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

In the Matter of:

D10

Implementation of Section 210 of the Satellite
Home Viewer Extension and Reauthorization Act
of 2004 to Amend Section 338 of the
Communications Act

) MB Docket No. 05-181
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REPORT AND ORDER

Adopted: August 22, 2005

Released: August 23, 2005

By the Commission: Commissioner Abernathy concurring in part and dissenting in part.

I. INTRODUCTION

1. In this Report and Order ("Order"), we adopt rules to implement Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA").¹ Section 210 of the SHVERA amends Section 338(a) of the Communications Act of 1934, as amended, ("Communications Act" or "Act"). Section 338 governs the carriage of local television broadcast stations by satellite carriers.² In general, the SHVERA amends this section to require satellite carriers to carry the analog and digital signals of television broadcast stations in local markets in states that are not part of the contiguous United States, and to provide these signals to substantially all of their subscribers in each station's local market by December 8, 2005 for analog signals and by June 8, 2007 for digital signals.³ Our rules will implement the SHVERA requirements for carriage of analog and digital signals in Alaska and Hawaii. This Order concludes that such carriage shall include high definition and multicast signals as broadcast by local stations in these states. We adopt a two-step carriage election process beginning with carriage elections for analog signals by October 1, 2005, and followed by carriage elections for digital signals by April 1, 2007.

II. BACKGROUND

A. Satellite Home Viewer Act (SHVA) and Satellite Home Viewer Improvement Act of 1999 (SHVIA)

2. In 1988, Congress passed the Satellite Home Viewer Act ("SHVA"),⁴ which established

¹ The Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA), Pub. L. No. 108-447, § 210, 118 Stat 2809 (2004). SHVERA was enacted on December 8, 2004, as title IX of the "Consolidated Appropriations Act, 2005."

² 47 U.S.C. § 338.

³ 47 U.S.C. § 338(a)(4) (as amended by § 210 of the SHVERA).

⁴ The Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935, Title II (1988) (codified at 17 U.S.C. §§ 111, 119). SHVA was enacted on November 16, 1988, as an amendment to the copyright laws. SHVA gave satellite carriers a statutory license to offer signals to "unserved" households. 17 U.S.C. § 119(a).

a statutory copyright license for satellite carriers to offer subscribers access to broadcast programming via satellite when they are unable to receive the signal of a broadcast station over the air (that is, an "unserved" household). In 1999, Congress enacted the Satellite Home Viewer Improvement Act ("SHVIA"),⁵ which expanded the 1988 SHVA by amending both the 1988 copyright laws,⁶ and the Communications Act⁷ to permit satellite carriers to retransmit local broadcast television signals directly to subscribers in the station's local market ("local-into-local" service) without requiring that they be "unserved" households.

3. A satellite carrier provides "local-into-local" service when it retransmits a local television station's signal back into the local market of the television station for reception by subscribers.⁸ If a carrier carries one or more stations in the market pursuant to the statutory copyright license, it is required to carry all of the other local stations in that market upon the station's request (that is, the "carry-one, carry-all" requirement).⁹ Generally, a television station's "local market" is the designated market area ("DMA") in which it is located.¹⁰ DMAs describe each television market in terms of a unique geographic area, and are established by Nielsen Media Research based on measured viewing patterns.¹¹ There are 210 DMAs that encompass all counties in the 50 states, except for certain areas in Alaska.¹² A satellite carrier choosing to provide such local-into-local service is generally obligated to carry any qualified local station in a particular DMA that has made a timely election for mandatory carriage, unless the station's programming is duplicative of the programming of another station carried by the carrier in the DMA, or the station does not provide a good quality signal to the carrier's local receive facility.¹³

B. Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA)

4. In December 2004, Congress passed and the President signed the Satellite Home Viewer Extension and Reauthorization Act of 2004.¹⁴ SHVERA again amends the 1988 copyright laws¹⁵ and the

⁵ The Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501 (1999) (codified in scattered sections of 17 and 47 U.S.C.). SHVIA was enacted on November 29, 1999, as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA") (relating to copyright licensing and carriage of broadcast signals by satellite carriers).

⁶ 17 U.S.C. §§ 119 and 122.

⁷ 47 U.S.C. §§ 325, 338 and 339.

⁸ See 17 U.S.C. § 122(j)

⁹ 47 U.S.C. § 338(a)(1).

¹⁰ Section 340(i)(1) (as amended by § 202 of the SHVERA) defines the term "local market" by using the definition in 17 U.S.C. § 122(j)(2): "The term 'local market,' in the case of both commercial and noncommercial television broadcast stations, means the designated market area in which a station is located, and – (i) in the case of a commercial television broadcast station, all commercial television broadcast stations licensed to a community within the same designated market area are within the same local market; and (ii) in the case of a noncommercial educational television broadcast station, the market includes any station that is licensed to a community within the same designated market area as the noncommercial educational television broadcast station."

¹¹ See 17 U.S.C. § 122(j)(2)(A)-(C).0.

¹² See Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates (2004-5 ed.); see also Television and Cable Factbook 2005 (Warren Communications) A-73.

¹³ See 47 U.S.C. § 338(a)(1), (b)(1) and (c)(1).

¹⁴ SHVERA, *supra* n. 1.

¹⁵ 17 U.S.C. §§ 119, 122.

Communications Act.¹⁶ This rulemaking is required to implement provisions in Section 210 of the SHVERA which establishes new and special requirements for satellite carriage of local stations in states outside the contiguous United States.

III. DISCUSSION

5. Section 210 of the SHVERA creates a new subsection of the Communications Act, 338(a)(4),¹⁷ that requires satellite carriers with more than five million subscribers in the United States to carry the analog and digital signals of each television broadcast station licensed in local markets "within a State that is not part of the contiguous United States." Analog signals are required to be carried by December 8, 2005, and digital signals by June 8, 2007. A carrier is required to provide these signals to substantially all of its subscribers in each station's local market. In addition, a satellite carrier is required to make available the stations that it carries in at least one local market to substantially all of its subscribers located outside of local markets and in the same State. The SHVERA also mandates that satellite carriers may not charge subscribers for these local signals more than they charge subscribers in other States to receive local market television stations. Although most of the requirements imposed by the new Section 338(a)(4) are self-effectuating, the SHVERA requires the Commission to promulgate regulations concerning the timing of carriage elections by stations in local markets covered by Section 338(a)(4).¹⁸

6. We adopted the required Notice of Proposed Rulemaking ("*Notice*") on April 29, 2005 and established a short pleading cycle due to the need to implement the new rules before the upcoming carriage cycle.¹⁹ We received comments from six parties.²⁰ As we stated in the *Notice*, the new and amended rules apply only to satellite service in the states covered by Section 338(a)(4), which we herein conclude are Alaska and Hawaii. The existing signal carriage provisions in Section 76.66 also continue to apply to satellite service in these states, where relevant and not inconsistent with the rules adopted in

¹⁶ 47 U.S.C. §§ 325, 338, 339 and 340.

¹⁷ Due to an apparent inconsistency in numbering the provisions added by the SHVERA, it is not clear if this provision will ultimately be codified as 338(a)(4) or (a)(5). See 47 U.S.C.A. § 338 n.1 (West 2005) ("So in original. Two pars. (3) enacted."). In this Order we use the subsection as enacted by Section 210, 338(a)(4).

¹⁸ See 47 U.S.C. § 338(a)(4) (*as amended* by the SHVERA), which provides:

(4) CARRIAGE OF SIGNALS OF LOCAL STATIONS IN CERTAIN MARKETS- A satellite carrier that offers multichannel video programming distribution service in the United States to more than 5,000,000 subscribers shall (A) within 1 year after the date of the enactment of the Satellite Home Viewer Extension and Reauthorization Act of 2004, retransmit the signals originating as analog signals of each television broadcast station located in any local market within a State that is not part of the contiguous United States, and (B) within 30 months after such date of enactment retransmit the signals originating as digital signals of each such station. The retransmissions of such stations shall be made available to substantially all of the satellite carrier's subscribers in each station's local market, and the retransmissions of the stations in at least one market in the State shall be made available to substantially all of the satellite carrier's subscribers in areas of the State that are not within a designated market area. The cost to subscribers of such retransmissions shall not exceed the cost of retransmissions of local television stations in other States. Within 1 year after the date of enactment of that Act, the Commission shall promulgate regulations concerning elections by television stations in such State between mandatory carriage pursuant to this section and retransmission consent pursuant to section 325(b), which shall take into account the schedule on which local television stations are made available to viewers in such State.

