivery method to improve the quality of their signals to the satellite carrier. A television station may use microwave transmissions, fiber optic cable, or telephone lines as long as they pay for the costs of such delivery mechanisms. Such alternative delivery methods are sanctioned under the cable carriage rules and should be applicable in the satellite carriage context.

66. **Carriage of Television Stations With Disputed Signal Quality.** In the *Notice*, we recognized that a broadcaster not providing a good quality signal to a cable system headend is not qualified for carriage.[149] In this situation, a cable system is under no obligation to carry such a signal, but the broadcaster has an opportunity to provide equipment necessary to improve its signal to the requisite level and gain carriage rights.[150] We sought comment on whether Congress intended the same result for broadcasters that do not provide a good quality signal to the local satellite receive facility.

67. ALTV, AAPTS, and Network Affiliates agree that a satellite carrier may insist that a station cover the costs of delivering a good quality signal; they argue, however, that a satellite carrier cannot refuse to carry a television station just because its signal is less than adequate.[151] NAB comments that satellite carriers operating under Section 338, unlike cable systems operating under Sections 614 and 615, do not have the option of holding a station's carriage "hostage" during a dispute about a good quality signal.[152] It posits that 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

[146]ALTV Comments at iii.

[147]CTN Comments at 7.

[148]AAPTS Comments at 16.

[149]*Notice*, 15 FCC Rcd at 12157.

[150]*Broadcast Signal Carriage Order*, 8 FCC Rcd at 2991. A broadcast station may use microwave facilities, fiber-optics, or even a translator station to improve the quality of its signal, and therefore be qualified for carriage. *Id.*

[151]ALTV Comments at iii; AAPTS Comments at 15; and Network Affiliates Comments at 12.

[152]NAB Comments at 7.

effective date of the Section 338 requirements for long periods by dragging out Commission and court enforcement proceedings.[153] Conversely, DirecTV and LTVS assert that a satellite carrier may refuse to carry a station that fails to provide a good quality signal to the local receive facility.[154] LTVS adds that the satellite carrier should first notify the broadcast station of the deficient signal, including measurements and relevant data, and then discontinue carriage if the broadcaster fails to improve the signal quality.[155]

68. We disagree with the broadcast groups on this issue. We first observe that the statute does not affirmatively instruct satellite carriers to carry television stations that do not provide a good quality signal. Rather, Section 338 only provides that a television station is responsible for the costs of delivering a good quality signal. Given the absence of a statutory directive, we must interpret Section 338 in a manner that is both reasonable and consistent with current law. We also find that it would be contrary to the public interest to require satellite carriers to carry television stations that provide a poor quality signal. The principle reason underlying this decision is that satellite subscribers would not benefit from receiving a television signal that is of poor quality. In this instance, we believe that satellite subscribers would rather subscribe to cable or receive the signals over-the-air rather than pay for inadequate television signals retransmitted by a satellite carrier. Moreover, cable operators are not required to carry poor quality signals under Sections 614 and 615 of the Act. Noting the SHVIA's directive in establishing comparable carriage requirements between satellite carriers and cable operators, we should not require the carriage of poor quality signals under Section 338. We note that our findings here do not relieve the satellite carrier of its obligations to carry television signals where it provides local-into-local service. Rather, the satellite carrier does not have an obligation to carry television stations until they voluntarily pay and provide a good quality signal.

69. **Good Signal Quality Measurement and Testing.** With respect to the manner of testing for a good quality signal, we note that the Commission has adopted a method for measuring signal strength in the cable carriage context. Generally, if a test measuring signal strength results in an initial reading of less than -51 dBm for a UHF station, at least four readings must be taken over a two-hour period. If the initial readings are between -51 dBm and -45 dBm, inclusive, readings must be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results. For a VHF station, if the initial readings are less than -55 dBm, at least four readings must be taken over a two-hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, readings should be taken over a 24-hour period, with measurements no more than four hours apart to establish reliable test results.[156] The Commission stated that cable operators are further expected to employ sound engineering measurement practices when testing signal strength.[157] We sought comment on whether we should require the same signal testing practices for measuring a broadcaster's signal strength in the satellite context.

