

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

In the Matter of)	
)	
Inquiry Required by the Satellite)	MB Docket No. 05-28
Home Viewer Extension and)	
Reauthorization Act)	

**COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

Lisa Schoenthaler
Senior Director
Office of Rural/Small Systems

Daniel L. Brenner
Diane B. Burstein
Counsel for the National Cable &
Telecommunications Association
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036-1903

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The National Cable & Telecommunications Association (“NCTA”), by its attorneys, hereby submits its comments in the above-captioned Media Bureau inquiry on rules affecting competition in the television marketplace. NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving 90 percent of cable customers as well as more than 200 cable networks.

INTRODUCTION

The Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”) requires the FCC to complete “an inquiry regarding the impact on competition in the multichannel video programming distribution market of the current retransmission consent, network nonduplication, syndicated exclusivity, and sports blackout rules, including the impact of those rules on the ability of rural cable operators to compete with the direct broadcast satellite industry in the provision of digital broadcast television signals to consumers.”¹ Congress asked the FCC to recommend changes in the statutory provisions relating to those rules that the FCC deems appropriate.

¹ Section 208 of SHVERA.

The FCC should recommend that Congress make changes to ensure that cable operators can achieve regulatory parity with their large, well-financed direct broadcast satellite (“DBS”) rivals in the delivery of broadcast signals to consumers. And the FCC should initiate a rulemaking proceeding to remedy provisions of its blackout rules that also put cable operators at an unfair competitive disadvantage. DBS’s artificial advantage over cable operators, particularly in rural markets, has been magnified by adoption in SHVERA of new provisions regarding digital distant signal carriage.

DISCUSSION

I. DBS ENJOYS REGULATORY ADVANTAGES OVER CABLE TELEVISION IN PROVIDING BROADCAST TELEVISION TO CUSTOMERS

DBS is a strong competitor to cable television in markets all across the country. The Commission’s Eleventh Annual Competition Report confirms its steady maturation: “DBS subscribership continues to increase at nearly double-digit rates of growth, and its share of the marketplace is increasing.”² DBS subscribership “grew from about 20.4 million households to about 23.2 million households” between June 2003 and June 2004.³ DirecTV and EchoStar are now the second and fourth largest multichannel video programming distributors (“MVPD”), respectively.⁴

Cable operators are competing with DBS for every customer. The Commission’s recent Competition Report noted that the 2003 Competition Report “reported a decline in the number of cable subscribers. This year [the FCC] report[s] that cable subscribership has increased only

² Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No, 04-227 (Feb. 4, 2005) at ¶ 5.

³ Id.

⁴ Id. at ¶ 5

slightly, but now constitutes a smaller portion of the video programming market.”⁵ In many states – especially rural states – DBS penetration constitutes more than a quarter of MVPD customers.

STATE	DTH PENETRATION ⁶
Vermont	38.75%
Montana	35.84%
Utah	34.25%
Idaho	33.79%
Wyoming	33.36%
Mississippi	31.04%
Missouri	30.77%
Arkansas	29.77%
Georgia	28.01%
Colorado	27.60%
Oklahoma	26.76%
New Mexico	26.67%
Alabama	25.24%
Indiana	25.04%

Since the addition of local-into-local service in many markets across the country, DBS has experienced stepped-up growth. DBS has a highly competitive product to offer customers, aided in large measure by government policies that allowed DBS from its inception to gain access to programming, under Section 628’s access to programming provisions, for which the cable industry bore the entire development risk.

DBS has been, and continues to be, treated differently than cable operators with respect to broadcast signal carriage, starting with analog signals. It may be useful to detail these differences, prior to the passage of SHVERA, to see why the pre- and post-SHVERA rules work an unfair, unacceptable hardship on rural cable operators. The disparate regulatory treatment of

⁵ Id. at ¶ 9.

⁶ Oct. 2004. Source: Media Business Corp. (DTV/Subscribers); Nielsen Media Research (television households).

