

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

In the Matter of:

Implementation of the  
Satellite Home Viewer Extension  
and Reauthorization Act of 2004

Implementation of Section 340 of the  
Communications Act

MB Docket No. 05-49

**REPLY COMMENTS OF DIRECTV, INC.**

DIRECTV, Inc. (“DIRECTV”) agrees with NAB *et al.* (the “Broadcasters”) on many of the fundamental issues in this proceeding.<sup>1</sup> DIRECTV agrees, for example, that a subscriber must receive local-into-local service before receiving significantly viewed signals, and digital local-into-local service before receiving significantly viewed digital signals. DIRECTV also agrees that the Commission should implement the equivalent bandwidth restriction on a case-by-case basis, with an eye to preventing material discrimination against local broadcasters. And DIRECTV agrees that the Commission should also determine “bad faith” or “frivolousness” on a case-by-case basis.<sup>2</sup>

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<sup>1</sup> *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act*, Notice of Proposed Rulemaking, FCC 05-81, MB Docket No. 05-49 (rel. Feb. 7, 2005) (“Notice”); Joint Comments of the National Association of Broadcasters and of the ABC, CBS, FBC, and NBC Television Affiliate Associations (“Broadcasters Comments”).

<sup>2</sup> DIRECTV also agrees with the Broadcasters’ various “housekeeping” suggestions. *See* Broadcasters Comments at 3 (housekeeping issues); *id* at 15 (definition of “satellite carrier”).

The Broadcasters have, however, taken several positions with which DIRECTV cannot agree. These positions, if implemented, would limit the provision of significantly viewed signals in a manner that was never intended by Congress in passing the Satellite Home Viewer Extension and Reauthorization Act (“SHVERA”). More importantly, they would limit the availability of these channels to thousands of consumers who could receive them through their cable operator.

First, the Broadcasters claim that, in order to comply with SHVERA’s “equivalent bandwidth” requirement, DBS operators must ensure signal equality on a day-by-day, daypart-by-daypart, and (perhaps) even moment-by-moment basis. Such a suggestion might seem reasonable from the perspective of a broadcaster focusing solely on the comparison of its signal with that of a single significantly viewed station. From the perspective of a DBS operator, which might retransmit thousands of local and significantly viewed signals at any given time, it is a technical and logistical nightmare. DIRECTV cannot conceive of how it might go about complying with such a mandate.

Second, the Broadcasters argue that a DBS subscriber must be “receiving” a signal from the local affiliate at all times it receives a duplicating significantly viewed signal. But the law does not say this – it only says that subscribers must receive *local-into-local* service before receiving significantly viewed signals.<sup>3</sup> The Commission was thus entirely correct to conclude that a local broadcaster cannot block importation of a same-network significantly viewed signal by withholding retransmission consent.

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<sup>3</sup> Even SHVERA’s corresponding digital provision – which does reference local affiliates – does not say that subscribers must receive the affiliates’ signals at all times. *See* discussion below at 8-9.

These two proposals would severely disadvantage DBS operators compared to cable operators (to whom such rules presumably would not apply).<sup>4</sup> This would be an odd way indeed of interpreting a provision entitled “[c]able/satellite comparability.”<sup>5</sup>

**I. DBS OPERATORS COULD NOT COMPLY WITH THE BROADCASTERS’ PROPOSED DEFINITION OF EQUIVALENT BANDWIDTH**

DIRECTV and the Broadcasters agree on the general contours of the “equivalent bandwidth” and “entire bandwidth” restrictions set forth in new Section 340.<sup>6</sup> Both agree that the purpose of the restrictions is to prohibit DBS operators from materially discriminating against local broadcasters.<sup>7</sup> Both agree that the Commission should not define the concepts in this proceeding, but should instead provide examples of unacceptable practices.<sup>8</sup> Both agree that a DBS operator could not, for example, refuse to

