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Before the
Federal Communications Commission
Washington, D.C. 20554

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

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ORDER ON RECONSIDERATION

Adopted: September 4, 2001 **Released: September 5, 2001**

By the Commission:

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In this *Order on Reconsideration*, we consider two petitions for reconsideration of the Commission's *Report and Order* in *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*,[1] which implements Section 338 of the Communications Act of 1934 ("Act"), as amended by the Satellite Home Viewer Improvement Act of 1999 ("SHVIA").[2] The *Report and Order* adopted broadcast signal carriage requirements for satellite carriers in order to implement Section 338 of the Act.[3] Section 338 requires satellite carriers, by January 1, 2002, to carry upon request all local television broadcast stations' signals in local markets in which the satellite carriers carry at least one television broadcast station signal pursuant to the statutory copyright license, subject to the other carriage provisions contained in the Act.[4] As noted in the *Report and Order*, this transition period is intended to provide the satellite industry with time to begin providing local television signals into local markets, otherwise known as "local-into-local" satellite service.[5] The Commission's carriage rules in many respects mirror the broadcast signal carriage rules applicable to cable operators, but with key distinctions made in recognition of the statutory and practical constraints that result from differences in satellite and cable technologies.

2. DIRECTV, Inc. ("DIRECTV") and the Association of Local Television Stations, Inc. ("ALTV") separately filed petitions for reconsideration of the *Report and Order*, raising different issues.[6] Several parties separately filed oppositions or comments in response to DIRECTV's petition: ALTV; National Association of Broadcasters ("NAB"); Network Affiliated Stations Alliance ("NASA"); Paxson Communications Corporation ("Paxson"); and a joint opposition by the Association of America's Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting (collectively "Public Television Stations").[7] DIRECTV, in turn, filed a reply.[8] In response to ALTV's

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[1] *See* 16 FCC Rcd 1918 (2000) (hereinafter "*Report and Order*"). We note that judicial review of the constitutionality of the statutory satellite carrier must carry requirement and the Commission's implementing regulations has been sought by the Satellite Broadcasting and Communications Association ("SBCA"), EchoStar Communications Corporation, and DIRECTV, Inc. On June 24, 2001, the United States District Court, in *Satellite Broadcasting and Communications Ass'n, et al v. FCC*, No. 00-1571-A (E.D. Va.), issued an unpublished Order dismissing the plaintiffs' case, and holding that the SHVIA is constitutional and does not in any way violate the First and Fifth Amendment rights of satellite carriers. The district court further held that the Act is a proper exercise of Congress's plenary powers over copyright and Congress's power to promote the free and full exchange of information over the broadcast spectrum. Still pending, however, is an appeal before the United States Court of Appeals for the Fourth Circuit, where plaintiffs are challenging the constitutionality of the SHVIA and the Commission's *Report and Order*, in the case *Satellite Broadcasting and Communications Ass'n, et al v. FCC*, No. 01-1151 (consolidated cases pending).

[2] Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

[3] *See* 47 C.F.R. § 76.66.

[4] *See* 47 U.S.C. § 338. Until January 1, 2002, satellite carriers are granted a royalty-free copyright license to retransmit television broadcast signals on a station-by-station basis, subject to obtaining a broadcaster's retransmission consent. *See Report and Order*, 16 FCC Rcd at 1919. *See also* Joint Explanatory Statement of the Committee of Conference on H.R. 1554, 106th Cong. ("*Conference Report*"), 145 Cong. Rec. H11769-01, H11795 (daily ed. Nov. 9, 1999).

[5] *See* 16 FCC Rcd at 1919.

[6] DIRECTV Petition for Reconsideration (filed Feb. 22, 2001); ALTV Petition for Reconsideration (filed Feb. 22, 2001).

[7] Opposition to DIRECTV, Inc.'s Petition for Reconsideration filed by the Association of Local Television Stations, Inc. (filed Apr. 12, 2001) ("ALTV Opposition"); Response of National Association of Broadcasters to DIRECTV Petition for Reconsideration (filed Apr. 12, 2001) ("NAB Response"); Opposition of the Network Affiliated Stations

(continued....)

petition, DIRECTV filed an opposition and NAB submitted comments in support.[9] Both ALTV and NAB filed separate replies to DIRECTV's opposition.[10]

3. Our response to the petitions are governed by the Communications Act and our own rules.[11] Reconsideration of a Commission decision is warranted only if the petitioner cites a material error of fact or law, or presents additional facts and circumstances which raise substantial or material questions of fact that were not considered and that otherwise warrant Commission review of its prior action.[12] The Commission will not reconsider arguments that have already been considered.[13] For the reasons stated herein, we affirm our decisions in the *Report and Order* and deny both DIRECTV's and ALTV's petition. We also take this opportunity to clarify and, where necessary, amend some of the requirements set forth in the *Report and Order* and the rule.[14]

(...continued from previous page)
Alliance to the Petition for Reconsideration filed by DIRECTV, Inc. (filed Apr. 12, 2001) ("NASA Opposition"); Comments of Paxson Communications Corporation on Petitions for Reconsideration (filed Apr. 12, 2001) ("Paxson Comments"); Joint Opposition of the Association of America's Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting to the Petition for Reconsideration of DIRECTV, Inc. (filed Apr. 12, 2001) ("Public Television Stations Opposition").

[8] Reply of DIRECTV, Inc. (filed Apr. 25, 2001) ("DIRECTV Reply"). DIRECTV later filed an ex parte supplement to its reply. *See* Ex Parte Supplement to Reply of DIRECTV, Inc. (filed Apr. 30, 2001) ("April 30, 2001 DIRECTV Ex Parte Supplement").

[9] Opposition of DIRECTV, Inc. (filed Apr. 12, 2001) ("DIRECTV Opposition"); National Association of Broadcasters' Statement in Support of ALTV Petition for Reconsideration (filed Apr. 12, 2001) ("NAB Statement in Support of ALTV Petition").

[10] Reply of the Association of Local Television Stations, Inc. to Opposition filed by DIRECTV, Inc. (filed Apr. 23, 2001) ("ALTV Reply"); National Association of Broadcasters' Response to DIRECTV's Opposition to ALTV's Petition for Reconsideration (filed Apr. 23, 2001) ("NAB Reply to DIRECTV Opposition").

[11] Petitions for reconsideration of Commission decisions are provided for by Section 405(a) of the Communications Act of 1934, 47 U.S.C. § 405(a). Petitions for reconsideration in a rulemaking proceeding are governed by Section 1.429 of the Commission's rules. *See* 47 C.F.R. § 1.429.

[12] *See* 47 C.F.R. § 1.429. *See, e.g., 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services*, 12 FCC Rcd 5188, 5202 n.84 (1997); *Amendment of Section 73.202(B), Table of Allotments, FM Broadcast Stations*, 10 FCC Rcd 7727 (1995) (citing *Eagle Broadcasting Co. v. FCC*, 514 F.2d 852 (D.C. Cir. 1975)); *see also Amendment of Part 97 of the Commission's Rules Concerning the Establishment of a Codeless Class of Amateur Operator License*, 7 FCC Rcd 1753 (1992) ("petitions for reconsideration must show changed facts or circumstances, or facts that were unknown to the petitioner until after the petitioner's last opportunity to present them to [the Commission]"). In *Southwestern Bell Telephone Co. v. FCC*, 180 F.3d 307 (D.C. Cir. 1999) ("*Southwestern Bell*") and *Beehive Telephone Co. v. FCC*, 180 F.3d 314 (D.C. Cir. 1999), the D.C. Circuit recently upheld two Commission orders denying petitions for reconsideration. The court found unreviewable "the agency's refusal to go back over ploughed ground." *Southwestern Bell*, 180 F.3d at 311 (quoting *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282-84 (1987)).

[13] *See Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act: Part 73 Definition and Measurement of Signals of Grade B Intensity*, Order on Reconsideration, 14 FCC Rcd 17373 (1999); *Elimination of Telephone Company-Cable Cross Ownership Rules, Sections 63.54-63.56, for Rural Areas*, 91 FCC 2d 622 (1982) ("The major arguments raised by the petitioners here were raised and considered by the Commission in response to the NPRM in this proceeding. The petitioners have raised no new arguments now which warrant reversal of our decision."); *Amendment of Section 73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations)*, 82 FCC 2d 329 (1980).

[14] *See* 47 U.S.C. § 405; 47 C.F.R. § 1.108. *See also Central Florida Enterprises v. FCC*, 598 F.2d 37, 48 n.51 (D.C. Cir.), *cert. dismissed*, 441 U.S. 957 (1979).

4. In this *Order on Reconsideration*, we

- decline to adopt DIRECTV's proposal that we modify our noncommercial educational ("NCE") carriage rule by limiting a satellite carrier's carriage obligation to only one qualified NCE station per designated market area ("DMA"), with additional NCE stations carried on a voluntary basis only;

- deny DIRECTV's request that we permit satellite carriers to include local NCE stations, carried pursuant to Section 338, in the calculation of the four percent (4%) set-aside requirement under Section 335 of the Act and Section 100.5(c) of the rules;

- affirm the rule requiring satellite carriers to carry in its entirety the primary video, accompanying audio, and closed-caption data contained in line 21 of the vertical blanking interval ("VBI") and, to the extent technically feasible, program-related material carried in the VBI or on subcarriers;

- decline DIRECTV's proposal that we revise the good quality signal standard and require broadcast stations to deliver a "TV-1quality" signal;

- deny DIRECTV's request that we require television stations to pay new or additional costs to deliver a good quality signal in cases where a satellite carrier changes its facility in the middle of an election cycle;

- deny DIRECTV's request that we permit satellite carriers to offer local-into-local service through the use of different orbital positions that necessitate subscriber use of multiple dishes, and affirm the rule prohibiting satellite carriers from requiring subscribers to purchase additional equipment (*e.g.*, an additional satellite dish) to gain access only to some, but not all of the local signals in a market;

- decline to accept ALTV's request that we require satellite carriers to offer all local signals to their subscribers only as a unitary package;

- affirm the rule that all stations, whether they elect mandatory carriage or retransmission consent, may participate in voting on whether an alternative receive facility is acceptable;

- and on our own motion, we make the following clarifications/amendments to our rules:

    - clarify that satellite carriers may not refuse carriage requests without a reasonable basis by shifting onto local broadcast stations the burden to prove they are entitled to carriage;

    - where there is more than one satellite carrier providing local-into-local service subject to these carriage rules, a broadcaster may make inconsistent carriage elections (*i.e.*, elect must carry for one carrier and retransmission consent for the other);

    - absent an agreement by the parties to the contrary, if a broadcast station has a retransmission agreement that extends into and terminates during an election cycle, the station -- at the end of its contract term with the carrier -- will not be entitled to demand must carry if it has not elected must carry by the required date (*i.e.*, by July 1, 2001 for the first election cycle, by October 1, 2005 for the next election cycle, etc.);

- amend the carriage request procedures to make the requirements consistent for all elections; and
- clarify that satellite carriers may not require local broadcast stations carried pursuant to mandatory carriage to pay for basic reception equipment at local receive facilities but are, as in the cable rules, responsible for costs of additional or special equipment.

We address, in more detail, the foregoing issues below.

II. ORDER ON RECONSIDERATION

5. As explained below, after careful consideration of all the arguments and facts presented, we decline to revise the satellite broadcast signal carriage requirements adopted in the *Report and Order*, except to provide additional clarification to some of those rules. Consistent with the requirements of the SHVIA, the Commission's satellite broadcast signal carriage rules generally attempt to place satellite carriers on an equal footing with cable operators regarding the provision of local broadcast programming, in order to give consumers more competitive options in selecting a multichannel video program distributor ("MVPD"). In the legislative history to Section 338, Congress made clear that "[t]he procedural provisions applicable to Section 338 (concerning costs, avoidance of duplication, channel positioning, compensation for carriage, and complaints by broadcast stations) are generally parallel to those applicable to cable systems."[15] As the legislative history of the SHVIA indicates, Congress was concerned that, "without must carry obligations, satellite carriers would simply choose to carry only certain stations which would effectively prevent many other local broadcasters from reaching potential viewers in their service areas."[16] Our satellite carriage rules also reflect Congress's desire to provide satellite subscribers with local television service in as many markets as possible, but also take into account, to the extent possible, the inherent nature of satellite technology and constraints on the use of satellite spectrum in the delivery of must carry signals. Against this backdrop, we address the six issues raised by DIRECTV in its petition, then the two issues raised by ALTV in its petition, and, on our own motion, provide clarification and amendment to several of the rules governing procedures consistent with the legislative intent of Section 338(g).

A. DIRECTV's Petition

6. In its petition, DIRECTV seeks reconsideration of six issues concerning: (1) the NCE station carriage requirement applicable to satellite carriers; (2) the calculation of satellite carriers' four percent (4%) public interest set-aside obligation; (3) satellite carriers' obligation to transmit program-related material in the VBI; (4) the Commission's "good quality signal" standard applicable in the satellite context; (5) satellite carriers' obligation to pay the costs associated with a satellite carrier's mid-cycle relocation of its receive facilities; and (6) satellite carriers' ability to require subscribers to purchase additional equipment. We discuss below each of these issues in turn.

1. Carriage of Local NCE Stations

7. ***Background.*** In the *Report and Order*, the Commission held that, pursuant to Section 338(c)(2), a satellite carrier "must carry all non-duplicative NCE stations in markets where they provide

[15] 145 Cong. Rec. H11769-01, at H11795.

[16] *Id.*

local-into-local service."[17] Section 338(c)(2) of the Act states: "The Commission shall prescribe regulations limiting the carriage requirements under subsection (a) of satellite carriers with respect to the carriage of multiple local noncommercial television broadcast stations. To the extent possible, such regulations shall provide the same degree of carriage by satellite carriers of such multiple stations as is provided by cable systems under Section 615 [of the Act]."[18] Pursuant to this latter requirement, the Commission examined the NCE carriage obligations for cable systems and the appropriateness of its application to satellite carriers. As the Commission noted, cable systems are required to carry local NCE stations under a statutory provision based on a cable system's number of usable activated channels.[19] Thus, cable systems with: (1) 12 or fewer usable activated channels are required to carry the signal of one qualified local noncommercial educational station; (2) 13-36 usable activated channels are required to carry no more than three qualified local noncommercial educational stations; and (3) more than 36 usable activated channels are required to carry at least three qualified local noncommercial educational stations.[20] In attempting to develop a similar formulation for satellite carriers, the Commission determined that because DBS operators offer more than 36 channels per market, they should carry all nonduplicating NCEs in each DMA in which they offer local-into-local service pursuant to the SHVIA compulsory license.