¹⁹ *Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, 20 FCC Rcd 9319, 9330, ¶ 30 (2005) ("*Notice*").

²⁰ See List of Comments and Reply Comments in Appendix A. In addition, the Alaska Broadcasters Association submitted an ex parte letter after the comment period closed.

this proceeding.²¹

A. Satellite Carriers with More Than 5,000,000 Subscribers

7. Subsection 338(a)(4) expressly applies to a "satellite carrier that offers multichannel video programming distribution service in the United States to more than 5,000,000 subscribers."²² In the *Notice*, we proposed that this provision applies to satellite carriers that have more than five million subscribers in 2005 and, in the future, to any carriers with more than five million subscribers. Currently, DIRECTV and EchoStar qualify under this definition.²³ We received no comments relevant to the proposed rule, which follows the statutory language and which we adopt as new section 76.66(b)(2) without change.²⁴ If in the future there are new satellite carriers with more than five million subscribers, they would be required to comply with this carriage provision and to follow the rule provisions that apply to "new local-into-local service."²⁵

B. Noncontiguous States

8. Section 338(a)(4) as amended by Section 210 of the SHVERA applies to "a State that is not part of the contiguous United States."²⁶ Because the general definition of "State" in the Communications Act includes "the Territories and possessions,"²⁷ we sought comment on whether "State" as used in the SHVERA should be read to include the noncontiguous territories and possessions of the United States, including but not limited to Puerto Rico and Guam,²⁸ and whether considerations such as a satellite carrier's regulatory authorizations and/or actual service area are relevant to interpreting the obligation under Section 338(a)(4) to serve "noncontiguous states." Territories in the Pacific, such as Guam, are in a different International Telecommunication Union ("ITU") region from the 50 states.²⁹ We requested comment on the impact of regulatory differences (e.g., use of different frequency bands) between ITU regions in providing service to these locations, but we noted in the *Notice* that spot beam technology may allow coverage of widely spaced areas if visible from the satellite location.³⁰

²¹ See 47 C.F.R. § 76.66; see also amended rules in Appendix B.

²² 47 U.S.C. § 338(a)(4) (as amended by the SHVERA).

²³ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, MB Docket No. 04-227, FCC 05-13 at ¶ 54-55 (2004).

²⁴ See amended Section 76.66(b)(2) in Appendix B. Section 76.66(a)(1) of the current rules defines "satellite carrier." See 47 C.F.R. § 76.66(a)(1).

²⁵ See 47 C.F.R. § 76.66(d)(2).

²⁶ 47 U.S.C. § 338(a)(4) (as amended by the SHVERA).

²⁷ 47 U.S.C. § 153(40).

²⁸ *Notice*, 20 FCC Rcd at 9322, ¶ 7.

²⁹ The contiguous United States, Alaska, Hawaii, Puerto Rico and the U.S. Virgin Islands are located in ITU Region 2 and have orbital assignments in the Region 2 BSS Plan. The "Region 2 Plans" comprise the Plan for BSS in the band 12.2-12.7 GHz in ITU Region 2 as contained in Appendix 30 of the ITU Radio Regulations, and the associated Plan for the feeder-links in the frequency band 17.3-17.8 GHz for the broadcasting-satellite service in Region 2 as contained in Appendix 30A of the ITU Radio Regulations. Guam, the Northern Marianas, Wake Island and Palmyra Island are located in ITU Region 3 and have orbital assignments in the Region 3 BSS plan at 122.0° E.L., 121.80° E.L., 140.0° E.L. and 170.0° E.L. respectively. Satellites operating pursuant to the Region 2 BSS plan are subject to different technical requirements and use different frequency bands than satellites authorized to operate in Region 3. Therefore, satellites designed to serve Region 2 areas would not meet the technical requirements necessary to serve Region 3 areas.

³⁰ *Notice*, 20 FCC Rcd at 9322, ¶ 7.

9. We recognize that the phrase "a State that is not part of the contiguous United States" is susceptible to different interpretations. It is unclear from the statutory text whether the intended application of the term "State" means the definition of "State" as it appears in the Communications Act, which includes all territories and possessions, or whether it refers to the literal or colloquial use of the word "State," meaning one of the fifty more or less internally autonomous territorial and political units composing the United States of America.³¹ In determining the proper interpretation, we bear in mind that Section 3 of the Communications Act provides definitions of terms that apply for the purposes of this Act, "unless the context otherwise requires."³² As explained below, we believe the best construction of this phrase, based on context and the current record before us, is that "a State that is not part of the contiguous United States" was intended to refer only to Alaska and Hawaii and not to the broader definition of the Communications Act which includes territories and possessions. This conclusion is consistent with arguments made by satellite carriers EchoStar and DIRECTV, who point out the serious technical difficulties of serving all the territories and possessions.³³ Several broadcast stations in Puerto Rico argue that "State" should be read to include territories and possessions so that stations in Puerto Rico will be entitled to mandatory carriage.³⁴ In addition to the technical difficulties, EchoStar also argues that Congress' intent to limit Section 338(a)(4) to Alaska and Hawaii is evidenced by the related copyright provisions in the SHVERA.³⁵ We agree. As mentioned in the *Notice*, Alaska is the only one of the 50 states that is not entirely subsumed within one or more DMAs.³⁶ Similarly, none of the noncontiguous territories and possessions are included in a DMA. However, Section 122 of title 17, which defines "local market" for the statutory copyright license, as well as for Section 338 generally,³⁷ was amended only to add the areas in the State of Alaska that are outside of all DMAs to the definition of "local market." Critically, the noncontiguous territories and possessions were not added.³⁸ Consequently, were we to apply "State" to the noncontiguous territories and possessions, satellite carriers would not have a statutory copyright license to retransmit the stations in these markets because they would not fall within the definition of "local market" in Section 122(j).

³¹ See, e.g., Webster's II New College Dictionary, 1999 edition.

³² 47 U.S.C. § 153

³³ See DIRECTV Comments at 3, 10-11 (stating that most of the relevant areas in the South Pacific fall over the horizon and therefore cannot be served as a matter of physics; some territories in the Pacific are in a different region under the ITU where completely different frequencies are used for BSS service); EchoStar Comments at 2-5 (stating that U.S. satellite operators are not currently able to serve many of the areas in the U.S. territories and possessions and cannot serve a span of territory that ranges from the Atlantic Ocean to the middle of the Pacific).

³⁴ See Encuentro Christian Network ("ECN") and Eastern Television Corporation ("ETC") Comments at 2; International Broadcasting Corporation ("IBC") and R y F Television ("R y F") Comments at 2. ECN, ETC, IBC, and R y F argue that the plain language of § 338(a)(4) includes noncontiguous territories and possessions of the United States, including Puerto Rico. *Id.*

³⁵ See EchoStar Reply Comments at 2-3; see also 17 U.S.C. § 122(j)(2)(D), as amended by Section 111(b) of the SHVERA.

³⁶ *Notice*, 20 FCC Rcd at 9326, ¶ 18.

³⁷ See 17 U.S.C. § 122(j)(2) (generally defining local market as "the designated market area in which a station is located" and further defining "designated market area" by reference to determinations by "Nielsen Media Research and published in the 1999-2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates or any successor publication."); 47 U.S.C. § 338(k) (3).

³⁸ See 17 U.S.C. § 122(j)(2)(D), as amended by Section 111(b) of the SHVERA ("Certain areas outside of any designated market area.--Any census area, borough, or other area in the State of Alaska that is outside of a designated market area, as determined by Nielsen Media Research, shall be deemed to be part of one of the local markets in the State of Alaska. A satellite carrier may determine which local market in the State of Alaska will be deemed to be the relevant local market in connection with each subscriber in such census area, borough, or other area."); 47 U.S.C. § 338(k)(3).

