

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of:)	
)	
Implementation of the Satellite Home Viewer Improvement Act of 1999)	CS Docket No. 00-96
)	
Broadcast Signal Carriage Issues)	

To: The Commission

**NATIONAL ASSOCIATION OF BROADCASTERS'
STATEMENT IN SUPPORT OF ALTV PETITION FOR RECONSIDERATION**

Although the Commission's *Report & Order* correctly interpreted the Satellite Home Viewer Improvement Act ("SHVIA") in almost all respects, the petition for reconsideration filed by the Association of Local Television Stations identifies two critical errors in the Commission's decision. The National Association of Broadcasters ("NAB") strongly urges the Commission to modify its *Report & Order* to correct the two problems identified by ALTV.¹

First, the Commission undermined the fundamental goal of Section 338 by authorizing satellite carriers to discriminate against stations that request carriage under that provision. The Commission's authorization of a la carte pricing for local stations would allow satellite carriers to demote some local stations to second-class status in a manner that cable systems could never dream of -- namely, selling a handful of stations in a market as a package, while offering the

¹ NAB is a nonprofit incorporated association that serves and represents America's radio and television broadcast stations and networks. NAB's support for ALTV's petition for reconsideration is without prejudice to NAB's pending appeal in the Fourth Circuit.

smaller stations in the market only on an a la carte basis, which predictably will be purchased by far fewer subscribers.

Second, the Commission incorrectly allowed stations that have *not* asserted the right to carriage -- *i.e.*, those that have relied instead on retransmission consent -- to “vote” about whether a local receive facility may be located outside of the Designated Market Area. That result is inconsistent with the language of the Act and could easily be manipulated by satellite carriers to sabotage the Act’s purposes. The Commission should promptly correct these two critical errors in its SHVIA regulations.

I. The Commission’s Authorization of A la Carte Sales of Stations Insisting on Carriage Violates SHVIA’s Non-Discrimination Principle

In their marketing of local TV stations during the pre-2002 transition period provided by the SHVIA, DirecTV and EchoStar have consistently sold local TV stations as a unified package in each DMA in which they offer local-to-local service. *See, e.g.*, www.directv.com/howtoget/howtogetpages/0,1076,224,00.html (DirecTV web page about local-to-local packages); www.dishnetwork.com/content/programming/locals/index.shtml (same for EchoStar). Inexplicably, the Commission’s proposed rule would allow satellite carriers to discriminate against stations that request carriage under Section 338 by excluding those channels from the DBS company’s “local station packages” and instead relegating such stations to the vagaries of a la carte purchase -- or to manipulate packaging and a la carte pricing in other ways that deter its subscribers from acquiring access to all their local stations. *See Report & Order*, ¶ 99. The proposed rule would contradict the Act’s mandate that “the satellite carrier . . . provide . . . access to . . . [the] signals [of the local television broadcast stations] at a nondiscriminatory price and in

a nondiscriminatory manner on any navigational device, on-screen program guide, or menu.” 47 U.S.C. § 338(d).

The *Report & Order* contains virtually no justification for this incongruous result. The Commission’s sole explanation is that to do otherwise would ostensibly force satellite carriers to offer a “basic service tier” akin to that offered by cable systems. *See Report & Order*, ¶ 99 (“As EchoStar points out, Congress did not intend to establish a basic service tier-type requirement for satellite carriers when it implemented Section 338.”). But the common-sense proposals made by NAB, ALTV, and other commenters about unified packages of local stations would *not* amount to creation of a “basic service tier.” A mere requirement that satellite companies offer all local stations carried under the SHVIA compulsory license as part of a single package lacks at least four key elements of the basic service tiers that cable systems are required to provide:

- *First*, unlike cable systems, satellite carriers need not offer any local stations at all in any given market, even if they offer hundreds of other channels (such as CNN, HBO, regional sports channels, etc.) to viewers in that market.
- *Second*, unlike cable systems,² satellite carriers need not require subscribers to “buy through” a local station package before obtaining access to other programming.
- *Third*, unlike cable systems,³ satellite carriers need not offer their local station package as a stand-alone option, available without regard to whether the subscriber purchases other programming.
- *Fourth*, unlike cable systems,⁴ satellite carriers can charge any price they choose for their local station package.

² *See* 47 U.S.C. § 543(b)(7)(A) (“Each cable operator of a cable system shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service.”).

³ *Id.*

The Commission's rejection of a simple requirement that local stations be offered as a package (as carriers now offer them), or as part of a larger package, but *together*, is thus not warranted by any concern about inappropriately imposing aspects of the cable regulatory scheme on satellite carriers. In rejecting every single aspect of the cable model, however -- including the minimal requirement that a satellite carriers' optional local station package not exclude any local stations -- the Commission has gone too far. Among the critical objectives of the SHVIA is "to afford [the satellite industry] *a statutory scheme for licensing television broadcast programming similar to that of the cable industry,*" while accounting for "practical differences" between the two industries. *Intellectual Property & Communications Omnibus Reform Act of 1999*, H.R. Conf. Rep. No. 106-464, at 92 (1999) (emphasis added); *see also id.* at 101 ("The proposed licenses *place satellite carrier[s] [sic] in a comparable position to cable systems*, competing for the same customers.") (emphasis added). Although Congress was certainly not required slavishly to copy every detail of the cable regulatory scheme, the simple requirement that satellite carriers, like cable systems, offer all local stations in a single package is essential to the overall comparability that Congress sought to achieve between cable and satellite. It is equally essential to achieve another fundamental purpose of the SHVIA: to ensure that "Congress' interest in maintaining free over-the-air television [not be] undermined" by either satellite or cable marketing schemes. *Id.*