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<sup>4</sup> The Broadcasters also argue that “satellite communities” should continue to be defined in terms of traditional communities, rather than by five digit zip codes, as suggested by DIRECTV. Broadcasters Comments at 10-14. DIRECTV believes it has addressed this argument sufficiently in its initial comments, and reiterates here only that: (1) DIRECTV proposes to define future significantly viewed communities in terms of zip codes for both satellite and cable operators, which should minimize Broadcaster concerns about regulatory parity, *see id.* at 13; and (2) in this context, concerns about whether residents of a particular area “conceive of themselves as a community” pale when compared to the prospect of their losing service. The Broadcasters are also wrong when they claim that a geocoding solution for significantly viewed signals “works identically to geocoding . . . for delivery of distant signals.” *Id.* at 14 n. 26. First, as DIRECTV set forth in its comments, there is no geocoding data available for significantly viewed signals, and DIRECTV does not know how much it might cost to create such data. Second, geocoding for significantly viewed signals is far more complicated than geocoding for significantly viewed signals. Geocoding for distant signals “tells” DIRECTV’s system only that a subscriber is eligible or ineligible for a particular network’s distant signals. Thus, for each subscriber, geocoding can result in sixteen possible distant signal “packages” (depending on her eligibility for each of the four networks). Geocoding for significantly viewed signals, however, would involve the creation of *thousands* of such packages – one for each station for which any subscriber might be eligible. Moreover, such a solution would require DIRECTV to “decouple” significantly viewed service from the local package. This is a solution that the Broadcasters, who have insisted on coupling the two, presumably would not support. It would in any event greatly complicate the provision of significantly viewed signals. In short, geocoding would be a very difficult solution – certainly not one “identical” to the solution for distant signals.

<sup>5</sup> SHVERA, Pub. L. No. 108-447, § 202, 118 Stat 2809, 3393 (2004).

<sup>6</sup> 47 U.S.C. § 340(b)(2)(B).

<sup>7</sup> DIRECTV Comments at 8-9; Broadcasters Comments at 20.

<sup>8</sup> DIRECTV Comments at 8; Broadcasters Comments at 20.

retransmit a local station's full-time signal in HD while importing a significantly viewed station's full-time signal in HD.<sup>9</sup> Both agree that DBS operators violate the prohibition if they deliberately use compression to materially degrade an incumbent's signal compared to that of a significantly viewed signal.<sup>10</sup> And both agree even on some issues of timing – a DBS operator would not comply with the equivalent bandwidth restriction if it were, for example, to “retransmit the prime time schedule of the out-of-market station in HD but [refuse] to retransmit the prime time programming of the local station in HD.”<sup>11</sup>

DIRECTV and the Broadcasters part ways, however, when the Broadcasters suggest that DBS operators (1) must retransmit the exact number of hours per day of HD signals for both a local and significantly viewed station;<sup>12</sup> (2) must retransmit the exact number of hours per each daypart of HD signals for both stations;<sup>13</sup> and – perhaps – (3) can *never* at any given moment retransmit significantly viewed signals in a “more favorable format” than those of the local station.<sup>14</sup>

In one sense, the Broadcasters' position is understandable. From the perspective of single local station facing the importation of a single significantly viewed station, it is perhaps possible to imagine that a DBS operator could compare and adjust the two signals on a daypart-by-daypart or minute-by-minute basis. But from the perspective of a

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<sup>9</sup> DIRECTV Comments at 8; Broadcasters Comments at 20.

<sup>10</sup> DIRECTV Comments at 13; Broadcasters Comments at 20-21.

<sup>11</sup> Broadcasters Comments at 21.

<sup>12</sup> *Id.* at 22 n. 44 (arguing that it would be “discriminatory if an out-of-market signal is retransmitted in HD for a greater number of hours per day than the local signal”).

<sup>13</sup> *Id.* at 21-22 (arguing that the Commission “must account for the fact that discrimination . . . must be prohibited [] with regard to how local and distant signals are retransmitted during different dayparts”).

<sup>14</sup> *Id.* at 22 (arguing that “satellite carriers cannot discriminate against local stations by retransmitting significantly viewed signals in a more favorable format or standard, even if only for a limited part of the day.”).

DBS operator like DIRECTV, the difficulty of comparing hundreds if not thousands of stations in this manner is all too obvious.

The Broadcasters' proposal seems to contemplate that DIRECTV must (1) monitor hundreds (if not thousands) of stations, and (2) black out significantly viewed signals on a rolling basis to achieve absolute equality with the corresponding local signal. Under one of the Broadcasters' scenarios, DIRECTV would do so literally on a moment-to-moment basis. Under another, DIRECTV would have to add up the amount of significantly viewed HD programming for each daypart, subtract the amount of local HD programming for each daypart, and black out the difference. Under a third, DIRECTV would also have to do this on a per-day (as well as per-daypart) basis.

DIRECTV cannot even begin to imagine how this might work. It would, first of all, outrage thousands of viewers (viewers who, one must remember, would not be subject to such blackouts on their incumbent cable systems). And it would be a logistical and technical nightmare. DIRECTV has no system in place to monitor and black out hundreds of stations as described above, and cannot envision doing so manually (each pair of stations, one supposes, would require full time staff for this task). Nor is it obvious how the Commission would handle disputes that would arise if, for example, local broadcasters would prefer that DIRECTV black out some programs rather than others,<sup>15</sup> or if the two stations vary the amount of HD programming in their schedules, or if they begin HD transmissions at slightly different times.

