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Before the

Federal Communications Commission

Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:	
Implementation of the Satellite Home Viewer Improvement Act	CS Docket No. 00-96
Broadcast Signal Carriage Issues	CS Docket No. 99-363

PETITION FOR RECONSIDERATION BY THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.

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ASSOCIATION OF LOCAL TELEVISION STATIONS

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Executive Summary

ALTV reminds the Commission that the underlying purpose of §338 is to insure that satellite subscribers have access to *all* local signals in markets where the satellite carrier chooses to provide local-into-local service. The carriage rules enacted pursuant to this section are an integral part of the local satellite compulsory license, whereby satellite providers gain access to local signals without paying copyright fees. These rules are significant because they insure that *all* local signals will be equally available in a non-discriminatory fashion. Absent these provisions, many local stations will be denied access to these satellite platforms. As a result, these local stations will be placed at a significant competitive disadvantage, reducing their viability in a competitive marketplace. In the end, those consumers who rely solely on free, over-the-air local television will suffer the most significant harm through a loss of video voices in the marketplace.

Unfortunately, the FCC's *SHVIA Order* conflicts with this fundamental Congressional objective by permitting *a la carte* sales of local signals. As ALTV noted during the initial round of comments, offering all local stations as a single unitary package is the only way to meet both the letter and spirit of the statute. The variations in pricing and packaging permitted by the *SHVIA Order* are in direct conflict with the statute. Similarly, the FCC's decision to permit retransmission consent stations to be counted in the location of alternate, out-of-market receive facilities abrogates the plain language of the statute as well as its underlying purpose.

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Pursuant to 47 C.F.R. 1.429, The Association of Local Television Stations, Inc. (ALTV) hereby files the following Petition for Reconsideration in the above captioned matter. While the Commission is to be complimented for enacting rules consistent with Congressional timetables, several key parts of the decision are not only arbitrary and capricious, but run counter to specific Congressional directives.[1] ALTV has been an

[1] *Report and Order, Implementation of the Satellite Home viewer Improvement Act of 1999, Broadcast Signal Carriage Issues*, CS. Docket No. 00-96, FCC 00-417 (released November 30,2000); 66 *Fed. Reg.* No. 15 at 7410-7432 (January 23, 2001). (Hereafter cited as the *SHVIA Order*.)

active participant throughout this proceeding.[2] Resolution of these issues is vitally important to ALTV members and the entire television broadcasting industry.

ALTV reminds the Commission that the underlying purpose of §338 is to insure that satellite subscribers have access to *all* local signals in markets where the satellite carrier chooses to provide local-into-local service. The carriage rules enacted pursuant to this section are an integral part of the local satellite compulsory license, whereby satellite providers gain access to local signals without paying copyright fees. These rules are significant because they insure that *all* local signals will be equally available in a non-discriminatory fashion. Absent these provisions, many local stations will be denied access to these satellite platforms. As a result, these local stations will be placed at a significant competitive disadvantage, reducing their viability in a competitive marketplace. In the end, those consumers who rely solely on free, over-the-air local television will suffer the most significant harm through a loss of video voice in the marketplace.

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[2]Comments of the Association of Local Television Stations in CS Docket No. 00-96, (July 14, 2000); Reply Comments of the Association of Local Television Stations, Inc. in CS Docket No. 00-96 (August 4, 2000)

package is the only way to meet both the letter and spirit of the statute. The variations in pricing and packaging permitted by the *SHVIA Order* are in direct conflict with the statute. Similarly, the FCC's decision to permit retransmission consent stations to be counted in the location of alternate, out-of-market receive facilities abrogates the plain language of the statute as well as its underlying purpose.

I. Permitting *A La Carte* Sales of Local Television Signals Is Contrary to Law and Inconsistent with the Public Interest.

The *SHVIA Order* departs from the letter and intent of Section 338 by giving the satellite carriers the ability to package and sell "local-into-local" stations either as a package or on an *a la carte* basis. The offending language reads as follows:

> We do not believe that the statute requires satellite carriers to sell all local television stations as one package to subscribers. As Echostar points out, Congress did not intend to establish a basic service tier-type requirement for satellite carriers when it implemented Section 338. Nor did Congress explicitly prohibit the sale of local television station's signals on an a la carte basis. Rather Section 338's anti-discrimination language prohibits satellite carriers from implementing pricing schemes that effectively deter subscribers from purchasing some, but not all, local televison station signals. Thus, we find that a satellite carrier must offer local television signals, as a package or a la carte, at comparable rates.[3]

[3] *SHVIA Order* at para. 9.