DBS and cable has given DBS certain competitive advantages, especially in those areas underserved by over-the-air television.

For example, since 1992, Congress has required cable operators to obtain retransmission consent before they could carry the signal of commercial television stations (other than those that chose mandatory carriage [“must carry”] or certain superstations).⁷ In addition, FCC rules empower local broadcast stations to assert network nonduplication and syndicated exclusivity blackout rights against more distant broadcast stations that a cable operator might choose to provide its customers – regardless of whether the local station is carried on the cable system.⁸ The combination of these statutory rights and regulatory restrictions allow broadcasters to limit the availability of distant broadcast stations to cable customers.⁹

Reportedly, certain network affiliation agreements may not allow stations to grant retransmission consent to carriage outside their designated market area (“DMA”), except in limited situations (e.g., where a station has historically been carried or deemed “significantly viewed”).¹⁰ And even if a cable operator could obtain consent to bring in a distant network signal, a local station has the right to demand that a cable operator black out the distant station’s network and syndicated programming, leaving little programming beyond what is locally-

⁷ 47 U.S.C. § 325.

⁸ 47 C.F.R. §§ 76.93, 76.103. The very smallest cable systems – those serving fewer than 1000 subscribers – are exempt from these blackout rules. *Id.*, §§ 76.95; 76.106(b). Operators need not blackout duplicating programming on distant stations that are “significantly viewed.”

⁹ For this reason, NCTA urged the FCC to modify its network nonduplication rules in connection with its implementation of the broadcasters’ retransmission consent rights. NCTA proposed that the FCC eliminate the right of local stations that elected to negotiate for carriage through retransmission consent to rely on regulatory protectionism of these blackout rules to block importation of a distant signal. See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 9 FCC Rcd. 6723 (1994).

¹⁰ See, e.g., Monroe, Georgia Water Light and Gas Commission v. Morris Network, Inc., 2004 WL 1661042 (Media Bur. July 27, 2004) (NBC affiliation agreement prevents affiliate from granting retransmission consent outside the affiliate’s DMA.)

produced on the more distant station.¹¹ Even non-syndicated, non-network sports programming on that distant station would have to be blacked out by the operator if the station was airing a live sports event that was being played in the local cable system's area, but not aired on a local station.¹²

DBS's carriage of broadcast signals is subject to a very different regulatory regime. To be sure, Congress adopted protections for local stations that for the most part prevented DBS from bringing in distant network stations to areas that could receive local affiliated stations' signals.¹³ But in the areas outside of these "served" areas, DBS enjoys distinct statutory and regulatory advantages over cable competitors.

Most significantly, DBS has never been required to obtain retransmission consent from distant stations for retransmission to a so-called "white area."¹⁴ DBS's copyright compulsory license enables each satellite provider to offer two different network-affiliated stations from each network to customers who live outside a broadcaster's Grade B contour.¹⁵ And DBS operators have no comparable network non-duplication or syndex blackout obligations when they bring in network signals to these "white areas."¹⁶

DBS can and does exploit these three significant advantages over cable. There are millions of homes throughout the country that are unable to receive a Grade B signal from an affiliate of one or more of the major broadcast networks. Both DirecTV and EchoStar offer such

¹¹ 47 C.F.R. §§ 76.92; 76.101.

¹² *Id.*, § 76.111.

¹³ Congress, however, grandfathered certain DBS customers that had been signed up in violation of this restriction. 17 U.S.C. § 119(e).

¹⁴ 47 U.S.C. § 325 (c).

¹⁵ 17 U.S.C. § 119(a)(2)(B).