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[153] *Id.*

[154] DirecTV Comments at 28; LTVS Comments at 16.

[155] LTVS Comments at 17.

[156] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, 9 FCC Rcd 6723-24 (1994) ("Must Carry Reconsideration")

[157] *Id.* For example, we have required the: (1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; (2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; (3) height of the antenna above ground level and whether the antenna was properly oriented; and (4) weather conditions and time of day when the tests were done. *Id.*

70. LTVS states that the signal testing practices used in the cable context should apply in the satellite context.[158] NAB proposes adding "additional safeguards" to the signal testing process, such as permitting local stations to observe measurement procedures and requiring use of independent engineers to conduct tests.[159] NAB also advocates that the good quality signal requirements for satellite carriers should incorporate the various findings in Commission rulings in the cable context, such as the requirement that an operator use actual field measurements, rather than computer predictions, to measure a television station's signal.[160] BellSouth argues that NAB provides no support for imposing more stringent requirements on satellite carriers than on cable systems.[161] BellSouth also argues that like cable systems, satellite carriers should cooperate in testing the signal quality delivered by television stations to the satellite carrier's local receive facility.[162]

71. We believe that the signal testing practices in the cable carriage context should be generally applied in the satellite carriage context. The Commission developed its engineering standards through experience in adjudicating signal quality disputes between cable operators and television broadcast stations. In this instance, commenters have not provided any arguments or data suggesting that the cable practices and engineering standards would be unsuited for satellite carriers. As for NAB's call for additional safeguards, we find that such engineering and procedural processes should not be implemented as regulatory requirements. Instead, the parties should look to precedent as useful guidance. With regard to testing fees, we believe that the television broadcast station should pay for signal tests.[163]

72. At the same time, however, we note that the satellite carrier's local receive facility may not have a tower with broadcast station reception equipment mounted onto it like that is found at a cable system's principal headend. It has been standard practice among cable operators and broadcasters to test a television station's signal strength at the tower site. To remedy this situation, we strongly recommend that satellite carriers and broadcasters follow the testing procedures for field strength measurements found in Section 73.686(b)(2) of the Commission's rules, in addition to following the good engineering practices established in the cable context.[164] These rules, we believe, will serve as an adequate proxy for conducting signal measurements in lieu of an actual tower.

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[158]LTVS Comments at 17.

[159]NAB Comments at 14-15. DirecTV agrees that an independent engineer may be consulted to determine signal quality. DirecTV Reply Comments at 19.

[160]*Id.*

[161]BellSouth Reply Comments at 17.

[162]BellSouth Comments at 18.

[163]Under Section 338, the station bears the responsibility to provide a good quality signal. Attendant to this burden is its obligation to prove to the satellite carrier that the signal is of good quality.

[164]47 C.F.R. §73.686(b)(2). The rule, in part, requires that at each measuring location, the following procedures shall be employed: (1) The instrument calibration is checked; (2) The antenna is elevated to a height of 30 feet; (3) The receiving antenna is rotated to determine if the strongest signal is arriving from the direction of the transmitter; and (4) The antenna is oriented so that the sector of its response pattern over which maximum gain is realized is in the direction of the transmitter.

E. Duplicating Signals

73. **Definition.** Section 338(c)(1) states that:

> Notwithstanding subsection (a), a satellite carrier shall not be required to carry upon request the signal of any local commercial television broadcast station that substantially duplicates the signal of another local commercial television broadcast station which is secondarily transmitted by the satellite carrier within the same local market. . . .[165]

In the *Notice*, we asked several definitional questions concerning this phrase.

