

**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’
RESPONSE TO DIRECTV’S OPPOSITION TO
ALTV’S PETITION FOR RECONSIDERATION**

DirecTV’s Opposition to the Petition for Reconsideration filed by the Association for Local Television Stations (“ALTV”) offers only a weak response to ALTV’s sensible petition for reconsideration. We here rebut each of the arguments made by DirecTV.

1. The Commission has ample authority to require a unitary package. DirecTV argues that the “unitary package” requirement supported by ALTV and NAB is supposedly not based on “any express textual requirement of the SHVIA.” Opp. at 2. That argument is both irrelevant and wrong.

DirecTV’s contention is irrelevant because, unless a specific regulatory decision by the Commission would *contradict* the express language of the Act, the Commission has both specific authority under the SHVIA (47 U.S.C. § 338(g)) and plenary general authority to adopt regulations that reasonably carry out the overall intent of Congress in the Communications Act.

See, e.g., AT&T v. Iowa Utils. Bd., 525 U.S. 366, 378 (1999); *see also American Paper Inst., Inc. v. United States Env'tl. Prot. Agency*, 996 F.2d 346, 353 (D.C. Cir. 1993) ("Although . . . Congress did not expressly authorize use of such an interim measure, the agency's initiative seems a preeminent example of gap-filling in the interest of a continuous and cohesive regulatory regime . . .").

Here, DirecTV does not and could not argue that the unitary package requirement would be *inconsistent* with any statutory requirement. The Commission therefore has unquestionable power to adopt reasonable "gap-filling" regulations that carry out Congress's overall intent.¹ And, as discussed below, a fair implementation of the Act requires that, just as cable systems offer all local stations in a single package to ensure that local viewers will have access to all of the stations, satellite carriers do the same when they carry stations under the new local-to-local compulsory license.

DirecTV's contention that the ALTV petition is not grounded in a specific statutory directive is also wrong: many, if not all, of the unfair pricing schemes that DirecTV seeks the right to implement would contradict the Act's express prohibition on discrimination in pricing. For example, DirecTV and EchoStar today offer packages of network stations for a single, package price (*e.g.*, four local stations for \$4.99). If DirecTV or EchoStar continue to offer some (but not all) stations in such a package, at a "combo price," that practice would violate the Act's express prohibition on discriminatory pricing -- because excluded stations would not enjoy the same "combo price" benefit enjoyed by the included stations. The statutory language itself,

¹ The Commission has adopted many such regulations in this very proceeding. For example, the Commission's sensible compromise about remedial procedures (*see Report & Order*, ¶¶ 126-132), while certainly *consistent* with the Act, are not expressly *required* by the language of the Act.

therefore, requires the Commission to forbid this form of discrimination. And as discussed below, the overall objectives of the Act require the Commission to bar not only this practice but all forms of pricing that would be likely to deter access by satellite subscribers to the full range of local channels.

2. DirecTV does not and cannot deny that allowing a la carte pricing would largely defeat Congress’s central purposes in enacting the SHVIA. In deciding to make the new local-to-local compulsory license available (starting in 2002) only for carriage of *all* stations in a local market, rather than for carriage of only some of them, Congress sought to preserve the ability of free, over-the-air stations to reach their audiences and of consumers to view them. *Intellectual Property & Communications Omnibus Reform Act of 1999*, H.R. Conf. Rep. No. 106-464, at 92 (1999) (emphasizing Congress’s strong interest in ensuring that “free over-the-air television [not be] undermined” by either satellite or cable marketing schemes). Congress also sought to create a regulatory regime that, while adapted sufficiently to account for technological differences, would parallel the regulatory regime applicable to cable. *Id.* (Congress sought “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). *Id.*²

² DirecTV attacks a straw man when it argues that the Commission should not impose “identical regulatory requirements” on cable and satellite. (Opp. at 4.) As documented in detail in NAB’s April 12 Statement of Support (at 3-4), there are *many* differences between the cable and satellite regulatory regimes, almost all of which favor satellite. The point here is that those features of the cable regulatory regime that are essential to ensure the availability of all local stations to viewers must also be included in the satellite regime.

DirecTV also contends (at 3) that because Congress expressly granted it the ability to choose the specific channel numbers on which local stations will be offered, Congress intended to take an entirely “hands-off” approach to marketing issues, even if the choices made by DBS companies will effectively put many local stations out of reach of most satellite subscribers.