¹⁶ 47 U.S.C. § 339 applies the network non-duplication and syndicated exclusivity restrictions to DBS carriage of the "signals of nationally distributed superstations."

customers access to up to two distant affiliates of each of the “missing” networks, even if a customer resides in a DMA to which an affiliate of the network is assigned. These distant signals are exempt from blackout and allow DBS to offer their customers access to programming that would not otherwise be available, including multiple sporting events. In contrast, cable operators typically are much more limited in their ability to offer those same customers distant network programming due to the twin restraints of retransmission consent and blackout obligations.

Thus, competition has been hampered because of a regulatory playing field that is unfairly tilted against cable operators.

II. SHVERA GRANTS DBS SIGNIFICANT *NEW* ADVANTAGES IN THE DELIVERY OF DIGITAL BROADCAST SIGNALS IN RURAL MARKETS

These pre-SHVERA advantages will only be magnified as DBS competes against cable television in providing customers with access to digital broadcast signals.

While cable operators in markets throughout the nation are interested in bringing high definition (“HD”) programming to their customers, many operators in rural areas are unable to offer a complete complement of network HD signals to their customers. Some rural parts of the country are in DMAs to which a full complement of network affiliates has not been assigned.¹⁷ In other instances, there may be a local affiliate assigned to the DMA in which the cable system is located, but the system’s headend facilities are too far from the station’s transmitter to receive a good quality signal. In the analog environment, rural cable operators often are able to overcome difficulties in receiving the local affiliate’s signal by picking up the station from a nearby translator. These translators, however, typically have not commenced broadcasting a

¹⁷ According to the 2005 Cable and TV Factbook, 66 markets do not have local affiliates from each of the four broadcast networks.

digital signal and may not begin doing so until full power stations have given back analog spectrum.¹⁸

The problems faced by rural cable operators in obtaining digital signals, even from an in-market affiliate, are exacerbated by the fact that, by the broadcasters' own admission, "approximately 40 percent of stations operating pursuant to [special temporary authority ('STA')] are reaching less than 70 percent of their analog population with a digital signal."¹⁹ The FCC recognizes that households unable to receive these digital signals "are more likely to be in outlying or rural areas, since the minimum STA coverage requirement is that a station's DTV signal covers its actual community of license."²⁰ This situation may well continue for some time.²¹

Cable operators with limited or no access to digital programming from local affiliates of one or more networks have few options. Even where a local affiliate is present in the market, it may be years before it is providing a usable digital signal to the operator's headend. And, in order to bring in a distant digital signal to fill the void, the operator will need the distant station's retransmission consent and will face potential blackout obligations.

¹⁸ Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations, MB Docket No. 03-185 (Sept. 30, 2004) at ¶ 15 ("However, lacking sufficient spectrum, we were unable to award second channels to TV translator, LPTV, or Class A stations to facilitate their digital transition. Indeed, we do not expect spectrum for new low power digital operations, as 'companion' channels for existing analog programming services, to become available until TV channels are surrendered by full-service stations at the end of the full-service DTV transition period.")

¹⁹ Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, 19 FCC Rcd. 18,279 at ¶ 79 (2004).

²⁰ Id.

²¹ FCC rules establish a July 1, 2006 deadline for digital stations outside the top 100 markets to increase their power levels to serve additional viewers or lose interference protection to the un-served area. Id. at ¶ 78.

In contrast, as a result of changes in the Communications and Copyright Acts made by Congress in SHVERA, DBS operators face a far less difficult and less costly path in providing digital signals to otherwise unserved customers. Congress extended to DBS the right to provide distant digital network signals to households that are unserved by a network affiliate's analog signal.²² Thus, DBS will enjoy the same advantages over cable in offering digital distant signals that, as noted in Section I supra, it has today with respect to analog distant signals retransmissions, including exemption from the retransmission consent/blackout requirements. In addition, Congress gave DBS operators a valuable new right – effective beginning 2006 – to provide distant digital network signals to households that (i) are served by an analog network signal but (ii) fail to receive an over-the-air digital signal.²³

Given these differences, cable will suffer artificial regulatory disadvantages in three particular situations, each of which requires a remedy:

- No local affiliate is assigned to a market. As noted previously, many smaller markets do not have a full complement of network affiliates. In those markets, DBS operators can import two distant digital affiliates from the same time zone of each “unassigned” network, without gaining retransmission consent from those distant stations or facing blackouts from the more local affiliate. In contrast, cable operators would need retransmission consent to import distant digital signals, and even though there is no local affiliate, could still face blackout demands from adjacent market affiliates within whose “specified zone” the system operates.