8. Recognizing that Section 338(c)(2) also requires the Commission to limit the carriage of multiple NCE stations in markets where local-into-local service is provided, the Commission adopted a limitation principle based upon duplicative programming.[21] Based on this principle, until a satellite carrier reaches a threshold of three NCE stations in each market, it need not carry any NCE station that duplicates the programming of another NCE station in the market on a simultaneous basis. Once the satellite provider carries three NCE stations in the market, it need not carry any additional NCE stations

[17] *See* 16 FCC Rcd at 1954.

[18] *See* 47 U.S.C. § 338(c)(2).

[19] *See Report and Order*, 16 FCC Rcd at 1954.

[20] *See* 47 U.S.C. § 535(b) and (e); 47 C.F.R. § 76.56(a). *See also Report and Order*, 16 FCC Rcd at 1953 n.197. In the cable context, a NCE station is considered "local" if "its community of license is within 50 miles of, or the station places a Grade B contour over, the principal headend of the cable system." *Id.* at 1953. Cable systems with more than 36 channels must carry all qualified NCE stations but are not required to carry more than three if there is substantial duplication. *See* 47 C.F.R. § 76.56(a)(1)(iii) and note.

[21] *See Report and Order*, 16 FCC Rcd at 1955. Using the NCE station duplication definition found in the cable context as a general model, the Commission developed a two-step approach in defining substantial duplication in the satellite context:

> First, a noncommercial television station substantially duplicates the programming of another noncommercial station if it simultaneously broadcasts the same programming of another noncommercial station for more than 50 percent of prime time, as defined by § 76.5(n), and more than 50 percent outside of prime time over a three-month period. After three noncommercial television stations are carried, the test of duplication shall be whether more than 50 percent of prime time programming and more than 50 percent outside of prime time programming is duplicative on a non-simultaneous basis. As for the timeframe of when to measure duplication, we find that the amount of duplicative prime-time weekly programming broadcast should be examined over the course of [a] three month period. The end of the three-month period must fall within 30 days prior to the date the satellite carrier notifies the NCE station that it is denying or discontinuing carriage based on substantial duplication. The amount of duplicative weekly programming broadcast outside of prime time will be measured over the same period. Only if the station duplicates more than 50 percent of the other station's weekly programming in both of these respects can it be denied carriage.

Id.

that duplicate programming on a simultaneous or non-simultaneous basis.

9. DIRECTV, in its petition, contends that the Commission's NCE carriage requirement does not comport with the language in Section 338(c)(2) directing the Commission to "prescribe regulations limiting" satellite carriers' obligations to carry multiple local noncommercial stations.[22] Further, DIRECTV asserts that the Commission's rule causes NCE station carriage to occupy a much larger percentage of DBS providers' channel capacity relative to any cable system operator in the United States, and that this "disproportionate" burden is not consistent with Section 338.[23] DIRECTV asks the Commission to "adopt a specific NCE carriage limit for satellite carriers that takes into account the (i) nationwide character of satellite-based services, (ii) the finite channel capacity of satellite systems, and (iii) the larger local service areas of satellite carriers relative to cable operators."[24] DIRECTV recommends that the Commission impose a rule that requires the carriage of only one qualified NCE station per DMA, with additional NCE stations carried on a voluntary basis.[25]

10. Public Television Stations and Paxson oppose DIRECTV's proposal. Public Television Stations argue that Congress did not intend for the Commission to apply more limits on noncommercial station carriage by a satellite provider than a cable operator, given Section 338(c)(2)'s admonition to the Commission to "provide the same degree of carriage by satellite carriers . . . as is provided by cable systems."[26] Further, Public Television Stations state that, in light of expected increases in DBS capacity and the flexibility the SHVIA affords satellite carriers to determine the pace at which they introduce local-into-local service and incur the accompanying carriage obligations, it was reasonable for the Commission to determine that requiring satellite carriers to carry all nonduplicating NCEs in each local market they serve would impose a burden on satellite carriers comparable to that borne by cable operators under Section 615.[27] Paxson adds that allowing satellite operators to carry just one of the local NCE stations in a market would deprive the remaining stations of the ability to reach local audiences.[28]

11. ***Discussion***. We decline to revise our NCE carriage rule, as DIRECTV requests. Contrary to DIRECTV's contention, our rule is consistent with the plain language of Section 338(c)(2) as it requires, "[t]o the extent possible, . . . the same degree of carriage by satellite carriers . . . as is provided by cable systems."[29] It also promotes parity between DBS and cable by assuring that consumers receive via satellite essentially the same local channels they would receive if they subscribed to cable.

12. Contrary to DIRECTV's assertion, the standard we developed for the NCE carriage obligation also took into consideration the technical limitations, as well as the national character, of satellite systems, in addition to other factors that differentiate the satellite industry from the cable industry. Under our rules, a cable system with more than 36 channels must carry all of the first three local NCEs in its market, even when the stations transmit substantially the same programming at the same time.[30] The limitation on mandatory carriage of NCEs that duplicate only applies to additional NCEs

[22] *See* DIRECTV Petition at 7-12.

[23] *Id.* at 10.

[24] *Id.* at 3.

[25] *See id.* at 12.

[26] Public Television Stations Opposition at 5, quoting Section 338(c)(2).

[27] *See id.* at 6.

[28] *See* Paxson Comments at 15.

[29] 47 U.S.C. § 338(c)(2).

[30] *See* 47 C.F.R. § 76.56(a).

when there are more than three local NCEs in the cable system's market.[31] Satellite carriers, on the other hand, need not carry any simultaneously duplicative signals. Satellite carriers are required to carry up to three local NCEs that do not duplicate programming – with duplication defined as more than 50 percent of prime time programming and more than 50 percent of programming outside of prime time broadcast on a simultaneous basis. Once the carrier provides three local noncommercial stations, the duplication test becomes the same as for cable – whether more than 50 percent of prime time programming and more than 50 percent of programming outside of prime time is duplicative on a simultaneous or non-simultaneous basis.[32] Given this standard, our rule does address the capacity concerns that DIRECTV raises because the foregoing standard prevents satellite capacity from being wasted on repetitive programming while ensuring carriage of nonduplicating, diverse public stations that respond to the different audiences and distinct needs of each community.[33] In this regard, we agree with Public Television Stations and Paxson that the NCE carriage formulation proposed by DIRECTV (*i.e.*, that we require satellite carriers to carry only one qualified NCE station per DMA, with additional NCE stations carried on a voluntary basis) would deprive satellite subscribers of access to local noncommercial television stations in those markets where local-into-local is offered.[34]

2. Public Interest Set-Aside

13. ***Background***. In 1998, the Commission, in *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations* ("*DBS Public Interest Report and Order*"), adopted rules implementing Section 335 of the Act, as amended by the Cable Television Consumer Protection Act of 1992 ("1992 Cable Act").[35] The rules require DBS providers to reserve four percent (4%) of their channel capacity exclusively for use by qualified programmers for noncommercial programming of an educational or informational nature.[36] Channel capacity is determined annually by calculating the average number of channels available for video programming on all satellites licensed to the provider during the previous year. In the *Report and Order*, the Commission addressed DIRECTV's and BellSouth's request that satellite carriers be permitted to include local NCE stations, carried pursuant to Section 338, in the calculation of the set-aside required under Section 335 of the Act.[37] The Commission rejected their request, finding that the local NCE carriage requirements of the SHVIA have different purposes from the set-aside requirements contained in the DBS public interest obligations.[38] The Commission explained that the Section 338 provision furthers the goals of localism and nondiscriminatory treatment of local television stations, while Section 335 furthers the goal of program diversity.[39] The Commission expressed concern that if a satellite carrier

[31] *See* 47 C.F.R. § 76.56(a)(1)(iii). *See also Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues,* Memorandum Opinion and Order, 9 FCC Rcd 6723 (1994).

[32] *See Report and Order*, 16 FCC Rcd at 1955.

[33] *See* Public Television Stations Opposition at 5-6.

[34] 145 Cong. Rec. H11769-01, at H11795 ("Providing the proposed license on a market-by-market basis furthers 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 area.").

[35] *See* 13 FCC Rcd 23254 (1998). *See also* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[36] *See* 47 C.F.R. § 100.5.

[37] *See* 16 FCC Rcd at 1956.

[38] *See id.*

[39] *See id.*

were permitted to satisfy the public interest set-aside with NCE stations, programming diversity would be diminished because all programming currently carried to satisfy the set-aside will likely be dropped in lieu of NCE station carriage.[40] Further, the Commission stated that Section 335 would also be rendered a nullity if NCE stations, carried under a different statutory section, were allowed to satisfy the set-aside obligations.[41]

14. DIRECTV, in its petition, asks the Commission to permit satellite carriers to include NCE stations in the calculation of public interest programming required to be set aside by satellite carriers under Section 335 of the Act.[42] DIRECTV argues that Congress knew of the existence of Section 335 in crafting the satellite must carry regime of Section 338, and that "nothing in the text of this latter provision suggests that NCE stations should not be counted towards the 4% set-aside."[43] Public Television Stations, the only party to respond on this point, disagrees with DIRECTV and urges the Commission to affirm its rule on this issue.[44] Public Television Stations agree with the Commission that Congress enacted the public interest set-aside requirements under Section 335 and the SHVIA local noncommercial station carriage requirements under Section 338 for different reasons, pursuant to different statutory regimes, to carry out different Congressional goals.

15. ***Discussion***. We deny DIRECTV's request for reconsideration of this issue. We find that DIRECTV's request that we permit satellite carriers to include local NCE stations, carried pursuant to Section 338, in the calculation of public interest programming required to be set aside under Section 335 would not result in compliance with Section 335 because carriage of certain stations in a limited number of markets does not provide the national scope intended by Section 335. Section 338 is not a national but rather a market-by-market requirement.[45] Significantly, the public interest set-aside requirement under the 1992 Cable Act focuses on educational or informational public interest programming available to all subscribers nationally. SHVIA, in contrast, is intended to provide satellite subscribers with their local noncommercial educational stations. Allowing satellite carriers to count towards the national set aside individual local NCE stations provided only in their respective local markets would violate Section 335's requirement that a direct broadcast satellite service meet the set aside requirement "by making channel capacity available to *national* educational programming suppliers."[46] In applying this requirement, we have made it clear that eligible public interest programming must therefore be available to all

[40] *See id.*

[41] *See id.*

[42] *See* DIRECTV Petition at 12-13.

[43] *Id.* at 4.

[44] *See* Public Television Stations Opposition at 8-9.

[45] The requirement under Section 335 is a statutory provision that was enacted by Congress as part of the 1992 Cable Act, and it has nothing to do with Section 338, which was enacted in 1999. *Compare* 47 U.S.C. § 335(b) (requiring a public interest set-aside to make "channel capacity available to national educational programming suppliers," which include "any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions"), *and* H. Conf. Rep. No. 102-862, at 100 (1992) (explaining that Congress structured the public interest set-aside in part "to enable *national* educational programming suppliers to utilize this reserved channel capacity") (emphasis added), *with* H. Conf. Rep. No. 106-464, at 92 (1999) (emphasizing "the importance of protecting and fostering the system of television networks as they relate to the concept of localism" and explaining that one reason for the local-into-local carriage regime is "to encourage and promote retransmissions by satellite of *local* television broadcast stations to subscribers who reside in the local markets of those stations") (emphasis added).

[46] 47 U.S.C. § 335(b)(3) (emphasis added).

subscribers.[47] We also note that DIRECTV is seeking reconsideration of an issue that has already been addressed in the *Report and Order*, and that DIRECTV has not presented any new arguments that would warrant reconsideration of this issue.[48]

3. Programming in the Vertical Blanking Interval

16. ***Background***. In the *Report and Order*, the Commission, pursuant to Section 338(g) of the Act,[49] applied the current cable content-to-be-carried requirements to satellite carriers.[50] The Commission found that satellite carriers had not presented any credible argument that would justify treating them differently from cable operators in this context. After review of the record, the Commission found that "it is technically feasible for satellite carriers to carry the current program-related material contained in the television station's VBI."[51] Accordingly, the Commission required satellite carriers "to carry the same program-related vertical blanking information as cable operators, including but not limited to closed captioning, Nielsen rating codes, V-chip information and for NCE stations, material necessary for the receipt of programs by people with disabilities, as well as education and language-related material."[52] The Commission also required satellite carriers to carry the secondary audio programming ("SAP") material that accompanies many broadcast television programs.[53] The Commission stated that it would address case by case any instances in which new kinds of program-related data in the VBI might cause satellite carriers to incur inordinate expenses or to change or add a substantial amount of equipment.[54]

17. In its petition, DIRECTV contends that carriage of "additional" VBI material is not "technically feasible" for existing, deployed satellite systems.[55] It states that, "[a]part from primary video and audio signals and Line 21 closed caption transmissions, it is not technically feasible for DIRECTV's DBS system to reliably pass through additional material in a usable form from other portions of the

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[47] *See DBS Public Interest Report and Order,* 13 FCC Rcd at 23285, 23293 (subscribers must provide programming designed for a national audience); *see also American Distance Education Consortium,* 14 FCC Rcd 19976 (1999) (emphasizes that public interest programming under the statute and the Commission's rules should be nationally available).

[48] Alternatively, DIRECTV, in its petition, states that, "[a]t a minimum, the Commission should clarify that NCE stations that are distributed on a national basis should be included in the 4% DBS public interest set-aside calculation." DIRECTV Petition at 13. We note that the Commission has generally addressed DIRECTV's alternative request for clarification (on the issue of whether, in the abstract, a local NCE station can be counted as a programmer for Section 335 purposes) in another proceeding (*see DBS Public Interest Report and Order*, 13 FCC Rcd at 23292-93 (concluding "that we should interpret the term 'national' broadly so as to include local, regional, or national domestic nonprofit entities that qualify under the definitions listed above and produce noncommercial programming designed for a national audience")), but we decline at this point to go beyond what we said in the *DBS Public Interest Report and Order* about this matter without having a concrete set of facts before us.

[49] Section 338(g) states that, "the regulations prescribed [under Section 338] shall include requirements on satellite carriers that are comparable to the requirements on cable operators under Section 614(b)(3) . . . and 615(g)(1)." 47 U.S.C. § 338(g).

[50] *See* 16 FCC Rcd at 1961-65.

[51] *Id.* at 1964-65.

[52] *Id.* at 1962.

[53] *See id.* at 1963.

[54] *See id.* at 1965.

[55] *See* DIRECTV Petition at 13-17.