74. Section 614(b)(5) provides that a cable operator is not required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network.[166] The Commission decided that, based on the legislative history of this section, two stations "substantially duplicate" each other "if they simultaneously broadcast identical programming for more than 50 percent of the broadcast week."[167] For purposes of this definition, identical programming means the identical episode of the same program series.[168] Section 615(e) provides that cable operator with cable system capacity of more than 36 usable activated channels, and carrying the signals of three qualified NCE stations, is not required to carry the signals of additional stations the programming of which substantially duplicates the programming broadcast by another qualified NCE station requesting carriage.[169] The 1992 Cable Act states that substantial duplication was to be defined by the Commission in a manner that promotes access to distinctive noncommercial educational television services.[170] The Commission concluded that an NCE station does not substantially duplicate the programming of another NCE station if at least 50 percent of its typical weekly programming is distinct from programming on the other station either during prime time or during hours other than prime time.[171] We sought comment on whether the Commission should apply the cable carriage duplication definitions to satellite carriers under Section 338.

75. DirecTV proposes that the definition of "substantial duplication," as employed in Section 338(c), should include identical programming, whether broadcast simultaneously or not, of either 50 percent or more of a television broadcast station's total weekly programming, or 50 percent or more of its

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[165] 47 U.S.C. §338(c)(1).

[166] 47 U.S.C. §534(b)(5).

[167] *Must Carry Order,* 8 FCC Rcd at 2980-81. The Commission has stated, in the cable carriage context, that programs in foreign languages (e.g., MacNeil/Lehrer in Spanish) are not duplicative of the same programs broadcast in English, because they target different audiences. *Id.* at 2971.

[168] *Id.*

[169] 47 U.S.C. §535(e).

[170] *Id.*

[171] *Must Carry Order*, 8 FCC Rcd at 2970.

prime-time programming.[172] Network Affiliates argue that substantial duplication should be found only where there is an overlap in the Grade B contours of the stations in question. According to Network Affiliates, where there is no Grade B overlap between the stations, the stations' signals should not be deemed to substantially duplicate each other and should be entitled to carriage.[173] We do not find that these commenters have presented persuasive evidence as to why the cable standard is not suited for satellite carriers. Their proposals are also contrary to the purpose of the Act. DirecTV's proposal would winnow away a television station's right to carriage and would unduly expand the substantial duplication exception beyond what was intended by Congress. If the Network Affiliates' suggestion were adopted, we believe that the statutory duplication provision would be eviscerated, as there would be no station in a particular market that would duplicate another.

76. Accordingly, we will apply the duplication standards for commercial television stations,[174] set forth in the cable operator context, to satellite broadcast signal carriage as suggested by ALTV, NCTA, and LTVS.[175] That is, two commercial television stations substantially duplicate each other if they simultaneously broadcast identical programming for more than 50 percent of the broadcast week. The cable duplication provisions for commercial television stations have been in effect for the last seven years, without much controversy, and there is no reason to believe that they will be difficult to implement in the satellite carriage context.

77. We note, however, that due to the fundamental operational differences between cable systems and satellite service, a satellite carrier may choose which duplicating signal it is not required to carry. This policy differs from the cable duplication rules where an operator must carry the station that is closest to its principal headend. Since there are no "headends" in the satellite carriage context, that are relevant to the question of which stations in a particular market to carry, comparable rules in this specific instance should not be implemented. Absent an analogous headend standard or statutory guidance, we believe the public interest is best served by permitting satellite carriers to determine which stations to offer their subscribers.

78. DirecTV argues that, in addition to its ability to deny carriage of duplicative stations in the first instance, a satellite carrier should be permitted to remove a television broadcast station from its line-up if it begins to substantially duplicate its programming after carriage of the station has commenced.[176] We agree with DirecTV on this point. If the substantial duplication criteria are satisfied, a satellite carrier is permitted to drop that television station from its channel line-up. If this situation arises, however, we require the satellite carrier to notify the station, and its subscribers, in a timely manner prior to its removal from the relevant local-into-local channel line-up. By the same token, we

[172]DirecTV Comments at 35.