²² SHVERA, § 103 (4)(D) (applying compulsory license to DBS retransmission of network digital stations if permitted under section 339(a)(2)(D) of the Communications Act).

²³ Id., § 204(A)(2)(C)(vii). This new test applies to local network's digital signals in the top 100 television markets in April, 2006, and to network stations located in smaller markets in July, 2007.

- Local affiliate is assigned to the market, station is broadcasting both an analog and digital signal and some viewers in the market do not receive the analog signal at sufficient strength over-the-air. In these markets, DBS can serve those customers in the analog signal's "white area" with two distant digital signal affiliates from the same time zone from the same network without retransmission consent or blackout obligations. Cable may wish to carry the local digital signal, but may be unable to because it is too costly to obtain a good quality digital signal to the headend or because the station withholds consent for the system to retransmit the digital signal absent agreement to unacceptable terms. The cable operator in that case would not be able to provide a more distant digital signal without obtaining retransmission consent from that station and in any event such a distant digital signal would be subject to blackout demands from the local affiliate.
- Local affiliate assigned to the market, station is broadcasting both in analog and digital and subscribers in market receive a station's Grade B analog signal, but do not receive a digital signal of sufficient strength. Beginning in April 2006, a new "digital white area" standard will take into consideration the inability of viewers to obtain an acceptable digital signal over the air, to the unique advantage of DBS. Even if a viewer can obtain an acceptable analog signal over the air (and therefore cannot today obtain distant analog stations from DBS), DBS will be able to provide that customer with distant digital signals beginning in 2006. Cable operators, for the reasons described above, would be unable to match a DBS provider's digital broadcast signal carriage offering in these circumstances.

In short, DBS customers can enjoy a more robust offering of broadcast stations, both in analog and digital, due to these regulatory and statutory advantages.

III. DBS ALSO ENJOYS OTHER COPYRIGHT ROYALTY RATE ADVANTAGES

Other statutory and regulatory provisions – in addition to retransmission consent and the blackout rules – affect the environment in which DBS and cable are competing for customers. Most importantly, for all but the smallest cable operators, DBS enjoys a significant discount over cable for purposes of copyright royalty fee payments.

While copyright issues generally may be outside the FCC’s area of expertise, communications policy and the copyright compulsory licenses have always been intertwined. The Commission should ensure that these policies are applied in an even-handed way.

One inconsistency is in the definition of a “network” signal for copyright purposes. Both cable’s and DBS’s compulsory licenses have assigned a reduced value to “network” signals for royalty fee purposes, in recognition that copyright owners of network programming have already received compensation for their works based on their nation-wide coverage. But the disparate treatment arises in determining which stations are considered “network” stations subject to these lower royalties.

For DBS, a “network” station is defined in Section 119 of the Copyright Act as “a television station ... that is owned or operated by, or affiliated with, one or more of the television networks in the United States which offer an interconnected program service on a regular basis for 15 or more hours per week to at least 25 of its affiliated television licensees in 10 or more States...”²⁴ Therefore, a “network” for purposes of DBS distant signal carriage includes not only affiliates of ABC, CBS, and NBS, but also affiliates of Fox, and other “new” networks.

²⁴ 17 U.S.C. § 119(d)(2).

