

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

In the Matter of:)	
)	
)	
Inquiry Required by the)	MB Docket No. 05-28
Satellite Home Viewer Extension)	
and Reauthorization Act on Rules Affecting)	
Competition in the Television Marketplace)	
)	
)	

REPLY COMMENTS OF DIRECTV, INC.

The Satellite Home Viewer Extension and Reauthorization Act (“SHVERA”) requires the Commission to examine, among other issues, “the impact on competition in the multichannel video programming distribution [“MVPD”] market of the current retransmission consent . . . rules.”¹ Yet the cable industry has responded with two submissions that are startling in how little they have to do with retransmission consent. Rather than discussing the issue that Congress directed the Commission to examine, these submissions seek to obtain for cable operators unrelated regulatory advantages against their DBS competitors. The dominant MVPDs thus seek to hijack this proceeding in an attempt to entrench their market positions. DIRECTV, Inc. (“DIRECTV”) thinks this is an astonishing misuse of the regulatory process.

The submission by the National Cable and Telecommunications Association (“NCTA”) is particularly difficult to swallow. Nearly all NCTA members enjoy

¹ SHVERA, Pub. L. No. 108-447 § 208, 118 Stat. 2809, 3428-29 (2004). For convenience, we refer to SHVERA and its two predecessors, the Satellite Home Viewer Act (“SHVA”) and the Satellite Home Viewer Improvement Act (“SHVIA”) simply as “SHVERA.”

overwhelming market shares in their franchise areas, and the largest operators have obtained monopoly status across entire broadcast markets. Because of their market power, NCTA's members can obtain terms and conditions from broadcasters unavailable to DBS (for example, cable operators pay no cash for retransmission consent). Incredibly, NCTA now seeks more leverage for its members, claiming that they are "unfairly disadvantaged" by not being able to offer distant network signals in the same manner as DBS operators.

This presents an outlandish view of reality. Cable's single biggest historical advantage over DBS has been its ability to deliver local broadcast signals. Only a cable operator could argue that DBS's ability to provide some viewers with distant signals represents an "unacceptable disadvantage" *to cable*.

NCTA's argument, moreover, relies on a gross mischaracterization of the law. SHVERA does not, as NCTA alleges, provide DBS with leverage in retransmission consent negotiations. The law has allowed DBS to provide distant signals in a very limited set of circumstances. It is now even more restrictive – indeed, were cable really subject to "the DBS rules," it could practically never retransmit distant signals.

The American Cable Association's ("ACA's") submission is equally opportunistic. According to ACA, the problem with retransmission consent is that DBS operators do not sell cable operators local broadcast signals on a wholesale basis. It may come as no surprise to those familiar with the cable industry that ACA's members seem to have developed a concern about broadcast signal quality only after DBS operators began offering local service. In any event, ACA nowhere explains why the government should force DBS operators to provide such signals to incumbent cable operators that

typically far outstrip them in local market share, and which invariably can readily obtain the signals themselves. DIRECTV's prior and future planned spending on local service is expected to total billions of dollars. ACA members would doubtless find it easier to piggyback off of this investment than to spend their own capital. But this is no justification for the extraordinary intervention in the MVPD market that ACA seeks.

These submissions have two things in common. They aren't about retransmission consent. And they *are* about further entrenching cable's dominance. Each claims that DBS enjoys regulatory advantages that should flow to cable. But these advantages exist only in the imagination of cable's lawyers, and cable has no legitimate basis upon which to demand "equal treatment." The Commission and Congress should disregard these entirely transparent attempts at regulatory gamesmanship.