VBI."[56] It asserts that the Commission's requirement on this issue "could require the replacement of DIRECTV equipment for as many as ten million households, resulting in a cost of more than 2.8 billion dollars."[57] DIRECTV asks the Commission to reconsider its findings with respect to the ability of existing satellite carriers to carry additional VBI material, "at least insofar as it applies to satellite systems that are already in operation."[58]

18. In support of its request for reconsideration of this issue, DIRECTV submitted a declaration, stating that DIRECTV's system is able to carry "Line 21 closed captioning, closed text, XDS, V-chip and any other data carried in Line 21."[59] The declaration further states that, currently, "all DIRECTV set top boxes are designed to pass through any data stemming from Line 21, fields 1 and 2 of the VBI," but that "[a]ny additional data in the VBI will be entirely eliminated during the conversion to compressed digital form."[60] DIRECTV does not dispute that it could modify its system in order to carry additional VBI data, but asserts that doing so could result in "substantial costs and disruption" in retrofitting an existing system with millions of customers.[61] According to the declaration, in order to accommodate additional data in the VBI, "DIRECTV would have no option but to replace each set top box in circulation today for an installed subscriber base of almost ten million DBS customers."[62] The declaration represents that "DIRECTV would also need to replace 'mirrored' set top boxes (additional boxes serving a particular customer account), set top boxes currently in the distribution 'pipeline,' and those set top boxes located at the manufacturers' premises."[63]

19. The broadcast interests generally agree that DIRECTV should not have to replace all the set-top boxes currently being used by subscribers if it is technically infeasible or prohibitively expensive for DIRECTV to do so, but they maintain that DIRECTV should be required to comply with the VBI carriage requirement on a going-forward basis.[64] NAB recommends that this requirement become effective in six months. Further, it states that the requirement as to new boxes should apply both to boxes provided to new subscribers and to replacement boxes provided to existing subscribers.[65] Similarly, Public Television Stations recommend that DIRECTV "make available to existing subscribers at a reasonable price an upgraded set-top capable of receiving additional program-related material, so that

[56] April 30, 2001 DIRECTV Ex Parte Supplement at 2.

[57] *Id.*

[58] DIRECTV Petition at 16-17.

[59] DIRECTV Petition, Technical Declaration of David A. Baylor, at ¶ 4.

[60] *Id.*

[61] *Id.*, ¶ 6.

[62] *Id.*

[63] *Id.*

[64] *See* NAB Response at 3 (recommends that if certain VBI program-related material cannot be received by existing set-top boxes, then "any new boxes marketed by the carrier (whether manufactured by the carrier or not) should be designed to enable receipt of the additional VBI material"); ALTV Opposition at 3 (states that while it understands DIRECTV's legacy problem, it recommends "that any new set top box should be capable of decoding all of the program-related information contained in a station's VBI"); Public Television Stations Opposition at 12 (agrees that DIRECTV need not be required to replace all of its installed set-top boxes with boxes capable of delivering additional program-related information, and notes that DIRECTV does not assert that it would be technically infeasible to provide future subscribers with a set-top box capable of receiving additional program-related material).

[65] *See* NAB Response at 4.

existing subscribers who would like to receive this material can do so."[66]

20. In response, DIRECTV asks the Commission to reject the broadcasters' suggestion that DIRECTV redesign its system and set-top boxes on a going-forward basis to deliver additional program-related VBI material to subscribers.[67] It states that the Commission's rule with respect to VBI carriage need not be revised, but the Commission "simply needs to rescind its finding regarding the technical feasibility of satellite carriers carrying additional program-related material in the VBI."[68] DIRECTV suggests that "the requirement to carry additional VBI material should only apply, as in the cable context, if 'nominal costs, additions or changes of equipment are necessary.'"[69] According to DIRECTV, under this standard, "retrofitting the existing DIRECTV system and bearing the replacement cost of subscribers' set-top boxes to accommodate additional VBI material is not technically feasible."[70]

21. ***Discussion***. Section 338(g) of the Act states that, "[t]he regulations prescribed [under Section 338] shall include requirements on satellite carriers that are comparable to the requirements on cable operators under Sections 614(b)(3) . . . . and 615(g)(1)."[71] Section 614(b)(3) states that, "[a] cable operator shall carry in its entirety . . . the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers."[72] Section 615(g)(1) applies a similar requirement to the contents of noncommercial educational stations.[73] In the cable context, with regard to the "technical feasibility" of the carriage of program-related material in the VBI or on subcarriers, the Commission stated in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues* ("*Cable Must Carry Report and Order*") that such carriage should be considered "technically feasible" if only nominal costs, additions or changes of equipment are necessary in order to carry such material.[74] In the *Report and Order* the Commission expressed its view that, based on the record presented, it was technically feasible for satellite carriers to carry the program-related material currently carried in a television station's VBI.[75] The *Report and Order* declined to rule on new kinds of program-related data in the VBI or on subcarriers indicating that these issues would be addressed in the future on a case-by-case basis.[76] DIRECTV's petition addresses the carriage of such additional VBI material and does not dispute the feasibility of carrying the data in line 21. We conclude, for the reasons set forth below, that it is unnecessary to revise the rule requiring satellite carriers to carry in its entirety the primary video, accompanying audio, and closed-caption data contained in line 21 of the VBI and, to the extent

[66] Public Television Stations Opposition at 12.

[67] *See* April 30, 2001 DIRECTV Ex Parte Supplement at 1-5.

[68] *Id.* at 4.

[69] *Id.*

[70] *Id.*

[71] 47 U.S.C. § 338(g).

[72] 47 U.S.C. § 534(b)(3).

[73] *See* 47 U.S.C. § 535(g)(1).

[74] *See* 8 FCC Rcd 2965, 2986 (1993) ("*Cable Must Carry Report and Order*").

[75] *See* 16 FCC Rcd at 1964-65.

[76] *See id.* In determining the "technical feasibility" of the carriage of program-related material in the VBI or on subcarriers, we apply the same standard that is applied in the cable context; that is, we would consider signal carriage to be "technically feasible" if only nominal costs in the context of satellite service, additions or changes of equipment are necessary.

technically feasible, program-related material carried in the VBI or on subcarriers.[77]

22. We find no reason to reconsider these decisions since it was not the Commission's intention to require satellite carriers to carry program-related material in the VBI if it is not "technically feasible" for satellite carriers to do so. DIRECTV indicates that its system is able to carry line 21 closed captioning, closed text, XDS, V-chip information, "TSID" data and extended service packets on line 21. Neither DIRECTV nor the broadcast parties commenting on this issue have been specific as to what additional information that, if made the subject of a carriage request, would be jeopardized by the current system limitations described by DIRECTV.[78] In these circumstances, we believe it is generally appropriate to apply the "technically feasible" standard as previously articulated in the cable context, but that it is not appropriate to attempt to rule on any additional or future VBI service without more specific information.[79] We note, however, that most of the costs that DIRECTV claims it would have to bear as the consequence of any additional carriage obligation, totaling some $2.8 billion, relate to replacing the integrated receiver/decoders that are currently used to receive DIRECTV service. In the future, any claim of technical infeasibility should address separately the technical issues involved with the transmission of the material in question as opposed to its reception and management in the receiver/decoder and the extent to which each set of issues is under the control of the satellite provider.

23. On a different, but related point, DIRECTV argues that satellite carriers should not be required to carry programming material of a "must carry" station if inclusion of such type of material is not covered by the retransmission consent agreements reached by that carrier with other stations in the local market in question.[80] We find no authority in Section 338, and DIRECTV has not presented any, to support DIRECTV's request. The terms negotiated by retransmission consent stations for the carriage of program-related material cannot be used to undermine Congress's directive that the Commission adopt satellite carriage requirements that are comparable to the cable carriage requirements, which explicitly mandate the carriage of program-related material. We therefore reject DIRECTV's request that we establish separate VBI requirements for must carry and retransmission consent stations.

4. Good Quality Signal Standard

24. ***Background.*** Section 338(b)(1) of the Act requires a television broadcast station asserting its right to carriage to bear the costs associated with delivering a "good quality signal" to the satellite carrier's receive facility.[81] In the cable context, Congress defined a signal strength standard that would equate to a good quality signal.[82] In the satellite context, however, Congress did not define specific signal levels that local stations must deliver to satellite carriers, and apparently left that determination to the Commission. In determining what constitutes a "good quality signal," as that term is used in Section 338, the Commission, in the *Report and Order*, found that the signal quality parameters under Section 614 of the Act and Section 76.55 of the Commission's cable regulations were appropriate

[77] *See* 47 C.F.R. § 76.66(j)(1).

[78] We also note that none of the parties have described how this information or programming would be displayed, if at all, on subscribers' television equipment.

[79] Here, an assessment of the nominal costs, additions or changes of equipment that are necessary is evaluated in the satellite context. Thus, what might be considered "nominal costs" in the cable context may be different in the satellite context.

[80] *See* DIRECTV Petition at 17.

[81] *See* 47 U.S.C. § 338(b)(1).

[82] *See* 47 U.S.C. § 534(h)(1)(B)(iii).

in the satellite carriage context.[83] The Commission noted that, under the current cable carriage regime, television broadcast stations must deliver either a signal level of –45dBm for UHF signals or –49dBm for VHF signals at the input terminals of the signal processing equipment, to be considered eligible for carriage.[84] The Commission determined that application of the same standard to the satellite carriage context was appropriate, given that the standards that have been applied to cable operators "have functioned well since the inception of the statutory carriage requirements seven years ago."[85] Additionally, the Commission did not find evidence in the record to suggest that the cable signal quality standard will not prove equally satisfactory in the satellite context.[86] In providing a good quality signal, the Commission concluded that television stations may use any delivery method (*e.g.*, microwave transmission, fiber optic cable, or telephone lines) to improve the quality of their signals to the satellite carrier as long as they pay for the costs of such delivery mechanisms.[87]

25. In its petition for reconsideration, DIRECTV asks the Commission to change its signal quality standard and "compel any station seeking carriage to provide a signal that meets the requirements of GR-388 CORE, TV1 for <20 route miles."[88] DIRECTV asserts that the cable standard the Commission adopted will not allow satellite carriers to make efficient use of their allocated bandwidth and that it will increase the likelihood of signal degradation.[89] It argues that the adoption of the cable signal quality standard in the satellite context is based on "unsupported speculation that a higher standard may prove 'prohibitively expensive' for small television stations to meet."[90] DIRECTV also argues that there are no statutory limits on broadcasters' costs for providing a good quality signal. Furthermore, DIRECTV insists that the record contained "ample evidence" that satellite carriers must receive a TV-1 quality signal.[91] According to DIRECTV, requiring a TV-1 quality signal is "critical" to differentiating DBS from cable television.[92] DIRECTV maintains that it markets its services on the basis of providing a higher quality signal than cable, and that, without having a higher standard for what constitutes a good quality signal in the satellite context, its marketing advantage will be severely undercut. DIRECTV asserts that the use of compression systems based on the Moving Pictures Experts Group ("MPEG-2") standard requires signals that meet the requirements of GR-338 CORE, TV1 for <20 route miles.[93] It further asserts that all of the local stations that are currently carried by DIRECTV meet the TV-1 quality standard and are delivered to DIRECTV's local receive facilities using a dedicated fiber circuit.[94] DIRECTV insists that any station seeking carriage should be required to meet the same standard, thus ensuring a "good quality" satellite signal.

26. ALTV, NAB, NASA, Paxson, and Public Television Stations are unanimous in urging

[83] *See* 16 FCC Rcd at 1945-46.

[84] *See id.* at 1945.

[85] *Id.* at 1946.

[86] *See id.*

[87] *See id.*

[88] DIRECTV Petition at 20.

[89] *See id.* at 5.

[90] *Id.*

[91] *Id.* at 18.

[92] *Id.*

[93] *See id.*

[94] *See id.*

the Commission to reject DIRECTV's request for reconsideration of the "good quality signal" standard adopted in the *Report and Order*. ALTV points out that DIRECTV has not presented any new evidence to justify reconsideration of the issue.[95] ALTV asserts that Section 338's legislative history requires the Commission to enact regulations that are similar to those applied to the cable industry, and that the "good quality signal" standard applicable to the cable industry "is more than a sufficient signal strength to provide a top quality signal to either a cable headend or a satellite receive facility."[96] NAB asserts that DIRECTV's claims are inconsistent with those of another major DBS company (*i.e.*, EchoStar), which has stated that a fiber-optic TV-1 signal is not the only method of delivering a usable local station signal to a satellite carrier.[97] Further, NAB points out that DIRECTV's claims are also inconsistent with the views of two other satellite carriers (*i.e.*, BellSouth and LTVS) that filed comments in the rulemaking proceeding.[98] NAB asserts that imposing a fiber optic cable requirement -- in order to deliver a TV-1 signal -- on local stations seeking carriage would also result in a large disparity between the regulatory regimes applicable to cable systems and to satellite carriers.[99] NASA asserts that the costs associated with complying with a TV-1 standard for local television stations would be "excessive."[100] Paxson states that broadcasters should not be required to "subsidize" DIRECTV's competitive efforts.[101] Paxson contends that DIRECTV's proposals were not intended by Congress. Public Television Stations state that DIRECTV is "free to insist on TV-1 delivery for its own technical reasons, but it should bear the costs associated with such transmission."[102]

27. In reply, DIRECTV maintains that a "good quality signal" for satellite carriage purposes is not and should not mean the same thing as "good quality signal" in the cable carriage context.[103] It states that "it makes little sense for the Commission to adopt a signal quality standard used by cable operators, which are the very incumbents for whom Congress and the Commission are seeking to promote competition against in terms of price and service, including signal quality."[104] DIRECTV also states that broadcasters do not dispute DIRECTV's observation that "substandard local broadcast signals supplied to a satellite carrier's MPEG encoder will demand more channel capacity than TV-1 quality signals and will degrade the picture quality on all other channels utilizing the same transponder."[105] DIRECTV responds

[95] *See* ALTV Opposition at 7.

[96] *Id.* at 7-8. Similarly, NAB and ALTV argue that "DIRECTV's insistence that TV stations provide a signal of vastly higher quality than they are required to provide to cable systems is inconsistent both with the language of the SHVIA and with its goal of creating a regulatory regime parallel to that applicable to cable." *See* Letter from Thomas Olson, on behalf of NAB and ALTV, to Magalie Roman Salas, Secretary, filed in CS Docket No. 00-96 (July 6, 2001), at 2 ("July 6, 2001 Joint NAB and ALTV Ex Parte Letter").

[97] *See* NAB Response at 5.

[98] *See id.*, citing BellSouth Comments at 19 ("Since those signal quality standards have been effective in the cable environment, there is no reason they will not work for satellite."), and LTVS Comments at 16-17 n.21 ("The only difference between cable and satellite technology is that TV stations deliver the signal to a cable system headend, whereas in [the] satellite context the signal is delivered to the local receive facility.").

[99] *See* NAB Response at 6.