10. Satellite carriers do not and are not required to reach all geographic areas that include the possessions and territories of the United States.³⁹ The Commission has recognized that contiguous United States ("CONUS") antenna beams modified to include Puerto Rico and the U.S. Virgin Islands could divert power from other regions and potentially adversely affect the services of other countries.⁴⁰ We acknowledge that EchoStar and a company affiliated with DIRECTV currently provide service to Puerto Rico, including some local stations, and to the U.S. Virgin Islands.⁴¹ No one disputes, however, that service to Guam and other islands in the far Pacific would be outside the range of these companies and that requiring service to islands without television stations and without permanent populations would be absurd.⁴² Based on the serious technical difficulties of serving the territories and possessions, and the fact that the affected satellite carriers have never before served any subscribers in much of these areas, we believe Congress did not have in mind the definition of "state" as set forth in the Communications Act. For all the reasons discussed above, we believe the best reading of the statute, and the one most consistent with Congressional intent, is that section 338(a)(4)'s use of the phrase "State that is not part of the contiguous United States" was not meant to include the noncontiguous territories and possessions, but instead was meant to refer only to the States of Alaska and Hawaii.⁴³

C. Analog and Digital Signals

11. We explained in the *Notice* that the SHVERA requirements for satellite carriage to the noncontiguous states differ significantly from the existing satellite broadcast carriage requirements, both in scope and timing.⁴⁴ Currently, under the Communications Act and Commission rules implementing the Act, satellite carriers choose whether to rely on the statutory copyright license in section 122 of title 17 to offer "local-into-local service," which in turn triggers the carry-one, carry-all obligation.⁴⁵ Satellite

³⁹ Many areas are not visible to all satellites. For example, Guam is below the horizon for United States satellite assignment east of 148° W.L.

⁴⁰ See *Policies and Rules for Direct Broadcast Satellite Service Report and Order*, 17 FCC Rcd 11,368, 11,372 (2002).

⁴¹ See EchoStar Comments at 4; DIRECTV Puerto Rico and DIRECTV Investor Relations General Information, (DIRECTV website showing services offered throughout Puerto Rico by DIRECTV Latin America, an affiliated company in the DIRECTV Group, which includes - DIRECTV U.S. and Latin America), at <http://69.89.230.95/DDefault.aspx?tid=1> and <http://phx.corporateir.net/phoenix.zhtml?c=127160&p=irol-homeprofile>.

⁴² See EchoStar Reply Comments at 3-4 (stating that it is impossible to serve Pacific territories and that the statute contains no proviso to distinguish Puerto Rico from the others); DIRECTV Comments at 9, n. 19 (maintaining that drafters surely never contemplated requiring satellite operators to commence service in places such as Baker Island, Howland Island, Kingman Reef and Navassa Island, all of which are uninhabited, or Jarvis Island, Johnston Atoll, and Palmyra Island, which have tiny temporary populations, although no permanent inhabitants).

⁴³ See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (stating that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available); *Lawson v. Suwanee Fruit & S.S. Co.*, 69 S. Ct. 503 (1949) (Statutory definitions usually control the meaning of statutory words, but not where obvious incongruities in language would be created and major purpose of statute would be destroyed); *Teva Pharm., USA, Inc. v. FDA*, 182 F.3d 1003, 1011 (D.C. Cir. 1999) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)) (asserting that the FDA must interpret that statute to avoid absurd results and further congressional intent).

⁴⁴ *Notice*, 20 FCC Rcd at 9323, ¶ 8.

⁴⁵ See 47 U.S.C. § 338(a)(1) and 47 C.F.R. § 76.66(b); see also *Implementation of the Satellite Home Viewer Improvement Act of 1999*, 16 FCC Rcd 1918 (2000) ("*DBS Must Carry Report and Order*"), 16 FCC Rcd 16544 (2001) ("*DBS Must Carry Reconsideration Order*"). The U.S. Court of Appeals for the Fourth Circuit upheld the constitutional validity of SHVIA and the reasonableness of the Commission's rules promulgated thereunder. See *Satellite Broadcasting and Communications Ass'n v. FCC*, 275 F.3d 337 (2001), *cert. denied*, 536 U.S. 922 (2002).

(continued...)

carriers are not currently required to offer local-into-local service in any market.⁴⁶

12. Section 338(a)(4) supersedes carry-one, carry-all by mandating analog and digital carriage in Alaska and Hawaii. A satellite carrier with more than five million subscribers is now required to retransmit the analog signals of each television station in local markets in Alaska and Hawaii to subscribers in those local markets by December 8, 2005 (one year after enactment of the SHVERA) and to retransmit the digital signals of each station no later than June 8, 2007 (30 months after enactment of SHVERA). We sought comment in the *Notice* on whether the statute unambiguously means that if any or all of the local stations in these states are still broadcasting analog signals as well as digital signals as of June 8, 2007, the SHVERA requirement mandates dual must carry.⁴⁷

13. DIRECTV contends that section 338(a)(4) does not unambiguously require that satellite carriers must continue carrying analog signals after they begin carrying digital signals.⁴⁸ DIRECTV suggests that there are two plausible readings of the text: that satellite carriers must retransmit analog signals either as long as Alaska and Hawaii broadcasters transmit in analog, or until satellite carriers are required to retransmit digital signals. It advocates that latter reading as the wiser policy.⁴⁹ DIRECTV therefore reads section 338(a)(4) to require that satellite carriers replace the analog signals with digital signals in June 2007.⁵⁰ DIRECTV explains that because satellite carriers digitize analog broadcast signals, there is little quality difference between an analog and SD digital signal to the DBS subscriber.⁵¹ Microcom, a satellite distributor and dealer in Alaska, argues that dual carriage is not warranted when a broadcast station is operating both its digital and analog service in a standard definition format because the law requires the content of those two services to be identical.⁵² Microcom, however, is in error as the "simulcasting" requirements were eliminated in our Second DTV Periodic Review last year.⁵³ In contrast, IBC and R y F, representing broadcast stations in Puerto Rico, argue that SHVERA requires satellite carriers to retransmit both the analog and digital signals by the mandated dates.⁵⁴

14. We find that section 338(a)(4) is ambiguous with respect to the question of dual carriage. The statutory provision states that satellite carriers "shall (A) within 1 year after December 8, 2004,

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The Communications Act, moreover, prohibits a multichannel video programming distributor from retransmitting the signal of a broadcast station unless it has "the express authority" of the station. 47 U.S.C. § 325(b)(1)(A). See also 17 U.S.C. § 122(a) (as amended by § 1002 of the SHVIA) and 47 U.S.C. § 338(a)(1) (as amended by § 1008 of the SHVIA).

⁴⁶ The question of satellite carriage obligations concerning a station's digital signal is currently pending before the Commission. See MB Docket Nos. 98-120 and 00-96; see also *WHDT v. Echostar*, 18 FCC Rcd 396 (MB 2003) ("WHDT Order").

⁴⁷ *Notice*, 20 FCC Rcd at 9323-24, ¶ 9. The Communications Act provides for termination of analog signal licenses as of December 31, 2006, unless local stations request an extension and demonstrate that one or more criteria exist in their markets. See 47 U.S.C. § 309(j)(14) (criteria include the so-called "85% test").

⁴⁸ DIRECTV Comments at 20.

⁴⁹ *Id.*

⁵⁰ *Id.* at 21.

⁵¹ See DIRECTV Comments at 20-21.

⁵² Microcom Comments at 1.

⁵³ See *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, Report and Order*, 19 FCC Rcd 18,279, 18,336-37, ¶ 131 (2004) ("Second Periodic R&O").