While the FCC's language is not entirely clear, we understand the *SHVIA Order* to allow the following pricing regimes. For example, assuming a "local-into-local" satellite service with eight local stations, a satellite carrier could:

- Sell all eight stations as one unitary package
- Sell each of the eight stations individually on an *a la carte* basis
- Create any mix of packages and/or individually offered stations. For example, a satellite carrier could create a package of six or seven stations and offer the other stations on an individual *a la carte* basis. Similarly, a satellite carrier could create two packages with four stations in each package.

From a factual standpoint, a satellite carrier through its packaging and pricing decisions could directly influence the availability, hence access, to these local channels. ALTV respectfully submits that the second and third scenarios presented above are inconsistent with Section 338, and are also arbitrary and capricious. The only way to insure that consumers retain access to all local stations is to require satellite carriers to offer local stations as a single unitary package.

A. The SHVIA Order Conflicts with Section 338's Primary Objective: To Preserve Free, Over-the-air Television Broadcasting for Non-subscribers.

There can be little doubt that the underlying purpose of Section 338 is the preservation of free, local television. The Joint Explanatory Statement of the Conferees noted that "The proposed provisions are intended to preserve free television for those not

served by satellite or cable systems and to promote widespread dissemination of information from a multiplicity of sources."[4] Congress wanted to insure that those Americans who do not subscribe to satellite services would not be harmed. The Conference Committee noted that it was "concerned that, absent must-carry obligations, satellite carriers would carry the major network affiliates and few other signals. Non-carried stations would face the same loss of viewership Congress previously found with respect to cable non-carriage."[5]

> Although the conferees expect that subscribers who receive no broadcast signals at all from their satellite service may install antennas or subscribe to cable service in addition to satellite service, the Conference Committee is less sanguine that subscribers who receive network signals and hundreds of other programming choices from their satellite carrier will undertake such trouble and expense to obtain over-the-air signals from independent broadcast stations.[6]

To avoid these adverse consequences, Congress granted a "local-into-local" compulsory license for satellite carriers, and enacted carriage policies to insure that *all* local stations would be seen in markets where "local-into-local" service was offered.

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[4]Joint Explanatory Statement of the Committee of Conference on H.R. 1554, 106th Cong, 145 CONG REC, S14708, 14711 (daily ed. November 17, 1999) (hereinafter cited as *Conf. Rep.*)

[5]*Conf. Rep.* at 14711..

[6]*Id.*

> Providing the proposed license on a market-by-market basis further both goals by preventing satellite carriers from choosing to carry only certain stations and effectively preventing many other local broadcasters from reaching potential viewers in their service areas.[7]

Congress made it clear that "trading the benefits of the copyright license for the must carry requirement is a far and reasonable way of helping viewers have access to *all* local programming while benefitting satellite carriers and their customers."[8]

The FCC, through its packaging and *a la carte* pricing policies, establishes a regulatory regime that throughly frustrates the statute's objectives. Through either packaging and/or pricing manipulation, satellite carriers can achieve the same result as if there were no carriage policies at all. A satellite carrier has the ability to create packages and/or set prices, in such a way as to make some stations unattractive to satellite customers. Using the example provided above, the new rules would permit a satellite operator to package six of the eight television stations, and offer the remaining two stations on an *a la carte* basis. There should be little doubt that the stations sold individually, would be placed at a significant disadvantage, as few satellite subscribers would opt for the station. Alternatively, the *SHVIA Order* would permit a satellite carrier to offer all of the eight stations on an *a la carte* basis. However, according to the new

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[7] *Id*.

[8] *Id.*

rule, a carrier is not required to provide a uniform price for each signal. To the contrary, it is expressly permitted to offer signals at different prices. [9] Nonetheless, regardless of any uniform pricing scheme, the statute simply does not authorize the sale of local stations on an individual *a la carte* basis. ALTV believes that the only way to meet the letter and intent of the statute is to offer all "local-into local" stations as a single unitary package.

Through packaging and pricing, the *SHVIA Order* permits precisely the activity statute sought to proscribe. Stations will be treated in a different and discriminatory fashion. Satellite subscribers will, from an economic standpoint, find it more difficult to access *all* of the local stations. As a station continues to lose audience, the real harm will be felt by those who do not subscribe to satellites or other multi-channel pay services. These consumers will watch local television stations become economically disadvantaged and ultimately fail, thereby reducing video voices in the community.