[173]Network Affiliates Comments at 13-14.

[174]In the cable carriage context, the Commission treated the duplication provisions of Sections 615(b)(2) and Section 614(b)(5) separately. The Commission noted that the two provisions were intended to accommodate different situations and were addressed separately in the statute and its legislative history. 8 FCC Rcd at 2980. We believe that our separate duplication postulates for commercial and NCE stations in the cable context should also be applied in the satellite context.

[175]ALTV Comments at 44; NCTA Comments at 6; and LTVS Comments at 20.

[176]DirecTV Comments at 37.

also find that a satellite carrier must begin carrying a television station that stops duplicating another local television station. When this circumstance presents itself, the station shall use the same procedures to establish carriage as permitted for new television stations under Section 76.66.

79. We sought comment on the phrase, "affiliated with a particular television network." In this situation, we asked what definition of "television network" applies because that term is not specifically defined in Section 338.[177] We asked whether we should implement the definition of television network found in Section 339 of the Act, the SHVIA's distant signal carriage provision, for the purposes of administering the Section 338 duplication provision.[178] BellSouth, NCTA, and LTVS all agree that the definition in Section 339(d) is acceptable.[179] Given the parties assent to the inclusion of the Section 339 definition, and the lack of opposition, we adopt this definition for the purpose of the substantial duplication analysis.

80. We now turn to the second part of Section 338(c)(1): "Notwithstanding subsection (a), a satellite carrier shall not be required to carry upon request the signal of any local commercial television broadcast station that substantially duplicates the signal of another local commercial television broadcast station which is secondarily transmitted by the satellite carrier within the same local market *or to carry upon request the signals of more than one local commercial television broadcast station in a single local market that is affiliated with a particular television network unless such stations are licensed to communities in different states.*" (emphasis added). We find that this part of the provision dictates three results. First, satellite carriers are not obligated to carry more than one network affiliate in a television market when both affiliates are licensed to communities in the same state, even if the affiliates do not substantially duplicate their programming. This is analogous to the cable rule stating that a cable system need only carry the network affiliate closest to the principal headend.[180] In this context, a satellite carrier may select which network affiliate it wants to carry. Second, a satellite carrier must carry network affiliated television stations licensed to different states, but located in the same market, even if they meet the definition of substantial duplication under the Commission's rules. An example of this situation is WMUR and WCVB. Both are ABC network affiliates, but the former is licensed to Manchester, New Hampshire, while the latter is licensed to Boston, Massachusetts.[181] Under Section 338(c)(1), the satellite carrier would be obligated to carry both. Third, if two television stations located in different states (but within the same "local market") duplicate each other, but are not network affiliates, the satellite carrier only has to carry one. For example, if there are two Home Shopping Network station affiliates in the same market, but located in different states, the satellite carrier need not carry both because the Home Shopping Network is not a television network under our definitional rule.[182]

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[177] *Notice*, 15 FCC Rcd at 12159.

[178] *Id.* "The term 'television network' means a television network in the United States which 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." This is known as the 15-25-10 rule. 47 U.S.C. §339(d)(5).

[179] BellSouth Comments at 21; NCTA Comments at 6; and LTVS Comments at 20.

[180] *See* 47 C.F.R. §76.56(b)(5).

[181] We note that Hearst-Argyle is the licensee for both WMUR and WCVB.

[182] If a network no longer meets the 15-25-10 rule, or a new network meets that rule, it is incumbent upon the station to make this fact known to the satellite carrier. The satellite carrier can either accept or reject the station's determination. A station may file a complaint with the Commission if it is in a disagreement with the satellite (continued...)