⁵⁴ IBC & R y F Comments at 2. See also *ex parte* Letter from Alaska Broadcasters Association ("ABA"), MB Docket No. 05-181, at 3 (July 18, 2005) ("ABA Ex Parte").

retransmit the signals originating as analog signals of each television broadcast station located in any local market within a State that is not part of the contiguous United States; and (B) within 30 months after December 8, 2004, retransmit the signals originating as digital signals of each such station.” While this language clearly contains two separate carriage requirements, it is unclear from the text whether Congress intended the analog carriage requirement to continue after commencement of the digital carriage requirement (*i.e.*, simultaneous or dual carriage) or whether it intended the analog requirement to end when the digital requirement takes effect. The statute does not speak directly to the issue,⁵⁵ and there is no legislative history to shed light on what Congress intended. Where the statutory language is ambiguous, we must construe the statute so as to effectuate the legislative purpose and intent.⁵⁶ Here, we agree with DIRECTV that the most reasonable interpretation of section 338(a)(4) is that the analog carriage requirement ends upon commencement of the digital carriage requirement. We therefore conclude that satellite carriers must carry the signals of local stations in Alaska and Hawaii that originate as analog beginning no later than December 8, 2005, and the signals that originate as digital beginning no later than June 8, 2007, but that the analog carriage requirement ends when the digital carriage requirement begins. Based on the record in this proceeding, requiring carriage of both analog and digital signals simultaneously would likely increase the burden on satellite carriers without offering subscribers a substantial benefit. Because satellite carriers digitize analog broadcast signals, there is essentially no difference from a satellite subscriber’s perspective between the analog signal and the standard definition (SD) digital signal broadcast when such signals are carrying the same programming, as is currently the general practice in the industry.⁵⁷ Thus, a dual carriage requirement would often result in a satellite carrier carrying the same programming with essentially the same signal quality twice. Moreover, in light of the requirement to carry multicast signals described below, satellite subscribers will be able to receive multiple digital programming streams offered by local stations, and we do not believe that the remote likelihood that certain programming transmitted by analog signals would not be transmitted by any of a station’s digital signals justifies the burden that a dual carriage requirement would impose on satellite carriers. Therefore, we conclude that simultaneous carriage of both analog and digital signals is not required and would serve no useful purpose in light of our other decisions in this proceeding. We will address other issues related to carriage of digital signals in the context of the proceeding addressing satellite carriage of local stations pursuant to Section 338 as it applies throughout the United States

⁵⁵ See, *e.g.*, *ex parte* Letter from DIRECTV, MB Docket No. 05-181 (filed July 7, 2005) (asserting that the statute is silent as to carriage of the analog signal after carriage of the digital signal commences and noting that in many cases the content of the analog and digital signals would be identical and requiring dual carriage would result in burdening satellite capacity for duplicative programming).

⁵⁶ See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (asserting that if a statute is silent or ambiguous, the question for the court is whether the agency’s interpretation is based on a permissible construction of the statute). The Supreme Court stated, “If Congress has explicitly left a gap for the agency to fill, there is express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 843-44; see also *Nat’l Cable & Telecomm. Assn. v. Brand X Internet Serv.*, 125 S. Ct. 2688, 2699 (2005) (citing *Smiley v. Citibank*, 517 U.S. 735, 742 (1996)) (clarifying that *Chevron* established the presumption that Congress, when it left a statute ambiguous, understood that the ambiguity would be resolved by an agency and desired the agency to possess whatever degree of discretion the ambiguity allowed). The Supreme Court noted that where a statute’s plain terms admit two or more reasonable ordinary usages, the Commission’s choice of one of them is entitled to deference. *Id.* at 2704.

⁵⁷ As DIRECTV explained in its comments, satellite carriers digitize analog broadcast signals; thus, there is little quality difference between an analog and SD digital signal to the DBS subscriber. See DIRECTV Comments at 20-21. See also, *e.g.*, *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 18279, 18336-37, ¶ 130 (2004) (“*Second Periodic R&O*”) (“As MSTV/NAB notes, simulcasting has been the general practice of broadcasters as the transition has progressed.”).

during and after the transition to digital television.⁵⁸

D. Digital Signal Content and Format

15. Section 338(a)(4) requires carriage of “signals originating as analog signals” and “signals originating as digital signals.” We stated in the *Notice* that there is no reference to “primary video” or any other term in section 338(a)(4) that expressly limits or describes the nature, format or content of the broadcast signal that satellite operators must carry in the noncontiguous states.⁵⁹ The *Notice* concluded, therefore, that the amendment requires that satellite carriers carry all multicast signals of each station in noncontiguous states and carry the high definition digital signals of stations in noncontiguous states in high definition format. We also referenced the pending proceeding on satellite carriage of digital signals, in general, and sought comment on our view of the statutory language and any alternative construction of the SHVERA as the statute relates to the carriage of multicast and/or high definition signals.⁶⁰

16. As explained in the *Notice*, we continue to believe that the statutory language requires that satellite carriers carry all multicast signals and high definition (HD) signals of each local broadcast station in the noncontiguous states. We find section 338(a)(4)'s use of the plural term “signals” in requiring carriage of “signals originating as digital signals” to unambiguously mean carriage of the entire free over-the-air digital broadcast, without limitation, being transmitted by a broadcaster. While DIRECTV argues that, because Congress also used the plural term “signals” with respect to analog signals (and there is no analog multicast or analog HD), the phrase “signals of each station” could be interpreted to mean the transmission of a single station's signal over time,⁶¹ we do not believe that this constitutes a reasonable interpretation of the statute. Section 338(a)(4) contains no limitation on the nature of the digital broadcast signal – such as the term “primary video” as used in the cable context – in describing the digital signals the satellite operator must carry in the noncontiguous states. At the time the SHVERA was enacted in December 2004, the Commission had interpreted, in the cable carriage proceeding three years earlier, the term “primary video” in section 614(b)(3) of the Act⁶² to mean “a

⁵⁸ See *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket Nos. 98-120 and 00-96 (pending rulemaking proceeding to determine satellite carriers' obligations with respect to carriage of digital signals pursuant to Section 338),

⁵⁹ *Notice*, 20 FCC Rcd at 9323-24, ¶ 9; see also 47 U.S.C. §§ 338(j), 534(b)(3) and 535(g). The Commission recently concluded that the statutory term relating to cable mandatory carriage, “primary video,” was ambiguous with respect to whether it requires cable operators to carry broadcasters' multicast signals. Faced with an ambiguous statute, the Commission did not require mandatory carriage of multicast signals by cable systems. See *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Second Report and Order and First Order on Reconsideration, FCC 05-27, at ¶ 33 (rel. Feb. 23, 2005) (“*DTV Second Report and Order*”) (declining, based on the record, to require cable operators to carry more than one programming stream of a digital station that multicasts).

⁶⁰ Satellite carriage of high definition and multicast local signals is also under review in the ongoing broadcast carriage rulemaking docket in the context of applying the statutory prohibition on material degradation. See *Implementation of the Satellite Home Viewer Improvement Act of 1999*, 16 FCC Rcd 1918, 1970-72, ¶¶ 120-123 (2000) (“*Report and Order*”); *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, 16 FCC Rcd 2598, 2600, 2658, ¶¶ 3 and 136 (2001) (“*First Report and Order*”). See also *Notice*, 20 FCC Rcd at 9323-24, ¶ 9.

⁶¹ DIRECTV Comments at 14.

⁶² 47 U.S.C. § 534(b)(3) (describing the content to be carried of local commercial television stations); see also 47 U.S.C. § 535(g)(1) (similarly describing the content to be carried of noncommercial stations to include the “primary video”).

single programming stream and other program-related content.”⁶³ Had Congress intended to limit digital carriage to only a single standard definition stream, we believe Congress would have included similar limiting language in the satellite context. Section 338(a)(4), by contrast, contains a broad requirement that satellite carriers retransmit “the signals originating as digital signals.” We also find unconvincing DIRECTV’s reliance on section 338(j)’s general directive that the Commission prescribe requirements on satellite carriers that are “comparable” to the must carry requirements imposed on cable operators.⁶⁴ According to DIRECTV, because cable operators in Alaska and Hawaii are not yet required to carry most digital signals in HD format nor are they required to carry multicast signals, the Commission cannot impose such requirements on satellite carriers in Alaska and Hawaii without running afoul of section 338(j).⁶⁵ We disagree. Under principles of statutory construction, section 338(a)(4)’s specific mandate requiring carriage of “the signals originating as digital signals” in Alaska and Hawaii supercedes the general comparability directive set forth in § 338(j).⁶⁶ Where the statute is clear and unambiguous, we must implement the express meaning of the statutory language.⁶⁷ Requiring carriage of multicast and HD signals most accurately reflects the requirement set forth in the statutory language itself. We decline to read into the statute a limitation where none exists. We believe that section 338(a)(4) requires carriage of Alaska and Hawaii broadcasters’ entire free over the air broadcast, including multicast and HD signals. This decision, however, is limited to section 338(a)(4) and does not interpret any other statutory provision that regulates cable or satellite carriage obligations.