B. The *SHVIA Order* Conflicts with the Language and Intent of Section 338(d).

Some may argue that these harms will not occur, because the statute prohibits a satellite carrier from discriminating against some local television stations. Unfortunately, the *SHVIA Order* misconstrues Section 338(d), and wipes out any statutory protections.

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[9]The problem becomes more complex when one attempts to compare, on a per channel basis, the prices charged for an individual channel and a channel offered as part of a package. As will be discussed *infra*, the FCC provides no guidance for evaluating such price

Indeed, the pricing and marketing policies sanctioned by the FCC's Order should be considered a *per se* violation of this statutory provision.

At the time the SHVIA was enacted, Congress knew that discrimination by satellite carriers against some local television stations was a very real possibility. At least one satellite carrier had already been carrying selected local signals in a number of markets. Moreover, the statutory delay in implementing the carriage provisions would continue this discrimination until January 1, 2002. Once the rules became effective, however, Congress specifically sought to end all discrimination with respect to pricing and manner of carriage. Section 338(d) is quite specific:

> [T]he satellite carrier shall retransmit the signal of the local television broadcast stations to subscribers in the stations' local market on contiguous channels and provide access to such stations' signals at a *nondiscriminatory price* and in a *nondiscriminatory manner* on any navigational device, on-screen program guide, or menu.[10] (Emphasis supplied)

The legal definition of non-discrimination has a long history in the field of regulation. *Blacks Law* states that discrimination is "a breach of the carrier's duty to treat all shippers *alike,* and afford them *equal* opportunities to market their product."

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[10]47 U.S.C. §338 (d)

The concept of discrimination is not unknown to the Communications Act. Section 202 prohibits any "unjust or unreasonable discrimination in charges, practices classification ...." Congress knew that a blanket nondiscrimination provision would have required the telephone companies to charge exactly the same rates for exactly the same service, without exception. To avoid this result, the prohibition contained in Section 202 provides some flexibility. Pricing differentials may not be "unjust or unreasonable."

As the satellite industry knows all too well, there are prohibitions against discrimination with respect to the sale of cable programming by vertically integrated cable companies. Title 47 U.S.C, §548(B) instructs the FCC to enact rules that generally "prohibit discrimination" with respect to the prices, terms, and conditions of satellite cable programming or satellite broadcast programming. However, this prohibition is not absolute. Section 548 (B) (i)-(iv) contains several specific exceptions, including a specific provision for establishing different prices terms and conditions, to this general rule.

Section 338(d) of the Satellite Home Viewer Improvement Act contains no such statutory exceptions. It establishes a blanket non-discrimination requirement, with no statutory exceptions.[11]

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[11]ALTV does not believe the nondiscrimination provisions of §338(d) are limited solely to a satellite carrier's discriminatory activity as between local television stations. To the

Despite the plain language, the *SHVIA Order* replaces the term "non-discrimination" with the concept that local stations must be offered at "comparable rates." While the *SHVIA Order* is not clear, the term "comparable" implies that satellite carriers may charge consumers different prices for local television stations contained in the same local-into-local service. The word "comparable," however, does not appear in the statute. Moreover, there is absolutely no discussion in the statute's legislative history to suggest that nondiscrimination means "comparable." The *SHVIA Order* has simply re-written the statute.

The FCC's decision to re-write the statute may be significantly more burdensome on satellite operators. The *SHVIA Order* provides no guidance for defining the term -- "comparable rates." Assuming a satellite carrier decides to charge different rates, will it have to justify the rate differential to the FCC? What factors will be considered in justifying a different price for the provision of different local signals in the same local market? Significantly, the satellite operator making use of the compulsory license will be obtaining the rights to the programs on all local stations essentially for free. In the end the standards needed to implement the "comparable rate" language will require the FCC to become involved in evaluating rates, a task which the FCC apparently wants to avoid.

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contrary, the nondiscrimination provisions of the statue also prohibit discriminatory activity as between local stations and other non-broadcast, satellite delivered programming.

In summary, ALTV believes that the sale of stations individually on an *a la carte* basis is contrary to the statute. The FCC should revise its plan to authorize the sale of "local-into-local" signals as a single unitary package.

