

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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In the Matter of:	)	
	)	CS Docket No. 98-120
Carriage of Digital Television Broadcast	)	CS Docket No. 00-96
Signals and Implementation of the Satellite	)	CS Docket No. 00-2
Home Viewer Improvement Act of 1999	)	
	)	
_____	)	

To: The Commission

**COMMENTS OF ECHOSTAR SATELLITE CORPORATION**

EchoStar Satellite Corporation (“EchoStar”) hereby submits its comments in the above-captioned proceeding.<sup>1</sup> EchoStar supports strongly the Commission’s decision not to impose dual carriage requirements for analog and digital broadcast signals. There is no basis for the Commission to reconsider that decision, legally or factually. As a matter of law, the Commission’s doubts about the constitutionality of such a requirement are well-founded. In fact, dual carriage would be outright unconstitutional under any applicable standard. It would also be otherwise unlawful. Each time that the Commission has imposed must-carry rules without specific and unequivocal statutory authority, the courts have struck them down as contravening

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<sup>1</sup> *In the Matter of Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission’s Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues; Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, FCC 01-22, First Report and Order and Further Notice of Proposed Rule Making (rel. January 23, 2001).

the Constitution or the Administrative Procedure Act. And, only a few months ago, the D.C. Circuit set aside the Commission's horizontal concentration caps, because the Commission had no statutory authority to impose them, and because the significant record assembled by the Commission in that proceeding was not sufficient to sustain them.

Here, even setting aside the question of constitutionality, there is simply no particularized governmental interest to be served by the huge burden of requiring dual carriage of a station's analog and digital feeds. As a factual matter, the dual carriage would pose an even more formidable burden for satellite carriers than for cable distributors. Assuming local-into-local service to 40 cities, dual carriage could well mean that the majority of a satellite carrier's capacity (and, theoretically, even all of it) could be taken by the carriage of broadcast signals. This would expropriate the huge investment made by satellite carriers to develop a space-based platform for the delivery of multi-channel programming, it would hugely compromise the interests of DBS consumers by saddling them with programming they do not necessarily want, and it would be a disservice for all consumers in general, as it would deprive them of a competitive option. Dual carriage is not only unconstitutional and illegal, it is also absurd, and the Commission was right to reject it the first time.<sup>2</sup>

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<sup>2</sup> *Id.* at ¶3 (“[W]e tentatively conclude that. . . a dual carriage requirement appears to burden cable operators’ First Amendment interests substantially more than is necessary to further the government’s substantive interests of preserving the benefits of free over-the-air local broadcast television; promoting the widespread dissemination of information from a multiplicity of sources; and promoting fair competition in the market for television programming.”)

## **I. REQUIRING SATELLITE CARRIERS TO CARRY DIGITAL AS WELL AS ANALOG TELEVISION BROADCAST SIGNALS WOULD BE UNLAWFUL AND UNREASONABLY BURDENSOME**

At the outset, EchoStar notes that it is inappropriate to lump satellite and cable operators together for purposes of *any* must-carry analysis. EchoStar believes that the satellite must-carry legislation violates the First Amendment and other parts of the Constitution under any applicable standard, and the constitutionality of that statute is the subject of pending litigation in the Eastern District of Virginia and the Court of Appeals for the Fourth Circuit. Even assuming the intermediate scrutiny standard, for example, the factors that led the Supreme Court narrowly to uphold the constitutionality of *cable* must-carry – the cable “bottleneck,” a not inordinate burden on cable systems – in fact lead to the opposite conclusion for a carrier such as EchoStar.