17. Even if we were to find ambiguity in the statutory language, however, we believe, for the reasons given above, that the better reading, and the one that most accurately reflects Congress’s intent, requires satellite carriers to carry all multicast and HD signals. We also reject EchoStar and DIRECTV’s argument that in order to avoid an unconstitutional construction of section 338(a)(4), the Commission must not construe the statute to impose a multicast and HD carriage obligation.⁶⁸ As explained below, we find interpreting section 338(a)(4) as mandating multicast and HD carriage is consistent with the First Amendment. The Supreme Court has held that must carry “is a content-neutral regulation” that must be analyzed under the intermediate level of scrutiny.⁶⁹ Under this test, a content-neutral regulation will be upheld if: (1) it furthers an important or substantial governmental interest; (2) the government interest is unrelated to the suppression of free expression; and (3) the provisions do not burden substantially more speech than is necessary to further those interests.⁷⁰

18. With regard to the first prong of the analysis, we find that the multicast and HD carriage obligation imposed under section 338(a)(4) furthers two important governmental interests. First, it

⁶³ See *First Report and Order and Further Notice*, 16 FCC Rcd 2598, 2622 (Jan. 23, 2001). Shortly after the SHVERA was enacted, the Commission released the *Second Report and Order and First Order on Reconsideration*, 20 FCC Rcd 4516 (Feb. 10, 2005), which further addressed the multicasting and dual carriage issues in the cable context.

⁶⁴ See 47 U.S.C. § 338(j).

⁶⁵ See DIRECTV Comments at 18-19; see also EchoStar Comments at 1 (arguing that a multicast requirement for satellite carriers in the noncontiguous states would be inconsistent with the Commission’s recent digital must carry decision in the cable context).

⁶⁶ See *Shawnee Tribe v. U.S.*, 405 F.3d 1121, 1129 (10th Cir. 2005) (recognizing “fundamental canon of statutory construction that, when there is an apparent conflict between a specific provision and a more general one, the more specific one governs.”).

⁶⁷ See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

⁶⁸ See EchoStar Comments at 6; see also DIRECTV Comments at 15-17.

⁶⁹ *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 186 (1997).

⁷⁰ *Id.* See also *U.S. v. O’Brien*, 391 U.S. 367, 377 (1968).

ensures that the citizens of Alaska have full access to television programming. In enacting section 338(a)(4), we believe Congress recognized the unique situation in Alaska which makes communications services critically important to the public safety, education, and economic development of the state.⁷¹ Alaska has the lowest population density in the country, and communities in rural Alaska are unique in several ways. Most rural Alaskan communities are quite small – almost 90% of Alaskan communities have fewer than 1,000 people; 25% of the communities have between 100 and 250 people; and 29% of the communities have fewer than 100 people.⁷² Most Alaskan communities are also very remote and isolated – most rural communities in Alaska do not have access via road systems to the relatively urban areas of the State (Anchorage, Fairbanks and Juneau), and, indeed, many Alaskan communities can be accessed only by air or by water and are frequently inaccessible because of weather conditions.⁷³ These characteristics taken together significantly limit the communications options available to Alaskan communities. Indeed, Alaska's unique geography when combined with the State's unique population distribution presents many rural Alaskans with serious challenges in obtaining a diverse range of television programming, particularly through over-the-air broadcasting. Moreover, cable service and other forms of multichannel video programming distribution services are often not available to them.⁷⁴ As the Alaska Broadcasters have reported, 23% of Alaskan households are unable to access cable television, and these rural households on average are able to receive only one television station through over-the-air broadcasting.⁷⁵ Service transmitted by satellite is one of the few viable means of transcending these obstacles, and the ability to receive multiple programming streams from local stations through satellite carriers would be the only way that many rural Alaskan households would be able to access these programming streams. Moreover, given the important role that DBS service plays in rural Alaska, unless satellite customers are provided with access to multicasting, there may not be sufficient incentive for Alaskan television stations to develop additional programming streams targeted to the needs and interests of rural communities, thus denying these Alaskans the benefits of the digital transition. We thus believe Congress intended section 338(a)(4) to be interpreted broadly, without limitations, in order to further the important governmental interest of providing the Alaskan community with full access to digital communications.

19. In addition, we find that multicast and HD carriage obligations imposed under section 338(a)(4) further a second important governmental interest of ensuring Alaska and Hawaii an equitable distribution of satellite service. We recognize that section 338(a)(4) is responsive to a long history of more limited DBS service in Alaska and Hawaii than in the lower 48 states. Filings in prior Commission proceedings indicate that, with respect to DBS service, Alaskans had "far fewer choices than other Americans do, often their signal reception is poorer, and the reception equipment required is often much larger."⁷⁶ In Hawaii, the DBS subscriber packages were not comparable to the subscriber packages available in the 48 lower states, particularly in the area of programming.⁷⁷ For example, some of the

⁷¹ See Ex Parte Letter from Robert Halperin, Counsel for the State of Alaska, at 1 (Aug. 24, 2001) ("Halperin Ex Parte in IB Docket No. 98-21") (entered into MB docket 05-181 on July 26, 2005).

⁷² See ABA Ex Parte at 2-3. See also State of Alaska Supplemental Reply Comments, IB Docket No. 98-21, at 3 (filed Jan. 18, 2001) (entered into MB docket 05-181 on July 26, 2005).

⁷³ *Id.* at 4.

⁷⁴ See State of Alaska Comments, CS Docket No. 01-248, at 5 (filed Feb. 4, 2002) (entered into MB docket 05-181 on July 26, 2005).

⁷⁵ See ABA Ex Parte at 3.

⁷⁶ See Ex Parte Letter from Fran Ulmer, Lieutenant Governor of the State of Alaska, IB Docket No. 98-21 (Aug. 13, 1999) ("Ulmer Ex Parte in IB Docket No. 98-21") (entered into MB docket 05-181 on July 26, 2005).

⁷⁷ See DIRECTV Comments at 4, n. 6 (indicating that currently "DIRECTV does not provide Hawaii with several STARZ channels, distant network signals originating from the East Coast, most pay-per-view channels, and so called 'barker' channels previewing other DIRECTV programming" but expecting that each of these channels will become

(continued...)

most popular programming channels – such as CNN, ESPN, Headline News, Discovery Channel – were not offered to subscribers in Hawaii.⁷⁸ The State of Hawaii continues to maintain today that the level of service provided to Hawaiian subscribers remains significantly lower than that provided to subscribers in the lower 48 states.⁷⁹ According to the State of Hawaii, every television market that is larger than Honolulu already receives local-into-local service from DIRECTV and nearly half of the 130 markets that receive local-into-local service from DIRECTV are smaller than Honolulu.⁸⁰ We believe section 338(a)(4) was intended to remedy the situation in the noncontiguous states by providing Alaska and Hawaii with access to all of the programming offered through free over-the-air broadcasts, including all multicast and HD signals. We find that interpreting the statute in this manner best achieves the important governmental interest of making available “to all people of the United States” a “rapid, efficient, *Nation-wide*, and world-wide wire and radio communication service” and of providing “a fair, efficient, and *equitable* distribution of radio services” among the several States.⁸¹

20. With respect to the second prong of the constitutional analysis, we find the Government’s interest in ensuring the citizens of Alaska full access to television programming and the equitable distribution of satellite service are aimed at bringing a more robust communications service to the citizens of Alaska and Hawaii, not at stemming expression. These governmental interests are thus “unrelated to the suppression of free expression.” Indeed, they are aimed at providing the residents of Alaska and Hawaii with access to more information. We therefore find the second prong of the intermediate scrutiny test to be easily satisfied.