C. Offering Stations as a Single Package Does Not Create A Rate Regulated Basic Tier.

ALTV urged the FCC to adopt a rule that all local signals should be offered as a single unitary package.[12] The *SHVIA Order* declines this invitation on the grounds that, "Congress did not intend to establish a basic tier type requirement for satellite carriers."[13] Not only is the argument incorrect, it misconstrues the intent of the statute.

While recognizing the inherent differences between cable and satellite systems, Congress sought to create a comparable regulatory structure:

> The proposed licenses place satellite carriers in a comparable position to cable systems, competing for the same customers. Applying a must-carry rule in markets which satellite carriers choose to serve benefits consumers and *enhances competition with cable by allowing consumers the same range of choice in local programming* they receive through cable service. The conferees expect that, by January 1, 2002, satellite carriers' market share will have increased and that the Congress' interest in maintaining free

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[12]ALTV Comments at 16.

[13]*SHVIA Order* at para 99.

> over-the-air television will be undermined if local broadcasters are prevented from reaching viewers by either cable or satellite distribution.[14]

Thus, as a general policy matter, the FCC was instructed to create a regulatory structure that was as close as possible to the model applied to cable. This policy perspective was important for two reasons: 1) it gives consumers similar choices and, 2) it places satellite systems in a similar competitive environment.

Unfortunately, the FCC ignored this policy perspective when it permitted *a la carte* pricing of local signals that are carried as part of a local-into-local satellite service. The 1992 Cable Act does not permit cable systems to offer local stations on an *a la carte* basis. Moreover, cable systems are not permitted to mix and match packages of local signals. Accordingly, the *SHVIA Order* does not place satellite systems in a comparable competitive position with cable, and does not provide consumers with the same range of choice in local programming.

ALTV acknowledges that the Satellite Home Viewer Improvement Act does not establish a rate regulated basic tier of service for satellite systems. This does not mean, however, that the FCC is precluded from requiring that "local-into-local" signals be

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[14]*Conf. Rep.* at S14711..

offered as a unitary package. Attempts to recast this request as an effort to create a basic tier on satellite systems are simply inaccurate.

The basic tier provisions of § 623 (b) of the Communications Act, (47 U.S.C. §543), contain a number of requirements. At its core, is the obligation to regulate the rates of this service tier in the absence of effective competition. In addition, the basic service tier must be provided as a separately available service "to which subscription is required for access to any other tier of service."[15] Public, educational and governmental access programming must appear on this tier as well.

ALTV never suggested that satellite providers be subject to basic tier type regulation. Consistent with §338 ALTV has asked only that satellite providers carry local stations on contiguous channels, and that all stations be offered as a single package. Unlike cable's rate regulated tier of service there is no attempt to regulate the rates charged for "local-into-local" service. There is no requirement that consumers must first purchase a complete "local-into-local" package before purchasing other satellite services. Moreover, there are no requirements for including PEG access in the local-into-local broadcast package. In short, ALTV's proposal to require that all "local-into-local"

[15] 47 U.S.C. §543(b)(7)

stations be sold as a single package does not create a basic service tier. The FCC's concerns in this area are unfounded.[16]

In summary, ALTV respectfully requests that the Commission require satellite carriers providing local-into-local service to offer such service as a single package. This proposal is less intrusive than the *a la carte* plan proffered by the FCC, and is more consistent with the statute's objectives.

II. FCC Should Revise Its Alternative Receive Facility Rules

Section 338 requires satellite carriers to establish a local receive facility in each local market. As defined in §338(h)(2) a local receive facility is the "reception point in each local market which a satellite carrier designates for delivery of the signal of the station for purposes of retransmission." Pursuant §338(b)(1), a local station is responsible for the costs of delivering a good quality signal to the receive facility in order to "*assert its right to carriage.*" The provision reads:

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[16]Ironically, the FCC's decision allowing local stations to be sold on an *a la carte* basis creates precisely the type of rate investigation the Commission seeks to avoid. Under ALTV's plan the only issue for the Commission is to determine whether the stations offered as part of a "local-into-local" service are being sold as a single package. There is no need to examine the actual rates charged for this service. The *a la carte* plan outlined in the *SHVIA Order* forces the FCC to decide whether the prices charged for some local stations are "comparable" to the prices charged for other stations. In this regard, the FCC's decision is arbitrary and capricious. In an effort to avoid imposing a rate regulated basic tier on to satellite systems, its "comparable" *a la carte* pricing proposal gives rise to rate inquiries that are more complex and intrusive than those currently found in the cable industry.