In contrast, a “network” station for purposes of the cable compulsory license is “a television broadcast station that is owned or operated by, or affiliated with, one or more of the television networks in the United States providing nationwide transmissions, and that transmits a substantial part of the programming supplied by such networks for a substantial part of that station’s typical broadcast day.”²⁵ While the Copyright Office commenced a proceeding five years ago to examine the definition of what constitutes a “network” signal for cable copyright purposes, it has never concluded it.²⁶ At that time, the Office explained that, while receiving several informal inquiries regarding the status of the Fox network, it had “declined to rule” on that question.²⁷ As a result, cable faces the continuing absurdity of Fox and others not being recognized as “networks” for purposes of the cable compulsory license, leading to far higher royalty fees than when it carries the same stations as DBS.²⁸ Even if cable and DBS were subject to the same terms under communications laws and regulations for importing distant analog or digital signals, therefore, cable would still face a significant and artificial cost disadvantage in providing a full complement of broadcast signals to its customers.

IV. RECOMMENDATIONS

Eliminating these disparities will require changes in several areas – both statutory and regulatory. While Congress can change the retransmission consent and copyright royalty rates, the cable blackout rules are FCC-created rights.

²⁵ Id., § 111(f).

²⁶ Cable Compulsory License: Definition of a Network Station, 65 Fed. Reg. 6946 (Feb. 11, 2000).

²⁷ Id. at 6947.

²⁸ As the Copyright Office Notice recognized, “most cable systems throughout the United States have filled their quotas of permitted distant signals. If a new independent station seeks carriage on a typical cable system, such carriage will trigger the 3.75% royalty fee for non-permitted distant signals which cable systems are reluctant to pay. Consequently, the signal will not be carried. However, if the station is designated as a network station, carriage of the station becomes considerably more attractive to a cable system because the associated royalty fees are considerably lower.” Id.

In order to remedy the significant competitive disadvantage suffered by cable operators, particularly those in areas underserved by over-the-air broadcasters, the Commission should recommend that Congress take steps to create greater parity between cable and DBS with respect to retransmission of distant network signals. Cable operators, like DBS, should be exempt from obtaining retransmission consent under Section 325 of the Communications Act when they provide distant broadcast signals to a household that would be allowed to receive the signal if it was a DBS customer. This equal and straightforward treatment should apply both to the analog and digital distant signal carriage, and should extend to the newly-adopted digital “white area” test. Moreover, the FCC should recommend that Congress ensure that the same signals are considered to be “network” signals, and hence subject to the reduced copyright fee, whether carried by DBS or cable operators.

Beyond these recommendations to Congress, the FCC should initiate rulemakings to remedy the difficulties faced by cable operators in smaller and more rural markets. For example, the FCC should exempt a cable operator from facing blackouts under the network nonduplication, syndex and sports blackout rules so that it can fully serve customers with distant stations that it brings in to its community. Local stations should not be permitted to exercise network nonduplication and syndex rights against more distant network affiliates if the local stations choose to invoke retransmission consent. Retransmission consent gives local stations a powerful tool that can be used to deny cable operators the ability to provide their programming to cable customers. They have no need for the FCC to grant them additional regulatory rights against cable operators that only serve to deprive cable customers of network or syndicated programming from a more distant station in those circumstances.

CONCLUSION

Many cable systems got their start serving rural communities. Viewers in areas historically unserved or underserved by over-the-air television for the first time could watch the same signals as urban viewers. But these cable pioneers are under attack by well-financed national DBS competitors. The government should not unfairly skew that competition by perpetuating one-sided communications and copyright law policies.

Congress understood that SHVERA could have these unintended consequences and charged the Commission with recommending ways to remedy these disparities. We urge the Commission to recommend the changes suggested herein as a first step in eliminating these unfair regulatory advantages.

Respectfully submitted,

Lisa Schoenthaler
Senior Director
Office of Rural/Small Systems

Daniel L. Brenner
Diane B. Burstein
Counsel for the National Cable &
Telecommunications Association
1724 Massachusetts Avenue, N.W.
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