21. With respect to the third prong of the analysis, we find that this multicast and HD carriage requirement will not burden substantially more speech than is necessary to further the important governmental interests.⁸² Congress took steps to confine the breadth and burden of the regulation by directing the multicast and HD carriage obligation to apply only in the states of Alaska and Hawaii. The carriage requirement is thus narrowly tailored to serve the important government interests identified above in a direct and effective way. In addition, while DIRECTV makes a number of claims as to the burdensomeness of the regulation, the actual effects of a multicast and HD requirement in the States of Alaska and Hawaii remain unclear. We find speculative DIRECTV’s argument that imposing an HD and multicast carriage requirement for Alaska and Hawaii would place a substantial capacity burden on its system.⁸³ The requirement for carriage of multicast and HD signals does not begin until June 2007. We do not know at this time how many programming streams Alaskan and Hawaiian local broadcast stations will be multicasting in 2007. At this point, for example, no station in Alaska or Hawaii is broadcasting

(...continued from previous page)

available upon commencement of commercial service after the launch of a new satellite); *see also* Ex Parte Letter from Herbert Marks and Bruce Olcott, Counsel to the State of Hawaii, IB Docket No. 98-21 (Jan. 11, 2002) (“Marks/Olcott Ex Parte in IB Docket No. 98-21”) (entered into MB docket 05-181 on July 26, 2005).

⁷⁸ *See* Marks/Olcott Ex Parte in IB Docket No. 98-21 (filed Jan. 11, 2002).

⁷⁹ *See* State of Hawaii Reply Comments at 3.

⁸⁰ *See id.* at 2.

⁸¹ 47 U.S.C. §§ 151, 307(b). (emphasis added); *see also* State of Hawaii Reply Comments at 3.

⁸² Satellite carriage of local digital broadcast signals pursuant to Section 338 as it will apply in the contiguous states, including carriage of HD and multicast signals, is under review in the ongoing broadcast carriage rulemaking docket. *See Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, CS Docket No. 98-120.

⁸³ *See* DIRECTV Comments at 16; *see also* DIRECTV Comments at 17 (indicating the extent of any problem with respect to multicast carriage requirements “would depend on the nature of the programming streams then offered by Alaska and Hawaii broadcasters”).

more than two streams of programming.⁸⁴ Moreover, by the time the multicast and HD carriage requirement would take effect, many of the capacity issues may well be remedied through improvements in satellite technology.

22. In short, we believe that in enacting section 338(a)(4), Congress sought to address the specific communications problems and special needs that exist in the states of Alaska and Hawaii and intended, through expanded satellite carriage, that subscribers in Alaska and Hawaii would be ensured full, not limited, access to the benefits of the digital transition. The multicast and HD carriage requirement furthers these important governmental interests without burdening substantially more speech than necessary and thus satisfies the requirements under the First Amendment. We note, however, that the foregoing analysis interprets Section 338(a)(4) only, and thus does not interpret Sections 614 and 615⁸⁵ or Section 338 with respect to satellite carriage of digital signals throughout the United States.⁸⁶

E. Carriage Elections

23. Section 338(a)(4) leaves implementation of carriage election rules expressly to the Commission's discretion.⁸⁷ Consequently, in the *Notice* we proposed regulations concerning the timing of the carriage elections related to the new carriage requirements in Alaska and Hawaii.⁸⁸ The first satellite carriage cycle (pursuant to the SHVIA) will end on December 31, 2005. The carriage election deadline for the second cycle is October 1, 2005, for carriage beginning January 1, 2006.⁸⁹ As described in the *Notice*, the analog signal carriage requirement for Alaska and Hawaii commences December 8, 2005, which is just a few weeks before the carriage cycle that applies to satellite carriers and broadcast stations in the contiguous states, which commences January 1, 2006, and continues until December 31, 2008.⁹⁰ The carriage election process enables stations to choose between carriage pursuant to retransmission consent or mandatory carriage.⁹¹ If a station elects must-carry status, it is, in general, entitled to insist without other terms that the satellite carrier carry its signal in its local market.⁹²

24. To implement the carriage election timing requirements in Section 210 of the SHVERA, we will track the existing regulations as closely as possible so that carriage elections in Alaska and Hawaii will be synchronized with carriage elections in the contiguous states.⁹³ Because the analog

⁸⁴ See, e.g., www.CheckHD.com (showing one station, each, in Anchorage, Fairbanks, and North Pole, Alaska currently broadcasting two streams and none in Hawaii).

⁸⁵ See 47 U.S.C. §§ 534 and 535. See also *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, 20 FCC Rcd 4516 (2005). Petitions for reconsideration of the *Second Report and Order* are pending before the Commission, and a related appeal has been filed and remains pending with the U.S. Court of Appeals for the District of Columbia Circuit.

⁸⁶ See 47 U.S.C. § 338. See also *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, Further Notice*, CS Docket No. 00-96, 16 FCC Rcd 2598, 2658 (2001)

⁸⁷ 47 U.S.C. § 338(a)(4).

⁸⁸ *Notice*, 20 FCC Rcd at 9324-25, ¶¶ 10-15.

⁸⁹ 47 C.F.R. § 76.66(c)(4).

⁹⁰ *Notice*, 20 FCC Rcd at 9324, ¶ 11; see 47 C.F.R. § 76.66(c).

⁹¹ See 47 U.S.C. § 325(b). Retransmission consent is based on an agreement between a broadcast station and satellite carrier, and includes a station's authorization and terms for allowing its broadcast signal to be carried. Broadcast stations and satellite carriers are required to negotiate retransmission consent agreements in good faith. 47 U.S.C. § 338(b)(3)(c) (*as amended by* Section 207 of the SHVERA).

⁹² 47 U.S.C. § 338(a); see also 47 C.F.R. § 76.66(c).

⁹³ See EchoStar Comments at 7. EchoStar generally agreed it was desirable to track the existing election process to minimize confusion and burden for satellite operators and affected broadcasters. *Id.*

carriage requirement in Alaska and Hawaii takes effect only 24 days before the carriage cycle in the rest of the country, we will use the same carriage election deadline of October 1, 2005. Thus, commercial television broadcast stations in a local market in the noncontiguous states are required to make a retransmission consent-mandatory carriage (must carry) election by October 1, 2005, which is the same deadline for local stations in local-into-local markets in the contiguous states.⁹⁴ No commenter disagreed with this proposal and we adopt rules to implement it now.⁹⁵

25. With respect to carriage of the digital signals of stations in Alaska and Hawaii, the *Notice* proposed that the retransmission consent-must carry election by a station in a local market in Alaska or Hawaii should be a two-step process with one election that applies to the analog signal carriage, which commences December 8, 2005, and a second carriage election that would govern carriage of the digital signal.⁹⁶ Carriage of signals originating as digital must commence by June 8, 2007, but may begin pursuant to retransmission consent at any time. We proposed that the deadline for the second carriage election, for digital carriage, would be April 1, 2007, two months before carriage must commence.⁹⁷ As an alternative, we suggested a one-step process in which the station's election by October 1, 2005, for its analog signal, would also apply to its digital signal, for which mandatory carriage will commence by June 8, 2007.