[100] *See* NASA Opposition at 2-3 (the costs for a TV circuit from a telecommunications carrier would be around $800-$1500 per month; and that because TV-1 lines are leased in terms of distance, the cost has the potential to be even greater if a satellite carrier uses a regional, rather than a local, receive facility).

[101] Paxson Comments at 10.

[102] Public Television Stations Opposition at 10.

[103] *See* DIRECTV Reply at 8.

[104] *Id.*

[105] *Id.* at 9.

that broadcasters' concerns over the cost of implementing TV-1 as a standard are "vastly overstated."[106] It asserts that the statute does not place any limits on the expenses that broadcasters are required to bear in order to deliver a good quality signal to the local receive facility.[107] Furthermore, DIRECTV states that this expense is not being forced on broadcasters, and that broadcasters are free to forego satellite carriage altogether.[108] DIRECTV states that, contrary to NAB's statements, it is not its position that fiber optic cable is the only method of delivering a usable local station to a satellite carrier; rather, while the use of fiber optic cable is the easiest and most conventional method of ensuring that the TV-1 signal quality standard is met, DIRECTV is not contending that other modes of distribution, such as microwave links, should be precluded.[109] In an ex parte submission, DIRECTV further states that many broadcast stations "can come close to achieving a TV-1 quality signal via off-air transmission."[110] DIRECTV proposes that a station transmitting over-the-air would need to improve its "as-received" signal-to-noise ("S/N") ratio to meet the proposed TV-1 quality fiber standard, and suggests "a signal-to-noise ratio of approximately 60 dB."[111] DIRECTV surmises that broadcasters could achieve this S/N "with the addition of commercial noise reduction equipment that is relatively inexpensive."[112]

28. ***Discussion***. We decline to revise the "good quality signal" standard adopted in the *Report in the Order*, as urged by DIRECTV. As noted by ALTV and Paxson, DIRECTV made the same request in its initial comments in the proceeding which the Commission reviewed and rejected.[113] As reflected in the *Report and Order*, the Commission has already considered DIRECTV's request that the Commission define "good quality signal" as one that will facilitate efficient MPEG compression of all channels, and that the signal must meet the requirements of GR-388 CORE, TV1 for <20 route miles.[114] The Commission, however, declined to adopt DIRECTV's good quality signal proposals for the following reasons:

> First, we believe that the TV1 standard is too rigid a construct. Specifically, a signal-to-noise ratio of +67 dB cannot be easily implemented by most television broadcast stations. Broadcasters do not have to meet such exacting ratios and levels when delivering signals to a cable operator's headend to qualify for carriage. Moreover, as NAB points out, satellite carriers, such as EchoStar, have been retransmitting local television signals that they have received over-the-air . . . . We also note that it would be prohibitively expensive for a small television station to lease a dedicated TV1 circuit from a

[106] *Id.*

[107] *See id.* at 9-10.

[108] *See id.* at 11.

[109] *See id.* at 10 n.31.

[110] *See* Letter from James Barker, Counsel for DIRECTV, filed in CS Docket Nos. 00-96 and 99-363 (dated June 25, 2001), at 1 (hereinafter "June 25, 2001 DIRECTV Ex Parte Letter").

[111] *Id.*

[112] *Id.*

[113] *See* ALTV Opposition at 7; Paxson Comments at 10-11

[114] *See* 16 FCC Rcd at 1945, citing DIRECTV Comments in CS Docket 00-96 (filed July 14, 2000). DIRECTV, in its July 14, 2000 Comments (at 32), had proposed "a weighted signal to noise ratio of -67 dB" as necessary for the digital video compression equipment used in DBS systems. In the *Report and Order,* we noted that DIRECTV probably intended to request +67 dB S/N. *See* 16 FCC Rcd at 1945 n.142. Apparently, that was DIRECTV's intention, and they are now modifying their proposal by explaining that, in order for the local receive facility to have a 67 dB S/N ratio, the broadcaster should provide an "as received" S/N ratio of 60 dB. *See* June 25, 2001 DIRECTV Ex Parte Letter at 1.

telecommunications carrier. It is not our intention to impose inordinate costs on small television stations that would prevent them from being carried by a satellite carrier.[115]

29. In reviewing DIRECTV's petition, we find that DIRECTV has not presented new evidence that warrants changing the good quality signal standard already adopted to a TV-1 quality signal,[116] which NAB and ALTV refer to as an "essentially perfect signal."[117] DIRECTV, in an ex parte letter, suggests that "a number of" TV stations "can come close" to achieving a 67 dB S/N ratio.[118] By "coming close," DIRECTV means a S/N ratio of "approximately 60 dB," and says that even achieving that S/N ratio with an over-the-air signal will, in many cases, require the purchase of additional noise reduction equipment.[119] While lower than the 67 dB S/N ratio that DIRECTV initially requested, we agree with NAB and ALTV that "a 60 dB signal-to-noise [ratio] would still force stations to deliver to DBS firms a virtually perfect signal, rather than the good quality signal that the SHVIA requires stations to provide to satellite carriers and that the Cable Act requires stations to provide to cable systems (including cable systems that provide digital service)."[120] Moreover, we note that DIRECTV proposes requiring a S/N ratio of 60 dB but does not clarify what signal strength level would satisfy the "strong, high quality broadcast signal" or whether the intention is to combine the -49dBm for VHF signals and -45dBm for UHF signals with a 60 dB S/N ratio. Additionally, DIRECTV does not define the "as-received" S/N ratio that a broadcast station must deliver, but rather proposes that stations must achieve the desired 60 dB S/N through use of noise reduction equipment. Furthermore, DIRECTV acknowledges that stations with "weaker off-air signals at the local receive facility may not be able to meet the TV-1 (or 60 dB) standard via off-air transmission" and recommends that broadcasters can pay $14,000 per year to lease a TV-1 line to accommodate the standard proposed.[121] As the Commission previously stated, however, "[i]t is not our intention to impose inordinate costs on small television stations that would prevent them from being carried by a satellite carrier."[122]

30. With respect to DIRECTV's claims about the potential for diminished capacity under the current good quality signal standard, we are unable to make a meaningful evaluation of this claim based on the record. DIRECTV, in its June 25, 2001 Ex Parte Letter, explains that if each video frame is similar to the next, then only "a small amount of 'difference' information is required for the second frame" and states that "noise is the enemy of compression."[123] DIRECTV further explains that, in a compression system, it is difficult to differentiate between intended activity and undesirable background noise. It states that such excessive background noise will "consume valuable transmission capacity thus causing

[115] *Report and Order*, 16 FCC Rcd at 1945.

[116] Indeed, we note that DIRECTV acknowledges that four or five of the broadcast stations DIRECTV carries pursuant to retransmission consent agreements "have no fiber infrastructure," thus requiring DIRECTV to "bring in the primary feed off-air." June 25, 2001 DIRECTV Ex Parte Letter at 5.

[117] July 6, 2001 Joint NAB and ALTV Ex Parte Letter at 1 ("DIRECTV continues to press its campaign to force local stations to provide not a '*good* quality signal,' as the Satellite Home Viewer Improvement Act expressly specifies, but instead an essentially *perfect* signal.") (emphasis in original).

[118] June 25, 2001 DIRECTV Ex Parte Letter at 1.

[119] *Id.* As NAB and ALTV observes, "DIRECTV itself effectively admits that the only way to achieve a 67 dB signal-to-noise ratio is by arranging for a fiber-optic TV-1 line from the station's studio to DIRECTV's local receive facility." July 6, 2001 Joint NAB and ALTV Ex Parte Letter at 2.

[120] July 6, 2001 Joint NAB and ALTV Ex Parte Letter at 2.

[121] June 25, 2001 DIRECTV Ex Parte Letter at 2.

[122] *Report and Order*, 16 FCC Rcd at 1945.

[123] June 25, 2001 DIRECTV Ex Parte Letter at 3.

the desired picture to be degraded."[124] On this point, we note that DIRECTV, however, did not establish the amount of picture degradation that could result. DIRECTV asserts that tests conducted in its lab "show that one channel with a 50 dB weighted signal-to-noise ratio will consume 25% more bandwidth than the same program with a 67 dB signal-to-noise ratio."[125] DIRECTV, however, did not submit information as to how these tests were conducted and how capacity would be affected if we retain the signal strength standard established in the *Report and Order* versus adopting its proposed 60 dB S/N standard. Further, we see merit in NAB's and ALTV's response on this issue that a "DBS firm can set a cap on the number of bits that will be allocated to any one channel, thus ensuring that there will be no effect on any other channel through the statistical multiplexing process."[126]

31. Although DIRECTV clarifies, in its reply, that microwave transmissions may be used in lieu of fiber optic cable to achieve a TV-1 quality signal, it appears to expect that microwave spectrum is available everywhere. Moreover, DIRECTV provided no standard or cost analysis for such an alternative.

32. DIRECTV has not provided sufficient evidence to demonstrate that the good quality signal standard used in the cable context is inadequate or inappropriate in the satellite context. As NAB and ALTV point out, "many cable systems (like DBS firms) now provide digital service, but that has *not* resulted in any change in the quality of the signal that stations are required to provide to cable headends. As before, stations are still required to provide cable systems with a 'good quality,' but not a flawless, signal to cable systems."[127] The good quality signal standard -- in either the cable or satellite context -- ensures that a signal available to over-the-air viewers will receive carriage. We continue to believe that the standard used for cable is appropriate in the satellite context as well. The signal standard must be one that can be measured and can be satisfied by over-the-air delivery.[128] We believe that the goal of preserving over-the-air local television, which underlies the carriage requirements in the Communications Act, would be disserved by a signal quality standard that cannot be satisfied by over-the-air delivery.[129] Furthermore, as indicated in the *Report and Order*, the Commission was compelled to reject the TV-1 standard because, among other reasons, many television broadcast stations would have difficulty implementing the standard.[130] We believe that imposing an exacting standard that exceeds the level necessary would inhibit many local stations' ability to qualify for carriage with a satellite carrier, when the same stations can qualify for carriage with a cable operator. If we adopted DIRECTV's proposal to

[124] *Id.*

[125] *Id.* We note, too, that DIRECTV's test did not compare the 60 dB S/N standard it now proposes, but rather a 67 dB S/N ratio. The difference in effect could be significantly less than 25%.

[126] July 6, 2001 Joint NAB and ALTV Ex Parte Letter at 3.

[127] *Id.* at 2 (emphasis in original).

[128] As noted in the *Report and Order*, "the current good quality signal standards will provide parties with a workable, tested standard." 16 FCC Rcd at 1946.

[129] We note that broadcasters in the cable context may meet the good quality signal standard by delivering their station's signals via microwave or fiber at their expense. We anticipate that the same will hold true in the satellite context.

[130] NAB, NASA, and Public Television Stations contend that adopting DIRECTV's TV-1 quality standard would impose an excessive burden on many local television stations. *See* NASA Opposition at 2 (while the cost for leasing a TV1 line can range from $800-$1500 per month, this cost can potentially be greater if a satellite carrier uses a regional, rather than a local, receive facility, because the cost of leasing a TV1 line is based on distance); Public Television Stations Opposition at 11 ("[T]he TV1 standard advanced by DirecTV is a 'short-haul' standard designed for transmission of a broadcast signal up to 20 miles, and many stations will be sending their signals [at] a much

(continued....)

require broadcasters to meet a 60 dB signal-to-noise ratio, we would be creating disparate schemes for satellite and cable. Moreover, to the extent that cable operators have upgraded their systems and equipment since the 1992 Cable Act, they have been bearing the costs of improving some broadcasters' signal quality to meet the cable system's higher standards and subscribers' higher expectations.[131] Because the good quality signal standard is statutory for cable systems, we cannot revise it. Creating such a disparity for cable versus satellite subscribers, as well as for broadcast stations, is not what Congress contemplated in Section 338.

5. Relocation of Local Receive Facilities Mid-Cycle

33. ***Background.*** In the *Report and Order*, the Commission concluded that, as a general matter, a satellite carrier may relocate the designated local receive facility[132] at the beginning of an election cycle (*i.e.*, at the time broadcast stations must elect either must carry or retransmission consent).[133] The Commission stated that satellite carriers should have the flexibility to change their designated local receive facility or alternative facility, and required satellite carriers to provide 60 days advance notice to all local stations of such a change. In affording satellite carriers this flexibility, however, the Commission was concerned that the relocation of a local receive facility, if done mid-cycle, may make it more difficult for some television stations to pay the unanticipated costs of delivering a good quality signal. Accordingly, the Commission determined that if a satellite carrier decides to relocate its local receive facility in the middle of an election cycle (*i.e.*, after the time for electing must carry or retransmission consent during an election cycle has expired), it should pay the television stations' costs to deliver a good quality signal to the new location.[134]

34. DIRECTV contends that the costs of delivering a good quality signal in the context of the relocation of local receive facilities mid-cycle by satellite carriers should be borne by broadcasters, not satellite carriers.[135] DIRECTV argues that "nowhere in the text of the statute or in its legislative history did Congress express the intent that satellite carriers should be required to pay the costs of delivering a station's signal under any circumstances."[136] Further, DIRECTV asserts that, because of the expense involved in establishing a local receive facility, it is unlikely that a satellite carrier will move its facility

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greater distance to reach the carrier's receive facility."); NAB Response at 4 (noting that this distance may be hundreds of miles).

[131] The signal level of -45dBm for UHF and -49 dBm for VHF are the threshold signal levels required by the Commission for broadcast carriage. Under the current increasingly competitive environment, many cable operators have borne the costs of improving some broadcasters' signals to enable the system to be more competitive with DBS providers, as well as to meet cable subscribers' higher expectations.

[132] Section 338(h)(2) defines the term "local receive facility" as "the reception point in each local market which a satellite carrier designates for delivery of the signal of the station for purposes of retransmission." 47 U.S.C. § 338(h)(2). In the definition of "local receive facility" in Section 338(h)(2), the satellite carrier is the entity authorized to designate the placement of a local receive facility. If the satellite carrier designates a local receive facility, the television broadcast stations are required by the statute to bear the costs of delivering a good quality signal to "the designated local receive facility of the satellite carrier." 47 U.S.C. § 338(b)(1).

[133] *See* 16 FCC Rcd at 1943-44.

[134] *See id.* at 1944.

[135] *See* DIRECTV Petition at 20.