I. NCTA'S COMMENTS MISCHARACTERIZE BOTH THE LAW AND THE STATE OF THE MVPD MARKET

Nearly all of NCTA's members are the dominant MVPDs in their respective franchise areas. Moreover, NCTA's members include the largest multiple system operators – entities that, through clustering, have come to enjoy what can only be described as "local monopolies" in many of the most important DMAs.² These local monopolies enjoy extraordinary leverage. This, no doubt, is why cable operators – and cable operators alone – almost never pay cash for retransmission consent.³

² See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 05-13, MB Docket No. 04-227 at ¶¶ 141-42 (rel. Feb. 4, 2005) ("Cable operators continue to pursue a regional strategy of "clustering" their systems. Many of the largest MSOs have concentrated their operations by acquiring cable systems in regions where the MSO already has a significant presence, while giving up other holdings scattered across the country. This strategy is accomplished through purchases and sales of cable systems, or by system 'swapping' among MSOs.").

³ See, e.g., John M. Higgins & Bill McConnell, "No Cash, No Carry," *Broadcasting & Cable*, Feb. 7, 2005 at 20 ("Tired of cable systems' refusing to pay cash for carrying its stations, Nexstar is demanding that they start paying 30¢ per subscriber monthly for the right to retransmit the

Despite these advantages, NCTA now seeks even more leverage in retransmission consent negotiations. It argues that the existing rules disadvantage cable compared to DBS, because DBS can offer distant signals under some circumstances.⁴ It concludes that, to rectify this alleged disadvantage, cable (1) should not have to obtain retransmission consent for distant network signals delivered to households eligible for DBS distant network signals, and (2) should be able to deliver distant network signals free of exclusivity rules.⁵

NTCA's submission is entirely misleading both as a matter of law and as a matter of policy. First, the law. NCTA seems to be under the mistaken impression that SHVERA allows DBS operators to use distant signals as leverage against broadcasters in retransmission consent negotiations.⁶ NCTA perhaps imagines that distant network signals provide DBS with an alternate path for delivering network programming to subscribers where retransmission consent negotiations fail, thus strengthening DBS's bargaining position in such negotiations. Not content with the leverage its members already have, NCTA hopes "the DBS rules" will give them even more.

But the law has never given DBS such leverage. Prior to 1999, of course, DBS had no leverage at all because they were not retransmitting local broadcast stations. Since 1999, SHVERA has allowed DBS operators to provide distant network signals only to "unserved households" – typically viewers who cannot receive an adequate over-the-

signals. . . . Unlike cable operators, over the past few years, DBS companies have paid 15¢-20¢ per subscriber monthly for local broadcast signals.”).

⁴ NCTA Comments at 2 (claiming that the ability to offer distant signals offers DBS an “artificial advantage over cable operators, particularly in rural markets”).

⁵ *Id.* at 12.

⁶ *Id.* at 7, 12 (arguing that DBS can “bring in a distant signal to fill the void” when retransmission consent negotiations break down).

air signal.⁷ While there are significant numbers of such “white area” households nationally, in no DMA are there sufficient numbers of white area households to materially improve DBS operators’ bargaining position *vis-à-vis* local broadcasters. (On the other hand, some cable operators – those that serve only “white area” households – would indeed increase their leverage under such a rule. Thus NCTA’s purported search for “parity” would actually give some of its members an unfair advantage over DBS operators.⁸)

In recent months, moreover, SHVERA has become even more restrictive.⁹ The law now contains two new “no-distant-where-local” rules for analog and digital programming that generally preclude a DBS operator from adding new distant network signal subscribers where it provides local signals.¹⁰ Since cable operators provide local signals in their franchise areas, “the DBS rules” applied to cable would render the possibility of distant signals effectively illusory. Thus, for all of its discussion of the purported regulatory advantages SHVERA grants DBS, NCTA seeks changes to the law that, if granted, would help its members only rarely if at all.

⁷ 17 U.S.C. § 119(a)(2). Cable operators, by contrast, are permitted to retransmit distant network signals to all of their viewers. *See* 17 U.S.C. § 111(c). Cable, however, must obtain retransmission consent and observe blackout rules with respect to such retransmissions.