26. Two commenters, EchoStar and Microcom, favored the one-step approach on the basis of simplicity for satellite carriers and reduced burden for broadcasters.⁹⁸ We believe, however, that the two-step approach better tracks Congress' decision to mandate carriage of analog and digital signals in two separate steps. Two separate elections is also more consistent with the Commission's Cable Must Carry decision in 2001, which permits stations broadcasting both analog and digital signals to elect must carry for their analog signal and retransmission consent for their digital signal.⁹⁹ The two-step approach is also consistent with treating carriage of the digital signal as sequential rather than concurrent with the analog signal. It is important for local stations in Alaska and Hawaii to have a second, separate opportunity to elect between must carry and retransmission consent for their digital signals. We adopt the rule, as proposed in the *Notice*, which establishes the procedures for this two-step carriage election.¹⁰⁰

27. As further described in the *Notice*, after the initial carriage cycle in Alaska and Hawaii (January 1, 2006 through December 31, 2008), the election cycle and carriage election procedures provided in Section 76.66(c) will apply in the future.¹⁰¹ For example, the next carriage election (after the upcoming 2005 election) is required by October 1, 2008, for the carriage cycle beginning January 1, 2009.¹⁰² We received no comments on this point.

28. We also confirm that stations in Alaska and Hawaii should be permitted to elect must carry for their analog signals and negotiate for carriage of the digital signals via retransmission consent

⁹⁴ See amended section 76.66(c)(6) in Appendix B.

⁹⁵ See amended rule section 76.66(c)(6) in Appendix B.

⁹⁶ *Notice*, 20 FCC Rcd at 9325, ¶ 13.

⁹⁷ *Id.*

⁹⁸ See EchoStar Comments at 8; Microcom Comments at 2.

⁹⁹ See *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, etc.*, 16 FCC Rcd 2598, 2610 (2001) ("*DTV Carriage First Report and Order*").

¹⁰⁰ See amended rule section 76.66(c)(6) in Appendix B.

¹⁰¹ *Notice*, 20 FCC Rcd at 9325, ¶ 14.

¹⁰² See 47 C.F.R. § 76.66(c)(2) and (4).

before the mandatory digital signal carriage takes effect.¹⁰³ We received no comments on this point. Therefore, prior to June 8, 2007, when the mandatory digital carriage rights for local stations in Alaska and Hawaii take effect, such stations may separately negotiate for voluntary carriage of their digital signals even if they elect mandatory carriage for their analog signals.¹⁰⁴ This flexibility is also consistent with the approach generally taken in the digital carriage rulemaking proceeding thus far.¹⁰⁵

29. We also described in the *Notice* that new television stations in Alaska or Hawaii should follow Section 76.66(d)(3) of the Commission's rules to notify the satellite carrier and elect carriage.¹⁰⁶ Based on Section 338(a)(4), a new station in Alaska or Hawaii will have a right to mandatory carriage for its analog signal if it begins service after December 8, 2005, and for its digital signal if it begins service after June 8, 2007. The existing rule describes the procedures and timing for requesting and obtaining carriage; thus, no rule amendments are needed.¹⁰⁷ We received no comments on this issue, except that EchoStar asked that we clarify that stations that commence digital service after March 1, 2007¹⁰⁸ be required to comply with the Commission's rules for new stations.¹⁰⁹ We provide that clarification here: new television broadcast stations in Alaska and Hawaii should follow the new station rule in 76.66(d)(3) to notify satellite carriers and elect must carry or retransmission consent for their analog and digital signals.

F. Procedures for Carriage

30. The *Notice* provided that in all other respects related to the mechanics of carriage, other than the carriage election cycle, we would apply the existing rules pertaining to satellite carriage as they were adopted to implement Section 338 pursuant to the SHVIA.¹¹⁰ We received no comments with respect to the mechanics for carriage and application of the existing rules. Therefore, our amended rules provide that carriage may be requested by television broadcast stations in local markets in Alaska and Hawaii effective December 8, 2005 for analog signals, and June 7, 2007 for digital signals.¹¹¹ The carriage procedures for stations in Alaska and Hawaii shall follow the existing requirements, except with respect to the carriage election process, as described herein.¹¹²

G. Availability of Signals

31. Section 338(a)(4) provides that satellite retransmissions of local stations in Alaska and Hawaii "shall be made available to substantially all of the satellite carrier's subscribers in each station's

¹⁰³ *Notice*, 20 FCC Rcd at 9325, ¶ 13.

¹⁰⁴ See amended section 76.66(c)(6) in Appendix B.

¹⁰⁵ See *DTV Carriage First Report and Order*, 16 FCC Rcd at 2610.

¹⁰⁶ *Notice*, 20 FCC Rcd at 9325, ¶ 15; see 47 C.F.R. § 76.66(d)(3).

¹⁰⁷ See 47 C.F.R. § 76.66(d)(3)(ii)-(iv).

¹⁰⁸ This date was related to the proposed special notification rules, which are discussed, *infra*.

¹⁰⁹ EchoStar Comments at 8.

¹¹⁰ *Notice*, 20 FCC Rcd at 9324, ¶ 10; see also 47 U.S.C. § 338(a)(1), (b)(1), and (c); 47 C.F.R. § 76.66(g) and (h). As noted in the *Notice*, Section 338(a)(4) also refers to the "cost to subscribers of such transmissions" but does not require rules for implementation. *Notice*, 20 FCC Rcd at 9324, n. 34.

¹¹¹ See amended rule section 76.66(b)(2) in Appendix B.

¹¹² See amended rule section 76.66(c)(6) in Appendix B. Non-commercial television stations do not elect carriage because they cannot elect retransmission consent. See 47 U.S.C. § 325(b)(2)(A). They are entitled to mandatory carriage. See 47 U.S.C. § 338.

local market."¹¹³ The provision did not define "substantially all" subscribers, and we sought comment on its meaning in this context.¹¹⁴ Given that the statute refers to "subscribers," obviously it is not referring to parts of the state that the carrier cannot reach at all. Rather, as the *Notice* pointed out, this wording is consistent with the physical limitations of some satellite technology that may not be able to reach all parts of a state or a DMA where a spot beam is used to provide local stations.¹¹⁵ EchoStar agrees with our interpretation, noting that the existing geographic service rules apply to both Alaska and Hawaii and provide well-established parameters for service offerings.¹¹⁶ Microcom asserts that, at a minimum, "substantially all" should be defined as those that could be served by a satellite providing primary services within the engineering constraints of the primary or spot beams.¹¹⁷

32. We believe that this statutory provision recognizes the existing physical limitations on satellite service, particularly in these noncontiguous states. With respect to DBS service to Alaska, for example, the Commission has stated that although reliable service usually requires a minimum elevation angle of ten degrees or more, service to Alaska is often offered at elevation angles as low as five degrees.¹¹⁸ In addition, the Commission determined that in some areas of Alaska, from some orbital locations, the elevation angle was less than five degrees, or even below the horizon, thereby making service to those areas impossible.¹¹⁹ Microcom asserts that no location in Alaska has an elevation angle less than 10 degrees to the DBS orbital locations at 148 and 157 degrees West Longitude and proposes that carriers that use these orbital locations to provide local-into-local service to local markets on the west coast could do the same to provide the local stations in one or more of the Alaska DMAs, as well as to serve parts of Alaska not in a DMA.¹²⁰ We are inclined to agree with Microcom that satellite carriers that have these orbital slots and can serve these areas should do so, and we note that satellite carriers must abide by the geographic service rules that require service where technically feasible.¹²¹

33. In the *Notice* we said it is not necessary to adopt new rules to implement this provision and noted that this provision is similar to the Commission interpretation adopted in the implementation of the SHVIA, that satellite carriers that offer local-into-local service are not required to provide service to every subscriber in a DMA.¹²² Only EchoStar commented and agreed that no special rules were necessary on this point.¹²³

¹¹³ 47 U.S.C. § 338(a)(4) (as amended by § 210 of the SHVERA).

¹¹⁴ *Notice*, 20 FCC Rcd at 9326, ¶ 16.

¹¹⁵ *Id.*

¹¹⁶ EchoStar Comments at 6-7.

¹¹⁷ Microcom Comments at 2.

¹¹⁸ See *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11,331, 11,358-59 (2002). The Commission defined elevation angle "as the upward tilt of an earth station antenna measured in degrees relative to the horizontal plane (ground), that is required to aim the earth station antenna at the satellite. When aimed at the horizon, the elevation angle is zero. If the satellite were below the horizon, the elevation angle would be less than zero. If the earth station antenna were tilted to a point directly overhead, it would have an elevation angle of 90°." *Id.*

¹¹⁹ For example, the elevation angle for Attu Island, Alaska is less than zero or below the horizon for the 61.5°, 101°, and 110° orbit locations and only 4 for the 119° location.