[136] *Id.* (emphasis in original omitted).

voluntarily "unless unforeseen circumstances make relocation absolutely necessary."[137]

35. ALTV, NAB, NASA, Paxson, and Public Television Stations, on the other hand, are unanimous in asking the Commission to reject reconsideration of this issue. These parties agree that the Commission correctly interpreted the requirements of the SHVIA in requiring satellite carriers to pay for the costs of delivering a good quality signal if the carrier changes its facility mid-cycle.[138] They also argue that if television stations are required to incur costs associated with a satellite carrier's decision to move its local receive facility mid-cycle, then local stations will be forced to incur additional, significant, and unforeseen costs, and that these additional costs could prevent a station from getting its signal to the new receive facility.[139] Paxson, for one, asserts that, "[u]nder DIRECTV's proposal, a satellite operator could specify alternative receive sites multiple times during an election period (with the concurrence of just one-half of the local broadcast stations), thus imposing unpredictable and insurmountable expenses on must-carry stations."[140]

36. ***Discussion***. The Commission's prior interpretation of the statute is reasonable and consistent with the purpose of the SHVIA. It is within the Commission's discretion to interpret "designated" facility, as that term appears in Section 338(b), as the facility for which the carrier gives a station notice before the station makes its carriage election.[141] The carrier thus cannot change the "designated" facility to which the broadcaster can be held responsible for delivering its good quality signal until it comes time to make a carriage election for the next election cycle. If the satellite carrier, however, does make such a change mid-cycle, even as a result of unforeseen events, it is only reasonable to require it to bear any new capital costs and incremental ongoing expenses required for the delivery of a good quality broadcast signal, because the new receive facility was not the one initially "designated" and anticipated by local stations. We agree with Public Television Stations that this limited burden on carriers protects a broadcast station's reasonable expectations of the signal delivery costs it will incur if it elects satellite carriage.[142]

6. Extra Equipment for Some Local Signals

37. ***Background***. In the *Report and Order*, the Commission interpreted the nondiscrimination provision of Section 338(d) of the Act to prohibit satellite carriers from requiring subscribers to purchase additional equipment (*e.g.*, a satellite dish) to gain access only to some, but not all of the local signals in a market.[143] This determination was made in response to concerns over the possible discriminatory

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[137] *Id.*

[138] *See, e.g.*, NAB Response at 7-8.

[139] *See, e.g.*, ALTV Opposition at 13-14.

[140] Paxson Comments at 13.

[141] *See* NAB Response at 7 (the Commission "was well within its authority in concluding that while a carrier could require a station to pay those costs to deliver a signal to one location during an election cycle, it may not impose the costs repetitively on stations during a single cycle"); NASA Opposition at 7 (the Commission appropriately interpreted "designated" local receive facility to mean the facility designated by the carrier for that three-year election cycle); Public Television Stations Opposition at 13 (arguing same).

[142] Public Television Stations Opposition at 13 ("If the location of the carrier's receive facility changes mid-cycle, a broadcast station may no longer be able to afford the cost of getting a good quality signal to the relocated receive facility.").

[143] *See* 16 FCC Rcd at 1959-61. The anti-discrimination language is contained in Section 338(d) of the SHVIA, which states:

(continued....)

treatment that television stations electing mandatory carriage might receive; that is, a concern that a satellite carrier may place mandatory carriage stations on a satellite that would require a subscriber to purchase another dish and/or other equipment to receive such signals, which would effectively inhibit the ability of local stations to reach potential viewers. In addressing this issue, the Commission found that "the language of Section 338(d) covers the additional equipment concerns raised by the parties and bars satellite carriers from requiring subscribers to purchase additional equipment when television stations from one market are segregated and carried on separate satellites."[144] As the Commission explained, this interpretation does not prohibit a satellite carrier from requiring a subscriber to pay for additional equipment in order to receive all television stations from a single market.[145] To illustrate the application of the rule, the Commission noted: "For example, DIRECTV may require an additional dish to receive all television stations from the Baltimore market, but it may not require subscribers to purchase the same to receive some Baltimore stations where the others are available using existing equipment."[146]

38. In its petition, DIRECTV contends that Section 338(d) does not unduly restrict satellite carriers from offering local-into-local service through the use of different orbital positions, with multiple dishes if necessary.[147] It argues that the Commission's interpretation of Section 338(d) on this issue conflicts with Congressional intent.[148] It asserts that Congress considered this precise question and decided to delete draft statutory language that would have imposed the very restriction that the Commission found in the statute.[149] DIRECTV surmises that Congress contemplated restricting the satellite carriers' ability to segregate local stations on two satellites and require two receive antennas, but must have rejected the idea because it later deleted the proposed language.[150] DIRECTV states that it has been "innovative" in using multiple orbital locations to offer competitive multichannel services to

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(...continued from previous page)

> No satellite carrier shall be required to provide the signal of a local television broadcast station to subscribers in that station's local market on any particular channel number or to provide the signals in any particular order, except that the 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 station's signals 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) (emphasis added).

[144] *Report and Order*, 16 FCC Rcd at 1961.

[145] *See id.*

[146] *Id.*

[147] *See* DIRECTV Petition at 21-23.

[148] *See id.* at 21.

[149] *See id.* DIRECTV states that early drafts of the SHVIA on this subject read as follows:

> No satellite carrier shall be required to provide the signal of a local television broadcast station to subscribers in that station's local market on any particular channel number or to provide signals in any particular order, except that the satellite carrier shall retransmit the signal of the local television broadcast stations to subscribers in the station's local market on contiguous channels which a *subscriber may receive without the need to install an additional reception antenna or any other additional equipment* and provide access to such station's signals at a nondiscriminatory price and in a nondiscriminatory manner on any navigational device, on-screen program guide, or menu.

Id. at 22, quoting House Conferees' Counteroffer of the Copyright Satellite Statutory License Improvement Act, Discussion Draft, at 27 (Oct. 15, 1999) (emphasis added by DIRECTV).

[150] *See* DIRECTV Petition at 23.

consumers. It contends that the SHVIA was not intended to constrain this innovation, and that it "does not prohibit satellite carriers from offering local-into-local services from multiple locations, with multiple dishes if necessary, where it makes business and technical sense to do so."[151]

39. None of the other parties in the instant proceeding support DIRECTV's position on this issue.[152] ALTV, for example, contends that the Commission's construction of Section 338(d) "is fully consistent with the letter and spirit of the legislation." ALTV explains:

> Congress was primarily concerned with the discriminatory effect of carrying only the major network stations. If enacted, DIRECTV's plan would permit a satellite carrier to package some local signals with hundreds of other channels, while placing other local signals on a different satellite and forcing consumers to purchase extra equipment to access these signals. Such a result is contrary to the express non-discrimination language in section 338 as well as the legislation's intent.[153]

NAB argues that "even if the omitted language had (despite its language) been aimed only at preventing purchase of extra equipment for stations carried under Section 338, the Commission correctly concluded that the nondiscrimination language of Section 338 adequately covered this point with or without the omitted language."[154]

40. ***Discussion***. We decline to reconsider this issue. DIRECTV's arguments were squarely before us when we made our determination that Section 338(d)'s nondiscrimination provision bars satellite carriers from discriminating against some broadcast stations by requiring subscribers to purchase additional receiving equipment in order to access some, but not all, local signals.[155] DIRECTV has not presented any new facts or arguments to convince us to change our interpretation of Section 338(d) as it concerns this issue. Indeed, as reflected in the *Report and Order*, the Commission considered the very same line of legislative argument that DIRECTV now makes, which EchoStar previously made:

> EchoStar comments that one of the obligations advocated by the NAB – that local stations be available from the same orbital location – is tantamount to a provision that had been included in draft legislation prior to the passage of SHVIA. EchoStar states that such provision, which was dropped from the final version of Section 338, would have barred satellite carriers from transmitting local stations in a manner that would require additional reception equipment. EchoStar argues that the Commission cannot implement a rule similar to this provision when Congress decided not to include such a requirement in the SHVIA.[156]

In response, the Commission held "that the language of Section 338(d) covers the additional equipment concerns raised by the parties and bars satellite carriers from requiring subscribers to purchase additional

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[151] *Id.*

[152] *E.g.*, Paxson Comments at 9-10 (DIRECTV's arguments regarding the statute's legislative history is "without merit," and asserts that Congress enacted satellite must carry provisions to ensure that satellite subscribers have access to all local signals, not just those of the major affiliates and few other stations.).

[153] ALTV Opposition at 10.

[154] NAB Response at 9.

[155] *See Report and Order*, 16 FCC Rcd at 1959-61.

[156] *Id.* at 1960-61.

equipment when television stations from one market are segregated and carried on separate satellites."[157] The Commission's rule on this issue is intended to prohibit satellite carriers from placing mandatory carriage television stations on a satellite if that would require a subscriber to purchase equipment additional to what is needed to receive other local stations in the same market, and, at the same time, placing retransmission consent stations on another satellite that does not require subscribers to purchase any additional equipment.[158]

41. We agree with Public Television Stations that DIRECTV, in any event, misinterprets the legislative history of SHVIA in arguing that it should be permitted to require subscribers to use two separate dishes to receive the full package of local channels.[159] When Congress adopted the SHVIA, it rejected language that said subscribers could not be required to install an additional dish to receive any local signals. The legislative drafting change cited by DIRECTV involved a deletion of a much broader limitation on satellite carriers than what the Commission adopted under the general anti-discrimination language that survived. The legislative drafting change, at most, indicated that Congress did not want to prohibit satellite carriers from requiring additional dishes generally, but the change does not imply that Congress wanted to allow satellite carriers to require additional dishes if such a requirement created discriminatory effects. We believe that a limited prohibition on requiring subscribers to obtain a separate dish to receive some local signals when other local signals are available without the separate dish is necessary to give full effect to local station carriage requirements. Otherwise, as Public Television Stations argue, satellite carriers could structure local station packages and separate dish requirements to discourage consumers from subscribing to certain local stations, including local noncommercial stations. For the foregoing reasons, we affirm our rule prohibiting satellite carriers from requiring subscribers to purchase additional equipment to gain access only to some, but not all of the local signals in a market.

B. ALTV's Petition

42. In its petition, ALTV seeks reconsideration of issues concerning: (1) the a la carte sales of local signals; and (2) the determination of which stations are eligible to vote on an acceptable receive facility. In their separate pleadings, NAB, NASA, Paxson, and Public Television Stations submitted arguments in support of ALTV's position on these issues. Below, we discuss these two issues.

1. A La Carte Sales of Local Signals

43. ***Background.*** In the *Report and Order*, the Commission held that Section 338 does not require satellite carriers to sell all local television stations as one package to subscribers, as broadcast interests had urged in their comments.[160] The Commission found that Congress did not intend to establish a basic service tier-type requirement for satellite carriers when it implemented Section 338, and that Congress did not explicitly prohibit the sale of local television station signals on an a la carte basis. The Commission determined that, instead, Section 338's anti-discrimination language prohibits satellite carriers from implementing pricing schemes that effectively deter subscribers from purchasing some, but not all, local television station signals. Thus, the Commission stated, "a satellite carrier must offer local

[157] *Id.* at 1961.

[158] *See* NAB Response at 8 (The Commission correctly concluded that satellite carriers cannot force consumers to purchase additional equipment to receive stations carried under Section 338, as opposed to stations carried through retransmission consent.).

[159] *See* Public Television Stations Opposition at 15.

[160] *See* 16 FCC Rcd at 1960.

television signals, as a package or a la carte, at comparable rates."[161]

44. ALTV seeks reconsideration of this issue. NAB, NASA, Paxson, and Public Television Stations submitted arguments, similar to those that ALTV makes, in support of reconsideration. ALTV and other parties contend that the Commission's decision to allow a la carte pricing of local stations could result in discrimination against local stations and run counter to the SHVIA's anti-discrimination requirements.[162] They ask the Commission to require all local signals to be included in a single package in order to ensure that consumers have access to all local stations. ALTV insists that this change to the Commission's rule is needed because of its concern that a satellite carrier, through its packaging and pricing decision, could influence the availability of, and access to, local channels. NAB states that "allowing satellite carriers to adopt differential pricing policies for 'favored' and 'disfavored' local channels directly contravenes the statutory prohibition on discriminatory pricing."[163] Further, NAB asserts that authorizing 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 smaller stations in the market only on an a la carte basis, which predictably will be purchased by far fewer subscribers."[164]

45. DIRECTV opposes reconsideration of this issue, contending that the Commission correctly concluded that the SHVIA does not require satellite carriers to sell all local television signals in a single package to subscribers.[165] It argues that ALTV fails to trace its proposed "unitary package" rule to any express textual requirement of the SHVIA.[166] It states that, in declining to mandate a "unitary package" of local channels, the Commission is promoting an increase in the range of choice in local programming, not decreasing the range of choices as ALTV suggests.[167] It asserts that it may be that a unitary package is the best way to provide satellite carrier subscribers with local signals, as ALTV suggests, or it may be that offering local signals a la carte is preferable, but "the public will be well served by allowing the multichannel marketplace and satellite carrier business decisions to govern how local signals are packaged."[168]

46. ***Discussion***. We deny ALTV's request for reconsideration of this issue. As reflected in the *Report and Order*, the Commission considered and rejected the precise argument that ALTV is asking us to reconsider. Neither ALTV nor the parties that support ALTV on this issue has submitted new arguments or facts to warrant reconsideration of our decision that satellite carriers should not be required to offer local stations only as a single package. We find nothing in the statute that prohibits satellite carriers from offering local stations on an individual a la carte basis to the extent the carrier is not using this method of packaging to discriminate against local stations. As DIRECTV points out, and we agree, Congress could have created a requirement that satellite carriers must sell local stations to its subscribers as a single package, but it did not do so. The relevant part of Section 338 requires only that a satellite carrier provide access to a local television station's signal "at a nondiscriminatory price" and access "in a

[161] *Id.*

[162] *See* ALTV Petition at 3-14; NAB Statement at 3-5; NASA Opposition at 9; Paxson Comments at 4-8; Public Television Stations Opposition at 15-16.

[163] NAB Response at 5.

[164] NAB Statement at 1-2.

[165] *See* DIRECTV Opposition at 1-5.

[166] *See id.* at 2.

[167] *See id.* at 4.

[168] *Id.*

nondiscriminatory manner on any navigational device, on-screen program guide, or menu."[169] Neither of these requirements prohibits satellite carriers from offering local television signals to consumers on an a la carte basis, and we believe that allowing a satellite carrier the flexibility to offer local television station signals to its subscribers on an a la carte basis promotes consumer choice.

47. ALTV faults our decision to implement the statutory prohibition on discriminatory pricing by requiring that satellite carriers offer broadcast stations at "comparable rates." ALTV argues that the discriminatory pricing prohibition must translate to a prohibition of a la carte offerings and a requirement for a single package of local signals. We used the term "comparable" in the *Report and Order* to explain that "non-discriminatory" need not mean identical. That is, although the charges need not be the same, they should be within a nondiscriminatory range. The pricing should be based on relevant economic factors applied in a nondiscriminatory fashion that does not result in discriminatory treatment of any station or stations, such as pricing so as to effectively deter subscribers from purchasing some, but not all, local television station signals. We recognize that comparable pricing may require further clarification on a case-by-case basis, and that in most cases local stations should be offered to subscribers at the same or nearly identical prices. We are, however, unwilling at this time to require identical pricing for each local station carried and will evaluate on a case-by-case basis any complaints alleging discrimination prohibited by Section 338.