Under the regulatory system long applicable to cable systems -- which Congress sought to emulate here to the extent feasible -- cable systems carry *all* of the local stations in a single package, and may not offer an a la carte option. Although the Commission need not, and did not, impose on satellite carriers all of the details of the cable regulatory scheme, the requirement of a single package of local stations is essential to achieve Congress' purposes. As many of the filings in response to ALTV's petition make clear, the real-world consequence of straying from the cable model in this respect will be that many local stations will simply be unavailable to large numbers of satellite subscribers. *See* Comments of Paxson Communications Corporation (April 12, 2001); Opposition of the Network Affiliated Stations Alliance (April 12, 2001); Joint Opposition of [Public Broadcasting Parties] (April 12, 2001).

DirecTV does not and could not contend that there is any "practical difference" between the cable and satellite industries that makes it impossible for DBS firms to sell all local stations as a unified package, just as cable does. Nor could DirecTV claim that it would need to use any more satellite capacity (or incur any other extra costs) to deliver stations requesting carriage to all viewers that sign up for local stations, rather than to only those that request those stations on an a la carte basis.

Strikingly, DirecTV does not dispute that the natural and probable consequence of an a la carte policy will be to keep many local stations off of the TV sets of satellite subscribers. Instead, DirecTV makes the hollow claim that, by selling local stations in a way guaranteed to

That argument collapses on inspection: while the Commission has, of course, respected the statutory language about channel placement, nothing in the Act prevents the Commission from imposing other common-sense requirements that carry out Congress' overall purposes. And Congress's overall approach was not at all "hands-off." With regard to the specific issue of channel placement, for example, the Commission correctly concluded that carriers should be

sharply reduce the availability of many local stations to viewers, it has enhanced “choice.” Opp. at 4. But Congress’s way of protecting “choice” was to ensure that all TV households -- including the tens of millions of Americans who choose to receive television for free off the air -- would continue to have the choice of watching free, local stations. Only the requirement that satellite carriers using the SHVIA compulsory license offer a single package of all local stations can achieve that goal.

3. **DirecTV has no response to ALTV’s straightforward statutory argument about which stations are counted in voting on a non-DMA receive facility.** Under the Act, a satellite carrier may insist that stations deliver a good quality signal to a facility outside the DMA only if that facility “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). The Commission’s rule gets the matter upside down: it treats stations that have insisted on *non-carriage* (*i.e.*, opted for retransmission consent) as stations that are “asserting carriage.” DirecTV does not grapple with this inconsistency: it simply notes that all stations initially “are give[n] a choice of carriage rights,” Opp. at 6, but does not and cannot argue that a station that has elected retransmission consent is nevertheless still “asserting the right to carriage.” 47 U.S.C. § 338(b)(1). The Commission should therefore correct its regulations so that only stations actually “asserting” the right to carriage -- *i.e.*, those that have elected carriage rights rather than retransmission consent -- are counted in applying the “at least one-half the stations” rule.

Conclusion

required “to carry both retransmission consent stations and [stations requesting carriage] in a block on the satellite carrier’s channel line-up.” *Report & Order*, ¶ 94.

DirecTV's Opposition offers no real response to the compelling case made by ALTV for correction of two important flaws in the Commission's *Report & Order*. NAB therefore respectfully requests that the Commission modify its *Report & Order* and corresponding regulations to provide that (1) satellite carriers must offer all local stations carried pursuant to the SHVIA only as a unitary package; and (2) only stations actually insisting on carriage, and not stations that have waived that right (by opting for retransmission consent), may be counted in determining whether more than half of stations "asserting the right to carriage" have agreed to a non-DMA receive facility.

Respectfully submitted,

NATIONAL ASSOCIATION OF
BROADCASTERS

Henry L. Baumann
Benjamin F. P. Ivins
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5300
Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this 23th day of April, 2001, I caused a copy of the foregoing Response to DirecTV Opposition to ALTV Petition for Reconsideration to be served by U.S. Mail, first class postage prepaid to the following:

David L. Donovan, Esq.
V.P. Legal & Legislative Affairs
1320 19th Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 887-1970

Gary M. Epstein
James H. Barker
LATHAM & WATKINS
1001 Pennsylvania Ave., N.W.
Suite 1300
Washington, D.C. 20004-2505
(202) 637-2200

April 23, 2001

Benjamin F.P. Ivins