In theory, of course, a DBS operator could comply with the Broadcasters' approach by offering the "entire bandwidth" of every broadcast station in its local

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<sup>15</sup> See *id.* at 21-22 n. 43 (arguing that prime time programming is more important to a local station than early morning programming).

market.<sup>16</sup> Perhaps this is even the Broadcasters' objective in this proceeding. But DIRECTV will not have the capacity to offer the entire bandwidth of every local broadcaster – even after it launches the four new satellites with which it will retransmit digital local signals – without severely constraining the number of markets that can be served. Accordingly, compliance with the Broadcasters' proposed rule through an “entire bandwidth” strategy is simply not an option for DIRECTV. Moreover, compelling DBS operators to provide the entire bandwidth in order to carry significantly viewed stations would conflict with the clear intent of SHVERA – in such case there would have been no need to create the equivalent bandwidth restriction in the first place.

If DBS operators are to retransmit digital significantly viewed signals at all – something that Congress very clearly wants – they need to be able to do so in a technically, administratively, and commercially reasonable manner. This means that DIRECTV must be able to compare its carriage of a local/significantly viewed pair of stations *once*, decide *once* whether it carries sufficient bandwidth of the local station in order to import the significantly viewed station, and rely on that determination unless and until the either station makes substantial changes in its transmissions (*i.e.*, the significantly viewed station commences full-time HD transmission, as opposed to simply adding “Oprah” in HD to its schedule). The Commission need not, and should not, spell out exactly how this determination would work in every case. But it must understand that DBS operators cannot make these determinations every minute, every hour, or even every month – and should make clear that the law does not require them to do so.

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<sup>16</sup> 47 U.S.C. § 340(b)(2)(B)(ii).

The Commission should, as the Broadcasters suggest, implement the equivalent bandwidth restriction on a case-by-case basis, with an eye toward preventing discrimination. Yet it should, as DIRECTV has maintained throughout this proceeding, prohibit only material discrimination as measured on an overall carriage (not program-by-program or minute-by-minute) basis. In particular, the Commission should – as DIRECTV spelled out in its initial Comments – allow DBS operators to carry a single stream of programming for both the significantly viewed and local station, even if the two stations choose to carry somewhat different amounts of HD programming.

## **II. LOCAL BROADCASTERS SHOULD NOT BE ABLE TO BLOCK THE RETRANSMISSION OF SIGNIFICANTLY VIEWED SIGNALS**

The Broadcasters argue that, so as to prevent DBS operators from “extract[ing] more favorable retransmission consent terms,” stations should be able to block importation of third-party significantly viewed signals by withholding retransmission consent from DBS operators.<sup>17</sup> The law does not allow this. Nor does sound public policy support it – SHVERA already gives stations new protections in retransmission consent negotiations. There is no need to give stations the ability to deprive DBS viewers of two stations rather than just one – leverage they do not have against cable operators.

The Broadcasters argue that the law “could not be clearer.”<sup>18</sup> According to them, “[a] condition precedent to the delivery of a duplicating significantly viewed out-of-market station is that a subscriber ‘receive’ the [same-network] local affiliate.”<sup>19</sup> But the law does not say this. The provision governing analog retransmissions states that it “shall apply only to retransmissions to subscribers of a satellite carrier who receive

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<sup>17</sup> *Id.* at 16-17.

<sup>18</sup> *Id.* at 16.

<sup>19</sup> *Id.*

retransmissions of *a signal* that originates as an analog signal of a local network station from that satellite carrier pursuant to section 338.”<sup>20</sup> This says nothing about a subscriber needing to receive “the local affiliate” in order to receive a significantly viewed signal. It provides merely that a subscriber must receive “a” local signal – *i.e.*, local-into-local service – before receiving the significantly viewed signal. The legislative history explicitly confirms this straightforward reading of the text.<sup>21</sup> The Broadcasters’ legal analysis, at least with respect to analog signals, is plainly incorrect.

Nor does the law support the Broadcaster’s position even with respect to digital signals. SHVERA does indeed specify that the subscriber must receive the local affiliate’s digital signal in order to receive a duplicating digital significantly viewed signal.<sup>22</sup> But this does not say that a subscriber must do so at all times in order to continue receiving a significantly viewed signal. It merely says that a DBS operator cannot offer a subscriber significantly viewed digital signals unless that subscriber first “receives” the local affiliate. Congress never contemplated that, once having offered significantly viewed digital signals, DBS operators (but not cable operators) would have to withdraw those signals simply because they are not “received” at a particular moment when a local station withholds retransmission consent. It intended only that DIRECTV –

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<sup>20</sup> 47 U.S.C. § 340(b)(1) (emphasis added).