Furthermore, the a la carte rule that the Commission adopted does not even serve any competitive function. The costs that satellite carriers incur in providing local broadcast station

⁴ See 47 U.S.C. § 543(b)(1) ("The Commission shall, by regulation protect[] subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged . . . if such cable system were subject to effective competition.").

signals arise from carrying the stations *at all*: there are no *additional* costs incurred in retransmitting a local station's signal to 20,000 subscribers instead of 1,000. The only economic impact of deterring subscribers from receiving all their local stations will be felt by the stations, and therefore, by the millions of viewers in local-to-local markets who rely on those stations for free television.

Congress sought to protect the ability of all over-the-air stations to continue to serve their viewers by, among other things, imposing a statutory requirement of nondiscriminatory pricing in Section 338(d). There can be little doubt that the *practical* effect of permitting satellite carriers to exclude disfavored stations from the local station package will be highly discriminatory: in the real world of multichannel video programming distributors, far fewer consumers purchase a la carte channels than purchase standard programming packages. And the *Report & Order* itself concedes that the test is whether a pricing scheme will “effectively deter” viewers from obtaining access to all local stations. *Report & Order*, ¶ 99. Allowing satellite carriers to adopt differential pricing policies for “favored” and “disfavored” local channels thus directly contravenes the statutory prohibition on discriminatory pricing. And if satellite carriers avail themselves of the rule, it is certain to undermine the fundamental objective of Section 338 -- to ensure that the enactment of a new local-to-local compulsory license will not effectively block some television stations from reaching their full potential local audiences.

The Commission should therefore grant ALTV's petition for reconsideration and require that satellite carriers offer all local stations carried pursuant to the SHVIA as part of a single package.

II. **Permitting Stations with Retransmission Consent Agreements to Vote on the Location of the Receive Facility Is Contrary to the Language and Purpose of SHVIA**

Under Section 338(b)(1), a local station asserting its right to carriage under Section 338(a) is generally required to bear the costs of delivering a good quality signal to a local receive facility within the station’s DMA. The local station may be required to deliver a signal to an alternate facility outside of the DMA *only* if that site “is acceptable to *at least one-half the stations asserting the right to carriage* in the local market.” 47 U.S.C. § 338(b)(1) (emphasis added).

In its *Report & Order*, the Commission correctly found that satellite carriers must offer to stations that request carriage under Section 338 the same local receive facility as that offered to stations that elect retransmission consent. *Report & Order*, ¶ 48. Puzzlingly, however, the Commission went on to conclude that, when affected local stations “vote” on whether to accept a facility outside the DMA, *all* local stations, and not merely those “asserting the right to carriage,” are entitled to be counted. In particular, the Commission interpreted the Act to permit stations that elect retransmission consent, and not merely stations that assert their right to carriage under Section 338, to be counted in determining whether more than half of the relevant stations have agreed to a local receive facility outside the DMA. *See id.*, ¶ 51.⁵

ALTV correctly points out that this interpretation is contrary to the plain language of Section 338(d)(1), which specifically states that only those stations “asserting their right to carriage” are counted for purposes of the “50% of stations” test. Although the Commission is right that retransmission consent stations are “at least initially” *entitled* to assert a right to

⁵ The Commission implemented this decision in its regulations at 47 C.F.R. § 76.66(f)(2) (“A satellite carrier may establish another receive facility to serve a market if the location of such a facility is acceptable to at least one-half the stations with carriage rights in that market.”).

carriage under Section 338, *Report & Order*, ¶ 51, the Act does not turn on initial entitlement to insist on carriage, but on whether the station is *actually* “asserting the right to carriage in the local market.” 47 U.S.C. § 338(b)(1). Stations opting for retransmission consent necessarily lose their ability to “assert[] the right to carriage” for the pertinent election cycle. Indeed, retransmission consent is the *opposite* of asserting a right to be carried: the point of retransmission consent is that local stations have the right to *refuse* to be carried without their permission.⁶ The Commission therefore erred in reading the word “asserting” out of the statute by including in the “out-of-DMA” plebiscite those stations that have opted not to assert the right to carriage.

Conclusion

NAB respectfully requests that the Commission grant ALTV’s petition for reconsideration and revise its *Report & Order* and corresponding regulations to provide that (1) satellite carriers that rely on the SHVIA compulsory license must offer all local channels in a market as part of a single package, and (2) only stations insisting on carriage, and not stations that elect retransmission consent, may be counted in determining whether more than half of stations “asserting carriage” have agreed to a receive facility outside of the DMA.

⁶ “No . . . multichannel video programming distributor shall retransmit the signal of a broadcasting station . . . except . . . with the express authority of the originating station.” 47 U.S.C. § 325(b)(1)(A). Section 338(a) (1), of course, does allow local stations to insist on carriage by satellite carriers that have elected to use the SHVIA compulsory license: “each

satellite carrier . . . shall carry upon request the signals of all television broadcast stations located within that local market[.]”

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2001, I caused a copy of the foregoing Statement of Support of ALTV Petition for Reconsideration to be served by U.S. Mail, first class postage prepaid to the following:

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