48. We clarify here that although the statute does not prohibit satellite carriers from offering stations on an a la carte basis at comparable rates, we believe that a prohibited discriminatory effect would result if carriers created a mix of one or more packages for some stations while offering other stations only individually (*e.g.*, creating a package of six local stations and offering other local stations only on an individual a la carte basis, or creating two separate packages of different local stations). Allowing satellite carriers to offer some stations as a package and others on an a la carte basis could operate as a deterrent to the purchase of certain local stations without furthering consumer choice. We believe that this is one of the very discriminatory results that Section 338 sought to prohibit. In contrast, we do not believe it would be discriminatory for a satellite carrier to offer either each local station individually *or* a package containing all local stations for a price less than or equal to the sum of subscribing to each station individually (*e.g.*, each of twelve local stations for $1 *or* all twelve stations for $10).[170] Thus, if subscribers choose to forego a package of local stations that a satellite carrier is offering and instead subscribe, for example, to only three of the twelve stations that may be offered on an a la carte basis, that is an exercise of consumer choice. At the same time, other subscribers may choose to select a package that may be cheaper than the sum of individual stations.

2. Station Eligibility to Vote on Alternative Receive Facility

49. ***Background.*** Section 338(b)(1) of the Act requires a television station asserting its "right to carriage" under Section 338(a) to bear the costs associated with the delivery of a good quality signal to the satellite carrier's designated local receive facility or to "another facility that is acceptable to at least one-half the stations asserting the right to carriage in the local market."[171] In the *Report and Order*, the Commission interpreted the phrase "that is acceptable to at least one-half the stations asserting the right to carriage in the local market" to mean that a satellite carrier may establish an alternative receive facility if "50% or more" of those stations in a particular market consent to such a site.[172] The Commission

[169] 47 U.S.C. § 338(d).

[170] Nor, of course, would it be discriminatory to offer a package of all stations at a price equal to the sum of subscribing to each station individually.

[171] 47 U.S.C. § 338(b)(1).

[172] *See* 16 FCC Rcd at 1941.

determined that calculation of the "50% or more" stations should be based on the majority of stations entitled to carriage in each affected market.[173] The Commission reasoned: "Since the 'right to carriage' under Section 338 extends, at least initially, to all local television broadcasters, the calculation includes *all stations*, whether they elect mandatory carriage or retransmission consent."[174]

50. ALTV asks the Commission to revise its rule concerning this issue. ALTV contends that the calculation of the 50% threshold should be based on the number of local stations actually electing mandatory carriage, and that it should not include those stations that elect to proceed via retransmission consent.[175] ALTV asserts that, if stations that elect retransmission consent are allowed to approve an alternative receive facility, "stations 'asserting their right' to be carried under the signal carriage rules will be harmed," because of the costs associated with having to transport their signals to a distant location.[176] NAB and Public Television Stations submitted similar arguments in support of ALTV's position on this issue.[177] DIRECTV, on the other hand, which opposes reconsideration of this issue, asserts that ALTV simply "rehashes" its position on an issue that the Commission has already addressed, and contends that the Commission's rule is based on a reasonable construction of the statute.

51. ***Discussion***. We decline to revise our rule on this issue. As an initial observation, we note that the Commission already has considered and rejected similar arguments voiced in the initial rulemaking. In the *Report and Order*, the Commission stated:

> We disagree . . . with ALTV, which asserts that a non-local receive facility may be established if half the local stations electing mandatory carriage, rather than retransmission consent, agree to the alternate site. Just as we decide that a satellite carrier should include both retransmission consent and mandatory carriage local stations on the same designated local receive facility, we do not distinguish between retransmission consent and mandatory carriage in the determination of an acceptable alternative receive facility. . . . All stations "asserting a right to carriage," either through retransmission consent or mandatory carriage, may participate in the consideration of whether an alternative receive facility is acceptable.[178]

52. We recognize that ALTV wishes to ensure that stations electing retransmission consent are not permitted to vote in an election process that ALTV views as a protection only for must carry stations. We disagree, however, that this is the only or the best reading of the statute. The relevant language in Section 338(b)(1) ("asserting the right to carriage") is not the same as the language in Section

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[173] *Id.*

[174] *Id.* (emphasis added). The Commission further clarified that the "50% or more" stations does not refer to the aggregate number of stations in all affected markets. That is, a satellite carrier cannot calculate the 50% threshold by combining the votes of two DMAs in neighboring markets. On this point, the Commission explained: "For example, if DIRECTV were to establish an alternative receive facility in Howard County, MD (which is the Baltimore DMA) that would serve the Washington, D.C., Philadelphia, and Baltimore television markets, 50% or more of the stations in Washington, D.C. and 50% or more of stations in Philadelphia would have to agree to the site location. A satellite carrier cannot combine the number of Washington, D.C. and Philadelphia stations to reach the 50% threshold." *Id.* at 1941 n.121.

[175] *See* ALTV Petition at 15-16.

[176] *Id.* at 17.

[177] *See* NAB Statement in Support of ALTV Petition at 6-7; Public Television Stations Opposition at 14-15.

[178] 16 FCC Rcd at 1941-42.

338(a)(1), which requires carriage of those local stations that "request" carriage.[179] Nothing in this language suggests that a station seeking to participate in the selection of an alternative reception site in order to determine its rights under the law could not assert that it has a right to carriage in a market but thereafter opt to be carried pursuant to retransmission consent. In this, as in many other areas, asserting the existence of a right need not be the same as proceeding to exercise that right. As the process contemplated by the statue commences (and as it plays out in subsequent years) there is a set of stations that can assert a right to carriage consisting basically of all stations in the market. As the process proceeds, this group of stations is divided through the carriage election process into stations that request carriage and those that proceed under the retransmission consent provisions of the law. The assertion of the right and the request for carriage pursuant to that right are separate acts. Moreover, since the location of the receive facility may inform the station's decision to elect must carry or retransmission consent (*e.g.*, if the receive site is in a location to which the station is confident of delivering a good quality signal, it may encourage a mandatory carriage election), a logical reading of the phrase in Section 338(b)(1) of "asserting the right to carriage" would permit a vote by all must carry eligibles (including those ultimately choosing retransmission consent at the election for the upcoming cycle) prior to the election. In addition, since a station's status as a "must carry" or "retransmission consent" station may change from election cycle to election cycle, and since there may be only one opportunity to vote on the alternative receive facility, the best reading of the phrase "asserting the right to carriage" would cover those stations asserting that they have such a right at the vote, which they may then exercise at the upcoming election cycle, or in future election cycles.[180]

53. We note also that there are practical problems associated with the ALTV suggested rule. It is not known at the inception of the satellite broadcast carriage requirements, when or even if satellite carriers will attempt to use alternative receive facilities. If a satellite carrier proposes an alternative receive facility after the local stations in the affected market have submitted their carriage elections but before the carriage cycle commences (*e.g.*, between July 1 and December 31, 2001), it could be possible to identify stations that have elected mandatory carriage and that satellite carriers have agreed to carry. However, if the alternative receive facility is proposed at any other time, it is not possible to identify which stations have requested mandatory carriage for the relevant cycle. We believe the statute neither contemplates nor dictates station eligibility requirements that vary according to the timing of the satellite carrier's proposal of an alternative receive facility. We believe the statute provides us with the flexibility to adopt rules that will best address the factual circumstances we anticipate and, if warranted, to amend these rules if actions and events in practice prove otherwise.

[179] Section 338(a) requires satellite carriers to "carry upon request the signals of all television broadcast stations located within [a local market in which the carrier retransmits local broadcast stations under Section 122 of title 17], subject to section 325(b)." Section 325(b) limits retransmissions of broadcast signals to stations that grant "express authority" for retransmission or "elect[ ] to assert the right to carriage" under Section 338. *See* 47 U.S.C. §§ 325(b)(1)(A) and (C) and 338(a)(1).

[180] For example, if we confined voting rights to stations that elected must carry on July 1, 2001 for the carriage cycle from January 1, 2002 through December 31, 2005, we would deprive stations that elected retransmission consent in that cycle from voting on an alternative receive facility that would apply for the next cycle. If the station chooses to elect mandatory carriage in this subsequent cycle (*i.e.*, January 1, 2006 through December 31, 2008), it has had no voice in the election of the alternative receive facility. Similarly, we could inadvertently give a station that elected must carry in the present cycle the right to vote on an alternative receive facility for the subsequent cycle in which the station may elect retransmission consent. Moreover, if, after the carriage cycle begins, the satellite carrier proposes an alternative receive facility to be used during that cycle, this is essentially a mid-cycle change, and the satellite carrier would be responsible to paying the costs of delivering a good quality signal to that site. *See* Discussion section at ¶¶ 33-36, *supra*. We expect, in light of this requirement, that most proposals for an alternative receive facility will take place in advance of the election and carriage cycle.

C. Issues for Clarification

54. Below, we clarify and modify several requirements adopted in the *Report and Order*. We take these actions partly *sua sponte* and partly in response to informal telephonic requests for clarification of our rules from the public.[181]

1. Refusals to Carry

55. The *Report and Order* implemented the terms of Section 338 with respect to bases for refusing a local broadcast station's request for mandatory carriage.[182] To the extent the statutory language in Section 338 is similar to the language of Section 614, we patterned the rules for satellite carriers on the cable must carry rules.[183] Where possible, we endeavored to leave the details of compliance to the affected parties and the marketplace. We expected that the parties would act reasonably and not refuse carriage without a good-faith basis for doing so. As the parties have commenced acting on the carriage procedures set forth in the rules, however, we have seen indications that more specific instruction and parameters may be necessary. We take the opportunity afforded by this *Order on Reconsideration* to clarify our intent and expectations more fully. We continue to hope that specific rule amendments will not be necessary.

56. The rules we adopted to implement Section 338 govern carriage elections and describe the information a station must include in its carriage request "to ensure that a satellite carrier has the base information it needs to commence the carriage of local television stations."[184] The rules also require satellite carriers to respond to must carry elections by accepting or denying carriage and providing reasons for denial.[185] We noted, by way of example, that a valid reason for not commencing carriage is "poor quality television signal."[186] In addition, with respect to substantial duplication, we noted that a satellite carrier is not required to carry stations that broadcast programming that duplicates another station carried in the market.[187] However, a broadcast station requesting mandatory carriage is not required to provide evidence with its request to prove that it does not duplicate. Indeed, it would be difficult or impossible for a station to do so because it does not know which other stations in the market have requested carriage.[188] Rather, if the satellite carrier has a reasonable basis for asserting that the station substantially duplicates another station carried in the market, the carrier should describe its basis in sufficient detail to afford the station an opportunity to respond.[189]

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[181] *See* 47 U.S.C. § 405; 47 C.F.R. §1.108; *Central Florida Enterprises v. FCC*, 598 F.2d 37, 48 n.51 (D.C. Cir.), *cert. dismissed*, 441 U.S. 957 (1979).

[182] *See* 16 FCC Rcd at 1931-32, 1946-47, 1949-51, 1954-55.

[183] *See id.* at 1920.

[184] *Id.* at 1932.

[185] *See* 47 C.F.R. § 76.66(d).

[186] *Report and Order*, 16 FCC Rcd at 1932.

[187] *See id.* at 1955. *See also* discussion on carrier's NCE obligation in ¶¶ 7-12, *supra*. We note that substantial duplication for commercial stations differs from substantial duplication with respect to NCEs. *Id.*

[188] A station electing mandatory carriage is not in a position to know to which other stations it is being compared at the time it is making its carriage election. In addition, the carrier has the ultimate choice of deciding which of two or more stations that substantially duplicate it will carry. *See Report and Order*, 16 FCC Rcd at 1950.

[189] For example, a satellite carrier may consult program listings to compare stations in the same market where more than one station has requested carriage either by retransmission consent or mandatory carriage.

57. In the context of carriage elections, we did not require broadcast stations to provide information about signal quality nor did we require each station electing must carry to first prove to the satellite carrier that its signal is of good quality.[190] Rather, we left it to the satellite carrier, in its response to a request for mandatory carriage, to notify the station if the request is rejected and the reason for refusal is a poor quality signal. If a satellite carrier has a reasonable, good-faith basis for believing that a station is not delivering a good quality signal to the designated receive facility, then it may describe its basis for this belief in its response to the station's request for mandatory carriage. We do not require in the satellite context, as we did in the cable context, that satellite carriers must conduct tests or present specific measurements to broadcasters in response to requests for mandatory carriage. However, the absence of this express requirement should not be taken to imply that the satellite carrier is not required to have a reasonable basis for a denial of carriage and to convey that information to the broadcast station affected.[191] With respect to the issue of signal quality, a station should not be rejected for carriage unless, based on a knowledge of the facts and circumstances involved, there are engineering reasons for doubting that a good quality signal is likely to be available.[192] Our expectation was that carriers would generally be able to readily determine whether the signal of a station requesting carriage is being received by the facility's reception equipment.[193] It is implicit in the notification requirement, and indeed it is explicit in the statute itself, that stations are entitled to carriage if they qualify based on the applicable statutory and regulatory provisions. Carriage is not to be avoided by denials where there is no legitimate controversy as to the station's qualifications.

58. In discussing "disputed" signal quality, the *Report and Order* concluded that a satellite carrier is not required to carry a station "until" the station provides or pays the costs for a good quality signal.[194] We required that "the signal testing practices in the cable carriage context should be generally applied in the satellite carriage context."[195] In the event of a dispute over signal quality, we advised parties to look to cable precedent for guidance, and we concluded that the broadcast station should pay the cost of signal tests if necessary to prove that the signal is of good quality.[196] If, however, the satellite carrier has no reasonable basis for contending that the broadcast station does not provide a good quality

[190] *See* 47 C.F.R. § 76.66(d)(1)(iii).

[191] While we are not suggesting that a carrier is required to undertake extensive testing before it judges that a station fails to provide a good quality over-the-air signal to the receive facility, the rules require that a satellite carrier provide its reason for rejecting a carriage request.

[192] The relevant facts and circumstances can include the location of the station and its transmitter in relation to the receive facility and relevant terrain and obstacles in between. For example, if a station is in close geographic proximity to the receive facility or the receive facility is within the station's City Grade or Grade A service area, and there is no obvious and well-recognized physical barrier to signal reception, then the carrier would most likely not have a reasonable basis for refusing carriage on the basis of an inadequate signal unless the carrier actually measured the signal at the receive facility.