⁸ Cable operators negotiate retransmission consent agreements only for their respective franchises, not for a broadcaster’s entire local market like DBS. If substantially all of a cable operator’s subscribers were in white areas, being able to provide white area subscribers with distant network signals would provide the cable operator with leverage that the DBS operator does not have. This is because the cable operator (unlike DBS) would have an alternative means of providing network programming to all of its subscribers served by the broadcaster.

⁹ In this regard, DIRECTV notes that SHVERA cannot be characterized as providing DBS with “significant new advantages” with respect to distant digital signals. NCTA Comments at 6 (emphasis omitted). To the contrary: DBS operators already could import distant digital signals under SHVERA’s predecessor legislation. *See* Letter from William Roberts, Senior Attorney, United States Copyright Office to David Goodfriend, Director, Legal and Business Affairs, EchoStar Satellite Corporation (Aug. 19, 2003). SHVERA’s no-distant-where-local rules place significant new restrictions on this right.

¹⁰ *See* 47 U.S.C. § 339(a)(2)(B)-(C); 47 U.S.C. § 339(a)(2)(D)(iv).

NCTA's argument is mistaken on a broader policy level as well. Since the inception of DBS, DIRECTV has consistently offered subscribers more programming, better picture quality, and an alternative to cable's monopoly-style pricing and customer service. In only one area could DBS not match cable – local broadcast programming. Cable developed as a technology to deliver local broadcast programming, and every cable operator can now do so.¹¹ DBS's national platform, by contrast, historically could not match such offerings. Only over the last five years have DBS operators, with a change in the law and large capital investment in new facilities and technologies, been able to begin closing this gap.

Congress thus did not advantage DBS by allowing the transmission of distant signals. It *slightly reduced DBS's principal disadvantage against cable*. SHVERA's distant signal rules thus were and remain essentially stopgaps.¹² They give *some* DBS subscribers a way to receive network programming until DBS can match cable's full local offerings. NCTA's claim that this regime creates an "unfair, unacceptable hardship" *to cable*¹³ is belied by the fact that DIRECTV is making huge investments for satellites and associated equipment to deliver local stations.

NCTA doesn't want "parity" with DBS. It wants to create additional *disparity* by increasing cable's already-formidable leverage in retransmission consent negotiations. The Commission and Congress must not let cable succeed in this effort.

¹¹ This assumes, of course, that such rural cable operators are willing to make investments to receive a "good quality signal," as DBS operators have done.

¹² See, e.g., H. Rpt. No. 108-660 at 10 (Sept. 7, 2004) (noting that the unserved household limitation's "primary purpose is to ensure that those residing in rural areas or in areas where terrain makes it impossible to receive an acceptable over-the-air signal from their local television stations can receive a 'life-line' network television service from a satellite provider").

¹³ NCTA Comments at 3.

II. ACA PROVIDES NO JUSTIFICATION FOR ITS DEMANDS FOR DBS-DELIVERED BROADCAST SIGNALS

ACA's submission is every bit as opportunistic as is NCTA's. To most observers, DBS retransmission of local broadcast signals, and the expectation that they will soon be able to retransmit local digital signals, are pro-competitive developments. To ACA, though, these developments are anti-competitive. ACA complains that DBS operators can "deliver good quality locals that the rural cable systems cannot," and that "[t]he competitive implications of [this situation] are self evident."¹⁴ ACA has a "readily-available, low-cost solution" to this "problem" – Congress should require EchoStar and DIRECTV to sell cable operators a wholesale package of broadcast signals "on nondiscriminatory prices, terms and conditions."¹⁵

It may come as no surprise to those familiar with the cable industry that ACA members seem to have sought a solution to the poor signal quality they provide to their viewers only after DBS's introduction of local service.¹⁶ If ever the Commission needed a reminder of why MVPD competition is so important to viewers, and of what the world would look like without DBS, it need look no further than ACA's pleading.