81. **Different States Examples.** In the *Notice*, we inquired about the application of the statutory phrase, "communities in different states."[183] Congress stated that this phrase addresses unique and limited cases, including such station pairs as WMUR (Manchester, New Hampshire) and WCVB (Boston, Massachusetts) in the Boston DMA (both ABC affiliates), cited above, as well as WPTZ[184] (Plattsburg, New York) and WNNE (White River Junction, Vermont)[185] in the Burlington-Plattsburgh DMA (both NBC affiliates), in which mandatory carriage of both duplicating local stations upon request assures that satellite subscribers will not be precluded from receiving the network affiliate that is licensed to a community in the state in which they reside.[186] We asked whether there were other similar situations that must be addressed and accounted for.[187]

82. According to DirecTV, Congress sought to create only a very narrow exception to the general rule that satellite carriers shall not be required to carry duplicative signals – one that applies in "unique and limited cases."[188] DirecTV argues that the Commission must implement this provision in the limited manner that Congress intended--in no case should the Commission infer additional authority to address "similar situations."[189] We infer no such additional authority. NAB asserts that 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.[190] According to NAB, while these instances are no doubt "unique and limited," as the Conference Report indicates, the Act is not restricted to the particular examples mentioned in the Conference Report.[191] We agree with NAB. The reference in the legislative history, cited above, merely states known examples. It cannot be read to limit the phrase's application to only the noted examples.

83. **National Programming.** DirecTV argues that it would make no sense for the Commission to mandate carriage of local affiliates if they substantially duplicate the programming

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(....continued from previous page)
carrier.

[183]*Notice*, 15 FCC Rcd at 12159.

[184]We note that WNNE is a satellite of WPTZ.

[185]We note that Hartford, VT is the station's city of license. White River Junction is where the station's studio is located.

[186]Conference Report at H11795.

[187]Quorum of Maryland License provided the only other example of a situation meeting the duplication exception in Section 338. It states that WHAG-TV (NBC, Hagerstown, MD) and WRC-TV (NBC, Washington, D.C.) are located in different states, and thus the exception should apply. However, WHAG-TV only wants carriage in the upper northwest part of the Washington, D.C.-Hagerstown, MD DMA. Quorum of Maryland License Comments at 2-3.

[188]DirecTV Comments at 38.

[189]*Id.*

[190]NAB Reply Comments at 26, *citing* 47 U.S.C. § 338(c)(1).

[191]*Id.*

provided by the same channel that is carried nationally.[192] NAB argues that the term "another local commercial television broadcast station" in Section 338's duplication provision cannot be read to mean a non-local TV station or non-broadcast satellite channel.[193] We disagree with DirecTV's position here. The relevant statutory provision is specifically an intra-market exemption, directly referring to situations where "local" television stations duplicate each other. Congress did not intend for national programming to be considered in the duplication analysis, otherwise it would have so stated. If we were to adopt DirecTV's position, local television stations that carry Univision or Telemundo Spanish language programming, for example, would not have to be carried by satellite carriers because their national feeds are already carried. In so doing, we would obviate the statute's focus on localism.

F. Noncommercial Educational Television Station Carriage Issues.

84. Section 338(c)(2) states that: "The Commission shall prescribe regulations limiting the carriage requirements under subsection (a) of satellite carriers with respect to the carriage of multiple local noncommercial television broadcast stations. To the extent possible, such regulation shall provide the same degree of carriage by satellite carriers of such multiple stations as is provided by cable systems under Section 615."[194] Section 615(l)(1), in turn, provides that a local noncommercial educational television ("NCE") station qualifies for cable carriage rights if it is licensed by the Commission as an NCE station and if it is owned and operated by a public agency, nonprofit foundation, or corporation or association that is eligible to receive a community service grant from the Corporation for Public Broadcasting.[195] For purposes of cable carriage, an NCE station is considered local if its community of license is within 50 miles of, or the station places a Grade B contour over, the principal headend of the cable system.[196] Cable systems are required to carry local noncommercial educational television stations under a statutory provision based on a cable system's number of usable activated channels.[197] As part of our inquiry regarding Section 338's duplication provision, we sought comment on the scope of a satellite carrier's obligations with regard to noncommercial educational television stations.[198] We also asked whether we should adopt procedural rules for the carriage of NCE television stations to mirror the cable carriage requirements.[199]

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[192]DirecTV Comments at 36.