[193] A carrier could use the Individual Location Longley-Rice computer model as one way of learning if a station is predicted to deliver a good quality signal, as defined in the rules, to the receive facility.

[194] 16 FCC Rcd at 1946-47. Once a station delivers a good quality signal, it is entitled to carriage. Carriers are entitled to a reasonable time to arrange carriage after a station delivers or pays the costs to deliver a good quality signal.

[195] *Id.* at 1948. *See, e.g., Channel 5 Public Broadcasting, Inc.,* Memorandum Opinion and Order, 8 FCC Rcd 4953, 4953 & n.1 (MMB 1993) (describing good engineering practices for determining good quality signal for VHF and UHF stations).

[196] *See Report and Order*, 16 FCC Rcd at 1948. The obligation of a station to prove to a satellite carrier that the signal is of good quality, as set forth in the *Report and Order,* arises when there is a genuine dispute as to the quality of the station's signal. *See id.* at note 163.

signal, then no test is required.[197] When a carrier has a reasonable basis for asserting that the station is not providing a good quality signal, the station has the opportunity to improve its over-the-air signal or arrange alternative means of delivery. In that case, or if the station responds with a promise to provide or pay to provide a good quality signal in the future, we encourage the parties to arrange a reasonable time frame within which the good quality signal will be provided to avoid long-term uncertainty that ties up the carrier's capacity.[198]

59. We further clarify that rejection of a request for carriage based on a broadcast station's "failure" to prove in its initial request for carriage that it delivers a good quality signal to the receive facility is not a valid ground for refusing carriage. Specifically, it has been reported to us that at least one satellite carrier has utilized a form letter that rejected carriage requests solely on the basis of "failure to prove signal meets legal standard of quality necessary for mandatory carriage."[199] This is not a valid reason for rejecting a request for mandatory carriage. Additionally, we are informed that the same carrier's form letter also attempts to shift the burden to the station requesting carriage to prove that it does not substantially duplicate another station that has requested carriage.[200] Such attempts to shift the burden to the station requesting carriage do not comply with the rule or the *Report and Order*. We believe that stations that have received such form letters may appropriately respond by notifying the satellite carrier pursuant to Section 76.66(m)(1) that it has failed to meet its obligations under the rules.[201] Such notification by the broadcast station should specify how the satellite carrier's response failed to comply. For example, in response to a carrier's assertion that the station has failed to prove its signal quality, a station could provide information that the receive facility is within the station's Grade A service contours or that the Individual Location Longley-Rice computer model predicts that the station delivers a good quality signal to the receive facility. The satellite carrier would have 30 days to respond, pursuant to Section 76.66(m)(2). The carrier could use the response to rescind its initial rejection and agree to carry the station or to provide specific information as to its basis for asserting that the station is not entitled to carriage. This response must state either that the station will be carried (*e.g.*, as of January 1, 2002 for the

[197] Notwithstanding that a broadcast station has the burden to prove its signal quality in the event of a dispute, if in its response to a station's request for mandatory carriage pursuant to Section 76.66(d)(1)(iv), (d)(2)(iv), or (d)(3)(iv), a satellite carrier does not have a reasonable basis for asserting that the station does not deliver a good quality signal to the local receive facility (or alternative receive facility), the carrier shall have the burden of proving that the signal quality does not meet the standard in response to a signal quality complaint filed with the Commission. With respect to stations that are alleged to substantially duplicate, the burden is on the satellite carrier to articulate its basis for so alleging in a carriage response to a station, as well as having the burden to prove duplication to the Commission.

[198] As an example of a reasonable time frame in this context, *see* Ex Parte Filing from Thomas Olson, on behalf of NAB, to Magalie Roman Salas, Secretary, filed in CS Docket No. 00-96 (Aug. 14, 20001) (providing a sample DIRECTV letter to a station indicating that the station's request for carriage is denied for failure to provide a good quality signal, and informing the station that to ensure carriage by January 1, 2002, the good quality signal must be in place by October 15, 2001).

[199] *See* Notice of Ex Parte Communication from Amy Levine, on behalf of various commercial and noncommercial broadcast clients, to Magalie Roman Salas, Secretary, filed in CS Docket No. 00-96 (Aug. 9, 2001), at 1-2 and Appendix A("August 9, 2001 Levine Ex Parte Letter") (alleging that this form letter denying carriage was sent to all or virtually all stations requesting mandatory carriage); Ex Parte Filing from Thomas P. Olson, on behalf of NAB and ALTV, to Magalie Roman Salas, Secretary, filed in CS Docket No. 00-96 (Aug. 10, 2001), at 1 ("August 10, 2001 NAB Ex Parte Letter") (asserting same).

[200] *See* August 9, 2001 Levine Ex Parte Letter at 1 and Appendix A; August 10, 2001 NAB Ex Parte Letter at 5.

[201] Broadcasters that choose to respond to such form letters by providing a signal strength test or basis for non-duplication are free to do so, but are not required to do so to perfect their carriage rights. Satellite carriers are reminded that they must afford broadcast stations access to the receive facility so that they can conduct tests to demonstrate signal quality.

first election cycle), or provide reasons, including the reasonable basis therefor, for not carrying the station as requested.[202]

60. We also clarify that the 60 days within which a complaint must be filed with the Commission pursuant to Section 76.66(m)(6) will commence after the satellite carrier submits a final rejection of a broadcast station's carriage request, as clarified in this *Order on Reconsideration*. If a satellite carrier provides no response to a must carry election, the 60 days commences after the time for responding as required by the rule has elapsed.[203] Or, in the case of a carrier's failure to provide the second response, as described above, the 60 days commences after the 30 days for response pursuant to Section 76.66(m)(2) has elapsed. As in the cable context, if the parties are negotiating to resolve carriage disputes (*e.g.*, a station and carrier are planning to conduct a signal quality test or to determine alternative means for signal delivery), the 60 days does not begin to run until resolution efforts have failed, and the satellite carrier has notified the station in writing that it will not be carried.[204] We continue to hope that parties will work together to resolve disputes or to determine that disputes cannot be resolved by negotiation and that Commission action is required.[205] We note, however, that a station that has received an initial rejection letter may file a complaint with the Commission within 60 days of receipt if it believes that the carrier's apparent resolution efforts are not in good faith and are intended primarily to delay or derail legitimate carriage.

61. To summarize, as a general and guiding principle, we take this opportunity to note that the Act requires satellite carriers to carry stations upon request in those markets in which the carrier uses the statutory copyright license to retransmit one or more local stations. If the satellite carrier has a good faith, reasonable basis for refusing carriage, the carrier has the initial responsibility to specify that basis and to provide the station with adequate information and justification for its refusal. This principle applies to any refusal to carry, not only to refusals based upon signal quality. It is not consistent with the SHVIA or our rules to attempt to place the burden on the broadcast station to prove why it is entitled to carriage in the absence of a legitimate reason for questioning its eligibility. It is also inconsistent with the Act and rules to refuse to provide broadcast stations with reasonable and readily available access to the local receive facility to conduct signal strength tests as necessary. As in the cable context, a satellite carrier that fails to comply with the Act and rules, for example by using the notification procedures to frustrate the process or delay carriage without justification is not acting in the public interest and may be subject to further actions.[206] In addition, in the satellite context, a local broadcast station may file a civil

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[202] Likewise, in response to future elections pursuant to Section 76.66(d)(1)(iv), (2)(iv) or (3)(iv), satellite carriers must provide reasons for carriage refusals along with the reasonable bases therefor.

[203] *See* 47 C.F.R. §§ 76.66(d)(1)(iv), (2)(iv), and (3)(iv).

[204] *See, e.g., Mountain Broadcasting Corp.*, Memorandum Opinion and Order, 11 FCC Rcd 4772, 4775-76 (CSB 1996).

[205] This is the policy we have followed in the cable context as well. *See, e.g., Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems,* Memorandum Opinion and Order, 2 FCC Rcd 3593 (1987) (encouraging cable systems and broadcasters to resolve carriage disputes among themselves and bring them to the Commission only when the parties are unable to resolve after good faith attempts). *See also Willmar Video, Inc.*, 15 FCC 2d 113, 116 (1968) ("what is required is the good faith, reasonable cooperation of the broadcaster and the CATV operator, for the common good of the parties and of the viewing public in their communities").

[206] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues,* Clarification Order, 8 FCC Rcd 4142, 4143 (1993) ("*Cable Must Carry Clarification Order*"). *See also* 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(a). *E.g., Cable Systems Corporation*, Forfeiture Order, 15 FCC Rcd 24298 (2000) ($127,500 forfeiture against cable operator for violation of Section 614 of the Communications Act). Further, in *Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems,* Report and Order, 1 FCC Rcd 864, 889 (1986), the (continued....)

action under Section 501(f) of the copyright provisions in title 17 to the extent the satellite carrier's actions result in a failure to carry a station entitled to carriage.[207]

2. Consistent Carriage Elections

62. As indicated in the *Report and Order*, television broadcast stations are not required to have the same election requirement -- *i.e.*, of either retransmission consent or must carry – between a satellite carrier and a cable operator.[208] This decision was based in part on the lack of statutory language requiring television stations to make consistent retransmission consent/must carry elections for the two types of MVPDs, but also on the service area differences between satellite carriers and cable operators.[209] In this *Order on Reconsideration*, we further clarify that where there is more than one satellite carrier in a local market area, a television station can elect retransmission consent for one satellite carrier and elect must carry for another satellite carrier. We believe that allowing broadcast stations to elect independently is consistent with our goal of promoting competition in the MVPD market.

3. Retransmission Consent Agreements

63. Under our rules, a television station must, during the first election cycle, notify a satellite carrier by July 1, 2001 of its carriage intention if it is located in a market where local-into-local service is provided.[210] Beyond the first election cycle, our rules require television stations to make their retransmission consent-mandatory carriage election by October 1st of the year preceding the new cycle for all election cycles after the first election cycle.[211] Commercial television stations are required to choose between retransmission consent and mandatory carriage by the prescribed date; NCE stations, on the other hand, must simply request carriage. A satellite carrier, in turn, must respond to a television station's carriage request within 30 days of receiving notice (*e.g.*, for the first election cycle, by August 1, 2001), and state whether it accepts or denies the carriage request.[212] If the satellite carrier denies the request, it must state the reasons why. We clarify that, absent an agreement by the parties to the contrary, if a broadcast station has a retransmission agreement that extends into and terminates during an election cycle, the station -- at the end of its contract term with the carrier -- will not be entitled to demand must carry if it has not elected must carry by the required date (*i.e.*, by July 1, 2001 for the first election cycle,

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(...continued from previous page)
Commission stated that a cable system is required to give "a brief statement of its reasons" for its decision to decline carriage and will not be subject to forfeiture or other penalty if it complies in good faith even if the station is later determined to be entitled to carriage. In an analogous situation, the Commission found that parties seeking to exercise rights under the network non-duplication program deletion rules "demonstrated patterns of abuse in terms of the notification process" when they sent deletion notices "to all conceivably covered cable television systems, leaving it to the cable systems to determine what specifically is triggered." *Amendments to Part 76 of the Commission's Rules to Require Substantiation of Requests for Carriage or Nonduplication to Cable Television Systems, Request for a Declaratory Ruling by Service Electric Cable TV, Inc. and Service Electric Cable TV of New Jersey, Inc.*, Memorandum Opinion and Order, 92 FCC 2d 1058, ¶¶ 15-16 (1982) (deciding to rely on "good faith cooperation of the parties" rather than imposing additional paperwork burdens; but requiring that stations sending deletion notices "should stand ready to provide" additional information when questions arise as to the reasons notices are sent; and reminding stations that patterns of abuse could result in suspension of the right holder's rights).

[207] *See* 17 U.S.C. § 501(f); 47 U.S.C. § 338(a)(2). *See also Report and Order,* 16 FCC Rcd at 1973-74.

[208] *See* 16 FCC Rcd at 1929-30.

[209] *See id.*

[210] *See id.* at 1931. *See also* 47 C.F.R. § 76.66(c)(3).

[211] *See* 47 C.F.R. § 76.66(c).

[212] *See Report and Order*, 16 FCC Rcd at 1933.

by October 1, 2005 for the next election cycle, etc.). We believe that this clarification is consistent with the requirements of the statute that, in the absence of a specific request for carriage by the relevant election deadline, a broadcaster is deemed to have elected retransmission consent and cannot assert a demand for carriage until the next election cycle.

4. Amendment of Carriage Request Provisions

64. On our own motion, we take this opportunity to clarify and amend the rule provisions concerning carriage election provisions that apply to satellite carriers. As described in the *Report and Order*, under Section 338, satellite carriers are required to carry broadcast stations only "upon request."[213] The *Report and Order* further explains that if an existing station fails to request carriage by the election deadline, it is not entitled to demand carriage for the duration of that cycle.[214] The request for carriage is manifested by the station's election of must carry by the specified deadline.[215] Section 76.66(d)(1)(i) provides that "a retransmission consent-mandatory carriage election made by a television broadcast station shall be treated as a request for carriage for purposes of this section."[216] We are concerned that, as written, this provision could be misconstrued to mean that an election for retransmission consent constitutes a request for carriage that necessitates mandatory carriage under the statute. To avoid confusion or misinterpretation of this language, we revise Section 76.66(d)(1)(i), as follows:

> An election for mandatory carriage made by a television broadcast station shall be treated as a request for carriage. For purposes of this subsection concerning carriage procedures, the term "election request" includes an election of retransmission consent or mandatory carriage.

We will also change the reference from "carriage request" to "election request" in Section 76.66(d)(1)(ii) to conform to the revision in Section 76.66(d)(1)(i).[217]

65. In addition, on our own motion, we clarify and amend Section 76.66(d)(2)(ii), which provides for carriage elections by television broadcast stations in new local-into-local markets. This provision requires local stations to make elections and requests for carriage "in writing, no more than 30 days after receipt of the satellite carrier's notice." We note that this provision does not contain the same requirements that apply to carriage elections for existing local-into-local markets. We believe that certified mail, return receipt requested is the preferred method to ensure that broadcast stations are able to demonstrate that they submitted their elections by the required deadline, and that they were received by the satellite carrier.[218] Therefore, we will amend Section 76.66(d)(2)(ii) as follows:

> A local television station shall make its election request, in writing, sent to the satellite carrier's principal place of business by certified mail, return receipt requested, no more than 30 days after the station's receipt of the satellite carrier's notice of intent to provide

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[213] *Id.* at 1929.

[214] *See id.*

[215] Unlike the cable rules, the rules for satellite carriers essentially combine the election of must carry with the demand for carriage due to the differences in the statute. *See id.*

[216] 47 C.F.R. § 76.66(d)(1)(i)

[217] *See* Appendix A.