<sup>21</sup> “Satellite Home Viewer Extension and Reauthorization Act of 2004,” H.R. Rep. No. 108-634, 108<sup>th</sup> Cong., 2d. Sess. at 12 (July 22, 2004) (“*House Commerce Committee Report*”) (providing that subscribers may receive significantly viewed signals “only if the subscriber also receives local-into-local service”).

<sup>22</sup> See 47 U.S.C. § 340(b)(2)(A) (providing that a subscriber may receive digital significantly viewed signals only if he or she “receives from the satellite carrier pursuant to section 338 the retransmission of the digital signal of a network station in the subscriber’s local market that is affiliated with the same television network”).

like cable operators – had to include the local affiliate’s digital signal in its local digital package before importing a duplicating digital significantly viewed signal.<sup>23</sup>

The Commission thus got it exactly right when it concluded that “a subscriber should [not] be deprived of access to a significantly viewed station because the local station refused to grant retransmission consent or is otherwise ineligible for local carriage.”<sup>24</sup> Moreover, the Broadcasters’ objection to the Commission’s reasoning – that satellite carriers might “by-pass[] local stations or us[e] the threat of delivery of out-of-market stations to extract more favorable retransmission consent terms”<sup>25</sup> – is entirely unfounded. Indeed, the Broadcasters themselves sought, and obtained, language to address this very concern.<sup>26</sup> SHVERA thus now provides that a broadcast station can elect mandatory carriage in areas where a DBS operator might import a significantly viewed signal, while electing retransmission consent in non-duplicated areas.<sup>27</sup> There is no possibility that satellite carriers can use significantly viewed carriage to “extract”

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<sup>23</sup> *House Commerce Committee Report* at 12 (noting that the provision was intended to “ensure that the satellite operator cannot retransmit into a market a significantly viewed digital signal of a network broadcast station from a distant market without also retransmitting into the market a digital signal of any local affiliate of the same network”).

<sup>24</sup> *Notice* at ¶ 39.

<sup>25</sup> Broadcasters Comments at 17.

<sup>26</sup> *The Satellite Home Viewer Improvement Reauthorization Act of 2004: Hearing before the House Subcomm. on Telecom. and the Internet of the House Comm. on Energy and Commerce*, 108<sup>th</sup> Cong. 30-31 (2004) (Prepared Statement of Robert G. Lee, Present and GM, WBDH Television, on Behalf of the National Association of Broadcasters) (seeking “community by community” elections).

<sup>27</sup> 47 U.S.C. § 340(h) (providing that, if a DBS operator provides notice that it may import a significantly viewed station, “a television broadcast station that is located in a local market into which a satellite carrier retransmits a television broadcast station pursuant to section 338, [may] elect, with respect to such satellite carrier, between retransmission consent pursuant to such section 325 and mandatory carriage pursuant to section 338 separately for each county within such station’s local market”).

concessions in retransmission consent negotiations, and no reason for the Commission to read the statute other than as it is written.<sup>28</sup>

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DIRECTV and the Broadcasters agree here far more than they disagree. Two disagreements – equivalent bandwidth and the “receipt” requirement – nonetheless stand out. The Broadcasters’ proposals on these subjects would make delivery of significantly viewed signals far more onerous – and thus far less likely – than Congress intended. This, in turn, would deprive DBS subscribers of signals that would remain available from their cable operators. Neither the law nor sound public policy compels such an outcome.

Respectfully Submitted,

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<sup>28</sup> The Broadcasters also point out – as does the Commission – that, while the *Communications Act* provides that a DBS operator need not provide local-into-local service in order to import a significantly viewed signal with no duplicating local affiliate, the *Copyright Act* appears to provide otherwise. See *Notice* at ¶ 48; compare 47 U.S.C. § 340(b)(3) (providing that the local-into-local limitation “shall not prohibit a retransmission under this section to a subscriber located in a local market in which there are no network stations affiliated with the same television network as the station whose signal is being retransmitted pursuant to this section”) with 17 U.S.C. § 119(a)(3) (providing that the statutory license for significantly viewed signals “shall apply only to secondary transmissions of the primary transmissions of network stations and superstations to subscribers who receive secondary transmissions from a satellite carrier pursuant to the statutory license under section 122”). The Commission’s job, of course, is to interpret the *Communications Act*, not the *Copyright Act*. But the Commission would make compliance with SHVERA far easier if it harmonized the two provisions to the extent possible. It should set forth a simple rule for both analog and digital service – DBS subscribers must receive local-into-local service before they can receive significantly viewed signals.