Against this backdrop, however, EchoStar agrees with the Commission that the requirement of dual analog and digital carriage is inappropriate for any distributor. There is no basis to reconsider it, both as a matter of law and fact. For satellite carriers in particular, the Commission acknowledged that digital must-carry goes beyond the mandate of SHVIA when it found that the requirement of promulgating must-carry rules within one year of that law’s passage does not extend to digital must-carry.<sup>3</sup> The Commission should not now go beyond a law whose

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<sup>3</sup> 47 U.S.C. § 338(g)(requiring the Commission to issue regulations implementing must-carry rules within one year of November 29, 1999); *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, FCC 00-417, Report and Order, at ¶15 (rel. November 30, 2000). *See also* Joint Explanatory Statement of the Committee of Conference on H.R. 1554, 145 Cong. Rec. at H11795 (“by directing the F.C.C. to promulgate these [satellite] must-carry rules, the conferees do not take any position regarding the application of must-carry rules to carriage of digital television signals by either cable or satellite systems.”)

constitutionality is currently being questioned and impose even more onerous restrictions on satellite carriers.

Each time that the Commission has imposed must-carry rules without specific and unequivocal statutory authority, the courts have struck them down as contravening the Constitution or the Administrative Procedure Act.<sup>4</sup> And, only a few months ago, the D.C. Circuit set aside the Commission's horizontal concentration caps on cable systems, because there was no statutory authority for the regulation, and because even the significant record assembled by the Commission in that proceeding was not viewed by the court as sufficient to sustain it.<sup>5</sup> Here, even setting aside the question of constitutionality, there is simply no particularized governmental interest to be served by the huge burden of requiring dual carriage of a station's analog and digital feeds.

Given the significant technological differences between cable and satellite carriage, requiring dual carriage of digital and analog television broadcast signals would pose an even more severe burden on satellite carriers than on cable operators. As the Commission noted in its First Report and Order and Further Notice of Proposed Rule Rulemaking, "satellite carriers provide

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<sup>4</sup> See, e.g., *Century Communications Corporation v. F.C.C.*, 835 F.2d 292 (D.C. Cir. 1987)(striking the F.C.C.'s must-carry rules because they neither furthered a substantial government interest nor were narrowly tailored enough to justify their restriction on speech); *Quincy Cable TV, Inc. v. F.C.C.*, 768 F. 2d 1434(D.C. Cir. 1985)(striking the F.C.C.'s must-carry rules because Commission failed to demonstrate the threat to local broadcasting posed by unregulated cable industry and rules, as drafted, were "fatally overbroad").

<sup>5</sup> See *Time Warner Entertainment Co., L.P. v. F.C.C.*, 240 F.3d 1126 (D.C. Cir. 2001)(reversing the F.C.C.'s imposed horizontal limit on cable subscribers because Congress had made no judgment about such limits); see also *American Civil Liberties Union v. F.C.C.*, 823 F.2d 1554, 1579 (D.C. Cir. 1987)(F.C.C.-mandated exception for certain types of channels from cable lock-box requirement had "no discernible basis in the statute or legislative history" and was therefore invalid).

video programming on a national basis through a space-based delivery facility while cable operators provide video service on a local franchise-area basis through a terrestrial delivery facility.” FCC 01-22 at ¶136. The practical effect of this difference is that carriage of one more broadcast station in one city has an impact on the capacity of a satellite carrier far beyond that city. The advent of spot beam capacity will not eliminate this problem.<sup>6</sup> Cable operators, meanwhile, can deliver separate packages of local and national signals to their customers on a market-by-market basis and carriage of an additional broadcast station has an impact on the capacity of only one local head-end.

Congress recognized the technological constraints posed by satellite technology before passage of the SHVIA. When discussing whether satellite operators should be compelled to comply with the cable must-carry requirements, it noted that, “[b]ecause of unique technical challenges on satellite technology and constraints on the use of satellite spectrum, satellite carriers may . . . be limited their ability to deliver must-carry signals into multiple markets.”<sup>7</sup> Certainly, Congress did not contemplate the imposition of dual carriage requirements on satellite operators.