> 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.

The *SHVIA Order* interprets this provision to mean that a satellite operator may select an alternative, out of market receive site, if at least one half of *all* the stations in a market agree.[17] Pursuant to the FCC's decision, it would count both stations "asserting their right to carriage under the statute" as well as those stations who have secured carriage through the retransmission consent process. The FCC misreads the statute. According to §338(b)(1) only stations "asserting a right to carriage," and not retransmission consent stations, may be counted when determining an alternative receive facility.

The plain language in §338(b)(1) defines the class of stations that are obligated to provide a good quality signal and bear the costs of getting the signal to a satellite station's receive facility. The sentence limits the provision to a station "asserting its right to carriage under subsection (a)." The language is repeated with respect to calculating those eligible for deciding whether to approve an alternate, non-local receive facility. No

[17]According to the FCC, a satellite carrier intending to serve multiple markets must secure the agreement of at least one half of the stations in each market. We agree that the statute requires the agreement of stations in each affected market.

reference is made to stations negotiating carriage under the retransmission consent provisions of §325. In this regard the phrase "asserting a right to carriage" parallels the requirements of §338(a)(1) which requires a local station to "request carriage."

Basic statutory construction dictates that the phrase "asserting a right to carriage" can apply only to stations requesting carriage under §338(a), and not to those stations electing to negotiate for retransmission consent under §325. By definition a station opting for retransmission consent is not "asserting its right to carriage." To the contrary, a station selecting the retransmission option is asserting its right "not to be carried" without its consent. Stations selecting this option automatically lose their "right to carriage" in favor of marketplace negotiations.[18]

Permitting retransmission consent stations to approve non-local, alternate receive facilities eviscerates the statute. As noted above, the underlying purpose of the statute was to insure that all local stations are carried in markets where "local-into-local" service

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[18]Moreover, when a station commences retransmission consent negotiations with a satellite operator issues such as who bears the cost of getting the signal to the receive facility are points of negotiation. Depending on the circumstances, a satellite operator may be willing to bear the costs of getting a station's signal to its alternative receive facility. Under the Commission's interpretation, retransmission consent stations would be included in the class of stations that have a *statutory* obligation to bear these costs and to provide a good quality signal. There is nothing in the statute or legislative history to indicate that Congress intended to limit retransmission consent negotiations in such a fashion. To the contrary, it is entirely possible that satellite operators in some circumstances, may be willing to bear these costs.

is provided. Congress was concerned that absent these rules, "satellite carriers would carry the major network affiliates and few other signals."[19] These Congressional concerns are abandoned under the FCC's approach.

If stations that elect retransmission consent are allowed into approve an alternate receive facility, stations "asserting their right" to be carried under the signal carriage rules will be harmed. The costs of transporting a signal to an alternate, out-of-market receive facility can be significant. Depending on the distance, it may cost a station thousands of dollars per month to transport its signal to a distant location. Transport costs could become prohibitive for stations asserting their signal carriage rights under the statute.

Satellite operators have a strong incentive to create consolidated, non-local receive facilities. It reduces their costs. Moreover, as can be seen from the satellite industry's position in this proceeding, it is more than willing to reduce the number of stations that can assert carriage rights under the statute. By increasing station costs through distant, alternate receive facilities, satellite carriers can manipulate the process to reduce their carriage obligations.

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[19]*Conf. Rep.* at S1114711.

The potential for manipulation can be avoided by a proper reading of the statute. The *SHVIA Order* effectively eliminates the phrase "*asserting a right to be carried*" from the statute. The FCC's decision rewrites the statute to read that an alternative receive facility must be approved by half of *all* stations in a local market. This interpretation, however, leads to a situation that may eviscerate the protections provided in the statute.

III. Conclusion

The *SHVIA Order* makes two fundamental errors in statutory construction. Permitting a satellite carrier to offer local signals on an *a la carte* basis finds no support in the statute, and ignores explicit Congressional concerns. To meet the concerns expressed by Congress, all "local-into-local" stations must be offered as a single unitary package. Similarly, permitting retransmission consent stations to approve distant, alternative receive facilities runs counter to the plain language of the statute and frustrates the statute's intent. Accordingly, the FCC should revise its decision.

Respectfully submitted,
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