Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

To: The Commission

REPLY COMMENTS OF ECHOSTAR SATELLITE CORPORATION

EchoStar Satellite Corporation ("EchoStar") hereby submits its reply comments in the above-captioned proceeding.[1] EchoStar strongly supports the Commission's decision not to impose dual carriage requirements for analog and digital broadcast signals. The Commission should not be swayed from this decision by claims that dual carriage is somehow necessary for the digital television ("DTV") roll-out required by the law and the Commission's rules.[2] Such

[1] *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).

[2] Comments of Univision filed June 11, 2001, at 3 ("Without mandatory carriage of both signals, DTV will never achieve widespread acceptance within the television viewing community."); Comments of NAB/MSTV/ALTV filed June 11, 2001, at 6, 27 ("DTV must-carry will open up mass audience access to on-air DTV broadcasts, thus enabling a chain reaction of more sets and more programming, driving the market to the 'tipping point' where consumer demand will complete the transition" and "Digital must-carry has the potential to accelerate the transition from analog to digital."); Comments of Entravision Holdings, LLC, filed June 11, 2001 at 5 ("Contrary to the Commission's tentative conclusion on the matter, it is abundantly clear that

(Continued …)

claims are unfounded. Digital television deployment can and should proceed based on a combination of private initiative and the roll-out requirements that Congress and the Commission imposed on broadcasters in exchange for a lavish gift – free digital television spectrum.

Private initiative can help increase the penetration of digital and High Definition television.[3] EchoStar recently showed the way with its groundbreaking June 2001 deal with CBS.[4] Under the agreement, EchoStar will distribute HDTV CBS feeds in the local markets of 16 owned and operated CBS stations. In EchoStar's view, this kind of partnership sets the stage for a win-win solution for consumers, equipment manufacturers, broadcasters and distributors alike, by boosting sales of HDTV receivers and increasing overall acceptance of, and access to, HDTV signals.

The effectiveness of this agreement, of course, depends on receiving waivers from local network stations that would allow consumers living in "served households" in those stations' local markets to receive the HDTV feed. CBS has agreed to grant these waivers for the local markets of its owned and operated stations, and has encouraged its affiliates in other markets that do not now transmit HDTV signals to do the same. EchoStar hopes that those

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if the American public is to realize the total value of the Congressionally-mandated digital, over-the-air broadcast service, the agency must ensure full analog and digital carriage of local broadcast signals during the digital transition and assure continued carriage following the transition.")

[3] The Commission's emphasis on private initiative instead of regulation is clear. As Chairman Powell has stated, the "optimal environment[s] for innovation and entrepreneurship are capital markets and free markets." Post-Newsweek Business Information, Inc., Newsbytes, February 6, 2001.

[4] *See* Joint Press Release, "CBS and EchoStar's Dish Network to Offer High Definition Programming via Satellite TV" (rel. July 12, 2001) ("Press Release").

affiliates will be receptive to the network's urging, as the waivers make sense and are certainly in the public interest: in markets where the local affiliate does not transmit an HDTV signal, the distant HDTV feed is the only way for consumers to receive CBS's programming in the HDTV format.

In addition, EchoStar's new Model 6000 integrated receivers are capable of receiving local *off-air* HDTV signals through an optional off-air tuner cartridge.[5] In other words, EchoStar's deployment of its own boxes actually helps broadcasters to reach the 85% penetration benchmark. *See* 47 U.S.C. § 309(j)(14)(B)(iii). This is a further example of private initiative helping meet the statutory digital penetration requirements.

It is one thing, however, to facilitate digital roll-out by private initiatives such as EchoStar's, and an altogether different thing to seek to satisfy the digital roll-out obligations that Congress and the Commission have imposed on *broadcasters* through mandating extremely cumbersome dual carriage requirements on *distributors*. The broadcasters' roll-out obligations were part of a bargain: in exchange for receiving the digital television spectrum for free, the broadcasters were charged with achieving transition to DTV within a prescribed time frame.[6] As Senator McCain stated at the time: "The record is clear . . . [broadcasters] made commitments for getting the spectrum free, and in return for that, the American people would get this new

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[5] *See* Press Release at 3.

[6] That time frame was hardly unreasonably short. Former Commissioner Ness described it as: "...[r]apid, rigorous, and yet reasonable. It is practical and achievable. It enjoys the strong support of the broadcasters and receiver manufacturers upon whom we depend to roll out service to the public." *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, MM Dkt. No. 87-268, Mass Media Action, Separate Statement of FCC Commissioner Ness (1997).

technological marvel."[7] The broadcasters have already secured and are enjoying the benefit of that bargain. They cannot now properly argue that living up to their end of it requires imposition of onerous dual carriage requirements on a third party – multichannel distributors.

"Passing the buck" through requesting dual carriage is not only inequitable, but it is also an ineffective answer to the problem of non-compliance with the transition time frame on the part of broadcasters. The upcoming May 2002 milestone is a case in point. Reportedly, significant numbers of broadcasters will not be in a position to meet that milestone. No action of the Commission in this proceeding can alter the fact that consumers in the affected markets may not be able to receive digital television by next May. Rather, in handling any such extension requests, the Commission should be mindful that an extension leaving consumers in the relevant market without any recourse to digital television during the extension period should not be an option.

Not only would dual carriage fail to resolve the problems caused by the broadcasters' apparent delay in complying with the digital transition time frame; it would also pose an enormous burden on cable operators and an even greater one on satellite carriers. Such a requirement would significantly strain, if not deplete, the scarce capacity the distributors have to transmit signals. As EchoStar has already explained, the burden from any must-carry rule is exponentially greater in the satellite context, because of the nationwide nature of satellite distribution. A local station carried in one area strains the satellite carrier's capacity in a broader geographical region. A dual digital carriage requirement would *double* this already enormous

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[7] Bill Pietrucha, *Broadcasters Tell Congress HDTV Won't Be Orphaned*, Post-Newsweek Business Information, Inc., Newsbytes, Sept. 18, 1997.

burden.[8] The requirement would significantly affect the range of programming options that EchoStar can offer its customers, ultimately forcing EchoStar to offer them programming that they do not necessarily want and depriving them of programming that they might in fact wish to receive.

For these reasons, the Commission should uphold its earlier rejection of requiring simultaneous carriage of analog and digital signals.

Respectfully submitted,

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[8] The outcome of the satellite must-carry litigation does not detract at all from the Commission's well-founded concerns about the constitutionality of dual carriage. Among other things, dual carriage, unlike single-feed must-carry, has not been required by Congress. Furthermore, by definition, dual carriage entails doubling the burden on the distributor, significantly affecting the "burden" analysis in the *O'Brien* intermediate scrutiny equation (to the extent intermediate scrutiny is applicable). *See, e.g., Turner Broadcasting System, Inc. v. Federal Communications Commission,* 512 U.S. 622, 662 (1994)(applying intermediate scrutiny to must-carry constitutional analysis)(citing *U.S. v. O'Brien*, 391 U.S. 367 (1968)).