[218] We note that, in light of the rule provision as written and in effect, any elections or carriage requests sent pursuant to and in compliance with Section 76.66(d)(2)(ii) need not be sent by certified mail, return receipt requested until the amendment to this rule provision takes effect.

local-into-local service in a new television market. This written notification shall include the information required by Section 76.66(d)(1)(iii).

66. We will also amend Section 76.66(d)(3)(ii), which provides for elections and carriage requests for new television stations to be consistent with Sections 76.66(d)(1) and (2), as amended.[219] The amended language is as follows:

> A new television station shall make its election request, in writing, sent to the satellite carrier's principal place of business by certified mail, return receipt requested, between 60 days prior to commencing broadcasting and 30 days after commencing broadcasting. This written notification shall include the information required by Section 76.66(d)(1)(iii).

67. For similar reasons of consistency, we amend Sections 76.66(2)(iv) and (3)(iv), that set forth the procedures for new local-into-local service and new television stations, respectively. These amendments clarify the requirement that satellite carriers respond to elections for mandatory carriage within 30 days with notification of either agreement to carry or not to carry, along with reasons for the latter decision.[220] These amendments track the requirement in Section 76.66(d)(1)(iv).[221] Section 76.66(d) is amended as follows:

> (2)(iv) Within 30 days of receiving a local television station's election of mandatory carriage in a new television market, a satellite carrier shall notify in writing: 1) those local television stations it will not carry, along with the reasons for such decision; and 2) those local television stations it intends to carry.

* * * * *

> (3)(iv) Within 30 days of receiving a new television station's election of mandatory carriage, a satellite carrier shall notify the station in writing that it will not carry the station, along with the reasons for such decision, or that it intends to carry the station.

68. In this respect we also note that if a satellite carrier provides notification of intent to provide local-into-local service in a new market, pursuant to Section 76.66(d)(2)(i), the satellite carrier must respond to an election of mandatory carriage, requested pursuant to Section 76.66(d)(2)(ii), as required by Section 76.66(d)(2)(iv), notwithstanding that it has not yet commenced local-into-local service in that market. We clarify that the satellite carrier is not required to carry a local television station that elects mandatory carriage in the new local-into-local market until the satellite carrier has commenced such service. We amend Section 76.66(d)(2)(iii) accordingly, as follows:

> A satellite carrier shall commence carriage of a local station by the later of 90 days from receipt of an election of mandatory carriage or upon commencing local-into-local service in the new television market.

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[219] *See* amended rules in Appendix A.

[220] As explained in paragraph 131 of the *Report and Order*, a satellite carrier's failure to respond to a request for mandatory carriage within 30 days as required by Section 76.66 can be considered a denial about which the television station denied may file a complaint. *See* 16 FCC Rcd at 1975.

[221] We note, too, that the references to "carriage request" in Sections 76.66(d)(1)(iv), (2)(iv), and (3)(iv) mean elections of mandatory carriage, as explained above. The rules do not require satellite carriers to respond to elections of retransmission consent.

69. We further clarify that, with respect to determining the satellite carrier's principal place of business for purposes of submitting an election or carriage request, we believe it would be appropriate for a local television station to use a satellite carrier's letterhead address or other readily available principal address.[222] If the satellite carrier wishes to designate a particular name or address for purposes of receipt of election notices, the carrier bears the obligation of providing that information to the local television stations no later than 30 days prior to the deadline for election and carriage requests. In addition, as in the cable context, the local television station's election or request for carriage may be signed by any person authorized to make and submit such election on behalf of the station.

70. In response to numerous telephone inquiries, we clarify that election requests must be sent by the relevant election deadline. In the cable context, Section 76.64(h) provides that "on or before each must carry/retransmission consent deadline, each television broadcast station shall . . . send via certified mail to each cable system in the station's defined market a copy of the station's election statement with respect to that operator."[223] The rules implementing satellite carriage requirements do not contain the same language, and we received no comments on this specific question during the rulemaking proceeding. In light of our general goal of making the satellite carriage rules comparable and parallel to the cable carriage rules, and in the absence of arguments demonstrating why the procedures for election notifications should differ, we clarify our intent that the election request should be sent by certified mail, return receipt by the election date to be effective. We hereby amend Section 76.66(d) of our rules to clarify this intent, as follows:

> (4) Television broadcast stations must send election requests as provided in Sections 76.66(d)(1), (2), and (3) on or before the relevant deadline.

5. Allocation of Costs for Reception Equipment at Receive Facility

71. DIRECTV in an *ex parte* meeting and submission requested a clarification that it would be permissible for a satellite carrier to "pass through to broadcasters the costs incurred on the broadcaster side of the demarcation point at the local receive facility."[224] DIRECTV asserts that Section 76.66(g)(2) requires the broadcaster to provide a good quality signal "at the input terminals of the signal processing equipment."[225] DIRECTV contends that, in the satellite context, "this would mean the input to any signal preamplifiers in the antenna downlead. Thus, the demarcation point for a station to hand off a 'good quality signal' must be at the preamplifier input, which in [DIRECTV's] case is a junction box at the point where the downleads enter the building."[226] DIRECTV wants to pass through to broadcasters on a pro rata basis the costs of providing the rooftop equipment and other costs related to signal reception up to the junction box, which DIRECTV refers to as the "demarcation point."[227] DIRECTV further explains that the "non-recurring costs" for negotiating roof rights, obtaining local permits, mounting antenna masts and installing conduit range from $1,000 to $45,000 and average $15,000.[228] DIRECTV estimates

[222] For example, the letterhead address and signatory on a satellite carrier's notification of location of designated local receive facilities or notification of intent to provide local-into-local service in a new market can be considered to be the principal place of business and appropriate address for purposes of carriage elections.

[223] 47 C.F.R. § 76.64(h). *See Gannon University Broadcasting*, 10 FCC Rcd 8619 (CSB 1995).

[224] June 25, 2001 DIRECTV Ex Parte Letter at 4.

[225] *Id.*, citing 47 C.F. R. § 76.66(g)(2).

[226] June 25, 2001 DIRECTV Ex Parte Letter at 4.

[227] *See id.*

[228] *See id.* at 5.

average monthly costs for maintaining roof rights would be $2,500.[229] DIRECTV proposes to pass these costs on to the broadcasters in the market, both those carried pursuant to retransmission consent and mandatory carriage.[230] In the average case, and assuming ten stations in the market, DIRECTV estimates charging each station "a one-time, non-recurring charge of $1,500, and a recurring charge of $250 per month."[231]

72. In response to DIRECTV's views on this issue, NAB and ALTV, in a joint ex parte letter, contend that a station's obligation under the Act is only to deliver a good quality signal, "and not to build (or rent) a local receive facility for a DBS operator."[232] NAB and ALTV assert that "the roof space on which DIRECTV has erected (or plans to erect) antennas is the relevant part of its local receive facility; and all that a station is required to do is deliver a good quality signal to that location."[233] Thus, they argue, DIRECTV's demand that stations pay for DIRECTV's own real estate costs for creation of a local receive facility is "inconsistent with the division of responsibility established by Congress in the SHVIA."[234]

73. DIRECTV's proposal and request for clarification raise an issue not mentioned in the original proceeding nor in the Petitions for Reconsideration. We do not have in the record information that would warrant a decision that could potentially impose unexpected expense on broadcast stations. We note that, in the cable context, upon which the satellite carriage rules generally are based, the cable system headends typically include antennas and other receiving and processing equipment necessary to receive a broadcaster's good quality signal.[235] We have required cable operators to employ good engineering practices with respect to receiving and processing the broadcast station's signal.[236] In the *Cable Must Carry Report and Order*, we noted that the television station has the obligation to bear the costs associated with delivering a good quality signal to the system's principal headend. In this context we offered by way of example, "improved antennas, increased tower height, microwave relay equipment, amplification equipment and tests that may be needed to determine whether the station's signal complies with the signal strength requirements, especially if the cable system's over-the-air reception equipment is already in place and operating properly."[237] Cable operators are not, however, required to bear the burden of improving a broadcast station's signal.[238]

74. In the Order clarifying the *Cable Must Carry Report and Order,* the Commission was asked to address whether the broadcaster or the cable system should pay for the purchase, installation, and

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[229] *See id.*

[230] *See id.*

[231] *Id.*

[232] July 6, 2001 Joint NAB and ALTV Ex Parte Letter at 3 (emphasis omitted).

[233] *Id.*

[234] *Id.*

[235] We also note, as discussed above, that cable systems often improve broadcaster signal quality at their own expense to provide a better quality picture to their subscribers.

[236] *See Cable Must Carry Report and Order,* 8 FCC Rcd at 2988-91.

[237] *Id.* at 2991. The Commission further stated: "For cable systems that are being built and/or are in the design stage, we expect the cable operator to consult with local television stations concerning the necessary equipment needed to receive a good quality signal and to negotiate the additional costs of upgrading of equipment with the broadcaster if necessary." *Id.* at 2991 n.301.

[238] *See id.* at 2990.

maintenance of a special antenna if necessary to receive adequate signal strength.[239] The Commission concluded that the statute specifies that a broadcast station must deliver a good quality signal to the principal headend of the cable system in order to be entitled to mandatory carriage, and, for broadcast stations received at the principal headend and carried on the system, the signal quality measurements should be made using the existing equipment at the headend. For stations that were not carried by the cable system prior to the implementation of the carriage rules, the Commission concluded that cable operators should measure the signal quality using "generally accepted equipment that is currently used to receive signals of similar frequency range, type or distance from the principal headend" but need not "employ extraordinary measures or specialized equipment" for stations not currently carried.[240] The Commission also reiterated what was said in the *Cable Must Carry Report and Order* that broadcasters may provide "improved antennas" to deliver a good quality signal, that the cable operator may not refuse to allow the broadcaster to provide such types of equipment, either for measurements or delivery of signals, and that broadcasters "shall be responsible for the cost of such specialized antennas or equipment. However, cable operators may not shift the costs of *routine reception of broadcast signals to those stations seeking must-carry status*."[241] The Commission concluded: "Accordingly, we believe that it is appropriate to require a broadcast station to pay only for antennas, equipment and other needed improvements that are directly related to the delivery of its signal and not to contribute to the general maintenance of the cable system's facilities."[242]

75. We believe that for satellite carriers, like cable operators, it is reasonable to require that the local receive facility include, for example, the roof rights, antennas, towers, and processing equipment necessary to receive and process over-the-air good quality signals from local broadcasters. We do not believe, therefore, that it is consistent with our rules or with the statute to require broadcasters to pay for the basic equipment and property negotiations necessary to operate a receive facility. However, as in the cable context, if a broadcaster would require special or additional equipment so that its signal can be received at the established level of good quality at the receive facility, then the broadcaster is responsible for these additional costs.

III. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

76. This *Order on Reconsideration* has been analyzed with respect to the Paperwork Reduction Act of 1995 and has been found to contain no new or modified information collection requirements on the public. The rule revisions we adopt on our own motion are included in the approval we obtained from the Office of Management and Budget ("OMB").[243] No further OMB approval is required.

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[239] *See Cable Must Carry Clarification Order*, 8 FCC Rcd at 4144-45.

[240] *Id.* at 4144-45 & n.11.

[241] *Id.* at 4144 (emphasis added).

[242] *Id. See also Mountain Broadcasting Corp. v. Continental Cablevision of Western New England*, 11 FCC Rcd 6488, 6510-13 (CSB 1996), *aff'd*, 12 FCC Rcd 12262 (1997), *aff'd on other grounds, WLNY v. FCC*, 163 F.3d 187 (2d Cir. 1998) (In a must carry complaint concerning, *inter alia*, the safety of adding an additional antenna to an existing headend tower, we concluded that the station had the responsibility to pay for an engineering study on wind load, necessary equipment, antenna installation, and new tower, if required. These costs were for equipment in addition to the headend's existing reception equipment.)

[243] *See* OMB Notice of Action (OMB No. 3060-0980) (June 7, 2001).

IV. ORDERING CLAUSES

77. **IT IS ORDERED**, pursuant to Section 405(a) of the Communications Act of 1934, 47 U.S.C. § 405(a), and Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, that DIRECTV's Petition for Reconsideration and the Association of Local Television Stations' Petition for Reconsideration **ARE DENIED**.

78. **IT IS FURTHER ORDERED,** pursuant to Sections 4(i), 4(j), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 303, that the amendments to rule 47 C.F.R. § 76.66 discussed in this *Order on Reconsideration* and set forth in Appendix A, and the clarifications of that rule discussed in this *Order on Reconsideration*, **ARE ADOPTED**, and shall become effective 30 days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX A - Rule Changes

For the reasons discussed in this Order on Reconsideration preamble, the Federal Communications Commission amends Part 76 of Title 47 of the Code of Federal Regulations as follows: PART 76 -- MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE.

1. The authority citation for Part 76 reads as follows:
AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 336, 338, 339, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.66 is revised to read as follows:

§76.66 Satellite Broadcast Signal Carriage

* * * * *

(d) *Carriage procedures.*

(1) *Carriage requests.*

(i) An election for mandatory carriage made by a television broadcast station shall be treated as a request for carriage. For purposes of this subsection concerning carriage procedures, the term election request includes an election of retransmission consent or mandatory carriage.

(ii) An election request made by a television station must be in writing and sent to the satellite carrier's principal place of business, by certified mail, return receipt requested.

* * * * *

(2) *New local-into-local service.*

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(ii) A local television station shall make its election request, in writing, sent to the satellite carrier's principal place of business by certified mail, return receipt requested, no more than 30 days after the station's receipt of the satellite carrier's notice of intent to provide local-into-local service in a new television market. This written notification shall include the information required by Section 76.66(d)(1)(iii).

(iii) A satellite carrier shall commence carriage of a local station by the later of 90 days from receipt of an election of mandatory carriage or upon commencing local-into-local service in the new television market.

(iv) Within 30 days of receiving a local television station's election of mandatory carriage in a new television market, a satellite carrier shall notify in writing: 1) those local television stations it will not carry, along with the reasons for such decision; and 2) those local television stations it intends to carry.

* * * * *

(3) *New television stations.*

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(ii) A new television station shall make its election request, in writing, sent to the satellite carrier's principal place of business by certified mail, return receipt requested, between 60 days prior to commencing broadcasting and 30 days after commencing broadcasting. This written notification shall include the information required by Section 76.66(d)(1)(iii).

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(iv) Within 30 days of receiving a new television station's election of mandatory carriage, a satellite carrier shall notify the station in writing that it will not carry the station, along with the reasons for such decision, or that it intends to carry the station.

(4) Television broadcast stations must send election requests as provided in Sections 76.66(d)(1), (2), and (3) on or before the relevant deadline.