[193]NAB Reply Comments at 25.

[194]47 U.S.C. §338(c)(2).

[195]47 U.S.C. §535(l)(1). An NCE station is also considered qualified if it is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes. 47 C.F.R. §76.55(a).

[196]47 U.S.C. §535(l)(2).

[197]Cable systems with: (1) 12 or fewer usable activated channels are required to carry the signal of one qualified local noncommercial educational station; (2) 13-36 usable activated channels are required to carry no more than three qualified local noncommercial educational stations; and (3) more than 36 usable activated channels shall carry at least three qualified local noncommercial educational stations. *See* 47 U.S.C. §535(b) and (e); 47 C.F.R. §76.56(a).

[198]*Notice*, 15 FCC Rcd at 12160-61.

[199]*Notice*, 15 FCC Rcd at 12153. *See* 47 C.F.R. §76.56 (signal carriage obligations) and 47 C.F.R. §76.61(b) (regarding the carriage of noncommercial televisions).

85. AAPTS argues that the duplication provision is the only limitation on local NCE station carriage contemplated by SHVIA. AAPTS argues that Congress intended for eligible local NCE stations to be carried whenever a satellite carrier system is providing local-into-local service in a particular market.[200] On the opposite side, DirecTV and Echostar assert that the Commission should limit satellite carriage of NCE stations in a manner consistent with a carrier's technical limitations and other factors that differentiate the satellite industry from the cable industry.[201] For example, EchoStar argues that no more than 2% of a satellite carrier's total channel capacity (*i.e.*, 6 channels nationwide for a system of 300 channels) should be devoted to local noncommercial station carriage.[202] DirecTV submits that satellite carriers should only be required to carry a number of NCE stations that would bring the total number of NCE channels (defined to include national educational channels) available in a local market to a maximum of four percent of the local required channels offered by the satellite carrier in the market.[203] According to DirecTV, none of these channels should substantially duplicate programming that is offered on another channel already carried in the market.[204]

86. We find that the NCE carriage formulations proposed by DirecTV and Echostar would deprive satellite subscribers of access to local noncommercial television stations in those markets where local-into-local service is offered. While we recognize that satellite carriers provide a national service, their proposals would vitiate the intent of Congress in promoting carriage of local NCE stations. Instead, we agree with AAPTS that the duplication provision is the only limitation on NCE carriage contemplated by Congress when it promulgated Section 338. Therefore, a satellite carrier must carry all non-duplicative NCE stations in markets where they provide local-into-service. Section 338 instructs the Commission to implement NCE station carriage requirements providing the same degree of carriage by satellite carriers as is required by cable systems under Section 615 of the Act.[205] Cable systems with more than 36 channels are required to carry all non-duplicative NCE stations.[206] Given that satellite carriers have more than 36 channels, we hold that satellite carriers' NCE station carriage obligations should be comparable to the requirements imposed on cable operators.[207]

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[200]AAPTS Comments at 9.

[201]DirecTV Comments at 34; EchoStar Comments at 5.

[202]Echostar Comments at iv, 5.

[203]DirecTV Comments at 39.

[204]NCTA and AAPTS argue that the formulations proposed by EchoStar and DirecTV would lead to satellite NCE carriage requirements that do not remotely resemble those imposed on the cable industry in terms of the nature of the signal (national versus local) and in the number of stations carried. NCTA Comments at 10; AAPTS Reply Comments at 3.

[205]47 U.S.C. §338(c)(2).

[206]47 U.S.C. §535(e).