In any event, ACA's "solution" to its newly discovered problem is repugnant to sound competition policy and the public interest. DIRECTV does not provide subscribers with high-quality local signals by magic. DIRECTV's combined prior expenditures and future planned spending on satellites and related ground infrastructure to deliver local channels are expected to total several billion dollars over the next few

¹⁴ ACA Comments at 5.

¹⁵ *Id.* at 6

¹⁶ *See id.* at 5 ("Now, one or both [of DIRECTV and Echostar] can deliver clear local broadcast signals, regardless of distance from a transmitter site.") (emphasis added).

years.¹⁷ In each market, DIRECTV has had to lease space for local receive facilities at which it must install and maintain equipment. Where it cannot receive a “good quality” signal at such a facility, DIRECTV sometimes pays to have broadcast signals delivered to the facility via fiber. Finally, it pays the not-inconsiderable cost of backhauling these signals to uplink facilities in Colorado and California.

ACA members do not need to launch satellites in order to provide their viewers with clear local signals. All they need to do is a fraction of what DIRECTV has done – establish receive facilities and carry broadcast signals the modest distances to their local cable headends. ACA members, to be sure, would prefer to piggyback on DIRECTV’s investment rather than making the more modest investments needed to obtain better quality themselves.¹⁸ But this is no justification for requiring DIRECTV to subsidize its competitors. And a subsidy this would be – even if ACA members offered to pay a “nondiscriminatory price,” they would presumably request DIRECTV signals only if that price were cheaper than what they would pay to acquire the signals themselves.

Certainly, ACA could not make a claim that such signals represent an “essential facility” to which its members are entitled. Facilities are only essential if they are otherwise unavailable¹⁹ – here, ACA members can not only obtain broadcast signals, but can do so at least as cheaply as can DIRECTV. Moreover, even if DBS provision of

¹⁷ See, e.g., “DIRECTV Announces First 12 Markets to Receive Local Channels in High-Definition This Year” (Jan. 6, 2005), available at <http://www.directv.com/DTVAPP/aboutus/mediacenter/NewsDetails.dsp?id=01-06-2005A>.

¹⁸ See ACA Comments at 6 (“In a response to a recent ACA member poll on this issue, over 100 companies indicated that they could provide better quality local broadcast signals to their customers if they were permitted to access satellite delivered broadcast signals.”).

¹⁹ *Verizon Communications Inc. v. Law Offices of Trinko, LLP*, 540 U.S. 398, 411 (2004) (“It suffices for present purposes to note that the indispensable requirement for invoking the doctrine is the unavailability of access to the ‘essential facilities’; where access exists, the doctrine serves no purpose.”).

broadcast signals were considered “essential,” it would be odd indeed to require the *new competitors* in cable franchise areas (DIRECTV and EchoStar) to make facilities available to *dominant incumbents* (ACA members in most cases) in those areas. The government, to DIRECTV’s knowledge, has never done such a thing. Nor does it have any reason to do so here.

* * *

NCTA’s members would like even more leverage in negotiations with network broadcasters than they already have, and mistakenly believe that SHVERA’s distant signal rules would provide them with such leverage. And ACA’s members would like to receive broadcast signals by piggybacking on DIRECTV’s investment rather than investing themselves in receive facilities and backhaul. The Commission and Congress should recognize NCTA’s and ACA’s submissions for what they are – blatant attempts by dominant incumbents to entrench their position in the market. Such efforts should have no place in this proceeding.

Respectfully submitted,

/s/

Susan Eid
Vice President, Government Affairs
Stacy R. Fuller
Vice President, Regulatory Affairs
DIRECTV, INC.
444 North Capitol Street, NW, Suite 728
Washington, DC 20001
(202) 715-2330

William M. Wiltshire
Michael Nilsson
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, DC 20036
(202) 730-1300

Counsel for DIRECTV, Inc.

March 31, 2005