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<sup>6</sup> A spot-beam satellite will permit carriers to beam local transmissions into a local market while maintaining some ability to reuse that same spectrum in a distant part of the country. The carrier, however, will likely still be unable to reuse the same spectrum within the same geographical region. The Commission itself acknowledged the limitations inherent in spot beam technology when it noted that the technology cannot, on its own, create enough capacity to allow satellite carriers to carry significant numbers of local signals to the entire country. In its Report and Order regarding Direct Broadcast Satellite Public Interest Obligations, the Commission stated, “[A]lthough spot beam technology is available and could be used to regionalize programming, DBS providers may lack the channel capacity needed to serve all localities across the country.” Report and Order, *In the Matter of Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, 13 F.C.C. Rcd. 24279 at ¶53 (rel. November 25, 1998).

<sup>7</sup> Joint Explanatory Statement of the Committee of Conference on H.R. 1554, 106<sup>th</sup> Cong. Rec. at H11795 (daily ed. November 9, 1999).

Expanding the number of signals being carried to include dual carriage of digital and analog signals would have a significant and debilitating cumulative effect on the amount of channels that a satellite carrier could offer. For example, EchoStar currently serves 36 markets with local signals. In each of these markets, EchoStar would likely have to carry many stations in addition to the four network stations that it typically retransmits now under the current must-carry requirements (assuming they are not overturned as unconstitutional). Dual carriage could double that burden. It could well mean that the majority of a satellite carrier's capacity (and, theoretically, even all of it) could be taken by the carriage of broadcast signals. This would expropriate the huge investment made by satellite carriers to develop a space-based platform for the delivery of multi-channel programming, it would hugely compromise the interests of DBS consumers by saddling them with programming they do not necessarily want, and it would also be a disservice for all consumers in general, as it would deprive them of a competitive option.

The disproportionate impact that dual carriage would have on satellite carriers would also be a result that Congress and the Commission have expressed a repeated desire to avoid. *See, e.g.,* 47 U.S.C. §338(g) (“The regulations prescribed under this section shall include requirements on satellite carriers that are comparable to the requirements on cable operators. . . .”); Report and Order, *In the Matter of Carriage of Digital Television Broadcast Signals*, FCC 01-22 at ¶136 (noting “the SHVIA’s general thrust that the Commission issue satellite carriage rules comparable to the cable carriage rules”). Indeed, Congress and the Commission have long striven to eliminate the handicaps faced by satellite carriers in their efforts to compete with cable systems, and creating a new handicap would be inconsistent with these

concerted efforts.<sup>8</sup> Therefore, a dual carriage requirement for satellite operators would inherently frustrate Congress' and the Commission's goals of leveling the playing field between cable and satellite and certainly imposing no greater burdens and obligations on satellite systems than on cable distributors.

## II. CONCLUSION

In sum, dual carriage is not only unconstitutional and illegal, it is also absurd. The Commission was right to reject it the first time. This is all the more so for satellite carriers such as EchoStar.

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<sup>8</sup> See, e.g., 145 Cong. Rec. H2312 (daily ed. Apr. 27, 1999)(statement of Rep. Coble)("The time has come to . . . pass legislation which makes the satellite industry more competitive with cable television."); *Hearing on S.303 before the Comm. on Commerce, Science and Transportation*, 106th Cong. 14 (1999)(statement of Sen. Kerry)("The goal here ought to be to even the playing field by permitting DBS providers to offer local network signals at the same time as we have a regulatory structure that is fair and evenhanded. Most importantly, I think we have to promote competition, greater choice, and lower prices."); 145 Cong. Rec. H2312 (daily ed. Apr. 27, 1999)(statement of Rep. Tauzin)("The bill today we are considering is designed to put satellite television providers on that competitive equal footing. . . . In other words, to put cable on equal footing with cable so that consumers can have a real choice."); *Sixth Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 12 F.C.C. Rcd. 978, 983 (2000)("We expect that DBS operators will now offer a programming package more comparable to and competitive with the services offered by cable operators. We further believe that increased competition is the best way to keep cable rates reasonable and in check.")

Respectfully submitted,

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