[207]The Commission has held that Section 615 requires cable operators with more than 36 channels to carry additional qualified NCE stations where there are more than three such stations available. *See Must Carry Reconsideration*, 9 FCC Rcd at 6723-24. For example, Cox Communications in Fairfax County, VA, has to carry NCE stations WMPT, WETA, WHUT and WNVC because it has more than 36 channels and each of these stations are either within 50 miles of the operator's principal headend or the stations place Grade B Contours over the headend.

87. At the same time, we recognize that Section 338 requires the Commission to limit the carriage of multiple NCE stations in markets where local-into-local service is provided. It is important to note that this instruction was embedded in the NCE duplication provision of Section 338.[208] Against this backdrop, we adopt a limitation principle based upon duplicative programming.[209] Using the NCE station duplication definition found in the cable context as a general model, we have developed a two step approach in defining substantial duplication in this context. First, a noncommercial television station substantially duplicates the programming of another noncommercial station if it simultaneously broadcasts the same programming as another noncommercial station for more than for more than 50 percent of prime time, as defined by §76.5(n), and more than 50 percent outside of prime time over a three month period. After three noncommercial television stations are carried,[210] the test of duplication shall be whether more than 50 percent of prime time programming and more than 50 percent outside of prime time programming is duplicative on a non-simultaneous basis.[211] As for the timeframe of when to measure duplication, we find that the amount of duplicative prime-time weekly programming broadcast should be examined over the course of three month period. The end of the three month period must fall within 30 days prior to the date the satellite carrier notifies the NCE station that it is denying or discontinuing carriage based on substantial duplication. The amount of duplicative weekly programming broadcast outside of prime time will be measured over the same period. Only if the station duplicates more than 50 percent of the other station's weekly programming in both of these respects can it be denied carriage. We believe this approach is a reasonable means of achieving the statutory goal of implementing an NCE carriage obligation for satellite carriers that parallels the existing cable carriage requirement, and takes into account, "to the extent possible," the other relevant technical and legal constraints. In reaching this balance, we note in particular that, unlike satellite carriers, cable operators are generally required to carry up to three local noncommercial educational stations regardless of the duplication involved.[212] However, unlike satellite carriers, cable operators need not carry all NCE stations licensed to communities in an expansive DMA, but need only carry those NCE stations within 50 miles of the cable system principal headend or which place a Grade B service contour over the principal headend.[213] The rule adopted attempts to balance these differences in a practical way using the avoidance of duplication mechanism identified in Section 338(c) of the SHVIA.[214]

[208] *See* 47 U.S.C. §338(c)(2).

[209] Given the differences between commercial and noncommercial television stations in the statutory language, we are able to develop different definitions of substantial duplication.

[210] We note that 11 of the top 35 markets contain more than 3 NCE stations. They are: (1) New York (7 NCEs); (2) Los Angeles (4 NCEs); (3) Philadelphia (5 NCEs); (4) San Francisco-Oakland-San Jose (5 NCEs); (5) Boston (4 NCEs); (6) Washington, D.C. (6 NCEs); (7) Minneapolis-St. Paul (5 NCEs); (8) Indianapolis (4 NCEs); (9) Charlotte (4 NCEs); (10) Cincinnati (4 NCEs) ; and (11) Greenville-Spartanburg (4 NCEs).

[211] Like our conclusion in the cable context, we consider the programming broadcast in prime time distinct from the programming broadcast at other times because prime time often is intended for different purposes and attracts different viewers. *See Must Carry Order*, 8 FCC Rcd at 2971

[212] 47 U.S.C. §615(e).

[213] *Compare* 47 U.S.C. §615(l)(2) with 47 U.S.C. §338(h)(3).

[214] The Act's NCE cable carriage provision instructs that duplication shall be defined by the Commission "in a manner that promotes access to distinctive noncommercial educational television service." 47 U.S.C. §535(e).