¹²⁰ Microcom Comments at 2; see also *infra* discussion of areas outside local markets.

¹²¹ See *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd at 11,358-62.

¹²² *Notice*, 20 FCC Rcd at 9326, ¶ 17; see also *Implementation of the Satellite Home Viewer Improvement Act of 1999, Report and Order*, 16 FCC Rcd 1918, 1937-38 (2000).

¹²³ EchoStar Comments at 7.

H. Areas Outside Local Markets

34. As described above, Alaska is the only one of the fifty states that has areas that are not included within any DMA.¹²⁴ Section 338(a)(4) requires a satellite carrier in Alaska to make available the signals of all the local television stations that it carries in at least one local market to substantially all of its subscribers in areas outside of local markets who are in the same state.¹²⁵ Congress also modified the copyright provisions of title 17 to include these areas of Alaska that are outside of all DMAs within the definition of "local market" as it pertains to the statutory copyright license for carriage of local stations.¹²⁶ In Alaska, there are three DMAs covering the main population centers, but most of the state, which is sparsely populated, is not included in a DMA.¹²⁷ Thus, a satellite carrier in Alaska will be required to provide the television stations that it carries in at least one of the three DMAs, in which carriage of local stations is required by Section 338(a)(4), to areas of the State not included in DMAs. In the *Notice* we said that we believe the statute speaks for itself and that no special rule is required to implement this statutory requirement.¹²⁸

35. No commenter disputed that the statutory language is largely self-effectuating, but Microcom recommended that the Commission allow subscribers that are outside all DMAs to subscribe to any local package that they are technically capable of receiving.¹²⁹ DIRECTV contends that Section 338(a)(4) does not contemplate giving subscribers this option and that the SHVERA leaves the choice of which package to offer to the satellite carrier.¹³⁰ DIRECTV explains that it could not comply with a rule that allowed subscribers outside of DMAs to choose which DMA package of local signals they want due to limitations in the set top box based upon the "market ID" that DIRECTV assigns to each local market. The market ID is critical to the operation of DIRECTV's billing and customer service system, which cannot function with differing choices of local market packages within a given zip code or county.¹³¹ We agree that the statute does not require that the choice of local package rest with the individual subscriber, and, therefore, it is unnecessary to require a satellite carrier to reconfigure its operations to afford this choice. Moreover, the statutory copyright license in Section 122 of title 17 specifies that: "A satellite carrier may determine which local market in the State of Alaska will be deemed to be the relevant local market in connection with each subscriber in such census area, borough, or other area."¹³² We note, too, that DIRECTV has committed to working with local officials in Alaska to identify the appropriate local market to offer to Alaska subscribers who are not in a DMA.¹³³ A satellite carrier that wishes to offer subscribers their choice of Alaska DMA package, however, is free to do so, as the statutory language neither compels nor forbids this approach.

36. Microcom also raises a separate issue concerning signal availability, which is related to

¹²⁴ See Nielsen Station Directory and Nielsen Station Index United States Television Household Estimates (2004-5 ed.).

¹²⁵ 47 U.S.C. § 338(a)(4), as amended by § 210 of SHVERA.

¹²⁶ See 17 U.S.C. § 122(j)(2)(D) as amended by Section 111(b) of the SHVERA.

¹²⁷ See Nielsen Station Directory and Nielsen Station Index United States Television Household Estimates (2004-5 ed.); Television and Cable Factbook 2005 (Warren Communications) A-73.

¹²⁸ *Notice*, 20 FCC Rcd at 9326-27, ¶ 18.

¹²⁹ Microcom Comments at 3; see also ABA Ex Parte in MB Docket No. 05-181, at 3 (filed July 18, 2005).

¹³⁰ DIRECTV Reply Comments at 1-2.

¹³¹ See *id.* at 2-3.

¹³² See 17 U.S.C. § 122(j)(2)(D) as amended by Section 111(b) of the SHVERA.

¹³³ DIRECTV Reply Comments at 1.

the revisions to the distant signal statutory copyright license, as revised by the SHVERA in conjunction with local signal availability pursuant to Section 338(a)(4). Section 119(a)(16) of title 17 provides that the statutory copyright license for satellite retransmission of distant signals shall not apply with respect to satellite retransmission of a network station located outside of the State of Alaska to any subscriber in Alaska if a television station located in Alaska is made available by the satellite carrier pursuant to section 122.¹³⁴ Microcom asks that we define when a signal is made "available" for this purpose and to consider the cost to a subscriber to obtain the equipment to access the local signal package.¹³⁵ We did not raise this question in the *Notice*, as it applies specifically to eligibility for distant signals. We note, however, that the statute defines "available," as it pertains to the copyright license in Section 119, to mean that the station is available if the satellite carrier offers that local station to other subscribers who reside in the same zip code as the subscriber in question.¹³⁶ Thus, we cannot agree with Microcom's proposal to determine availability based on the cost of equipment to receive the local station package.¹³⁷

37. The rules governing satellite carriage of local stations that were adopted to implement the SHVIA define "local market" based upon the copyright definition cited in Section 338.¹³⁸ Accordingly, we amend our rule section to track the revised definition of local market in Section 122 of title 17 to reflect the revisions related to areas of Alaska outside of all DMAs.¹³⁹

I. Notification by Satellite Carrier

38. In the *Notice* we sought comment on a proposal to require special satellite carrier notifications to local stations in connection with the new carriage requirements in Alaska and Hawaii, although Section 338(a)(4) does not require such notification.¹⁴⁰ We proposed two special notifications: the first for the forthcoming carriage election for analog signals, and the second for carriage of digital signals in 2007.¹⁴¹ We received no comments on this proposal.¹⁴² We conclude that it is unnecessary to establish a special notification procedure for the upcoming carriage election with respect to analog signal carriage. Moreover, there is inadequate time to adopt such a provision and make it effective in time to be

¹³⁴ See 17 U.S.C. § 119(a)(16)(A) as amended by Section 111 of the SHVERA. Section 119(a)(16)(B) limits the restriction in (A) if the distant signal is a digital signal and no television station licensed to a community in Alaska and affiliated with the same network is transmitting a digital signal. See also, 17 U.S.C. § 122(j)(2)(D) as amended by Section 111(b) of the SHVERA, which amends the definition of "local" and thereby creates the copyright license for the areas in Alaska that are outside of a DMA: "Any census area, borough, or other area in the State of Alaska that is outside of a designated market area, as determined by Nielsen Media Research, shall be deemed to be part of one of the local markets in the State of Alaska. A satellite carrier may determine which local market in the State of Alaska will be deemed to be the relevant local market in connection with each subscriber in such census area, borough, or other area."

¹³⁵ Microcom Comments at 2. In ex parte comments, the ABA also objects to hardware costs of \$200-300 for dish antennas to receive local signals. ABA Ex Parte in MB Docket No. 05-181, at 4 (filed July 18, 2005).

¹³⁶ See 17 U.S.C. § 119(a)(4)(G) as amended by Section 103 of the SHVERA; see also 47 U.S.C. § 339(a)(2)(H) as amended by Section 204 of the SHVERA, which is substantially the same definition.

¹³⁷ Microcom Comments at 3. Microcom also asks the Commission to address questions pertaining to "commercial retransmission consent" for commercial establishments in Alaska that are not within a DMA. *Id.* This issue is not within the scope of this proceeding, which is limited to implementation of Section 338(a)(4).

¹³⁸ See 47 U.S.C. § 338(k)(3) (formerly (h)(3)); see also 47 C.F.R. § 76.66(e).

¹³⁹ See adopted section 76.66(e)(2) and (3) in Appendix B.

¹⁴⁰ *Notice*, 20 FCC Rcd at 9327, ¶ 19.

¹⁴¹ *Id.*

¹⁴² EchoStar referred to the notification proposal in connection with its request for clarification concerning new stations. See *supra* ¶ 30 and note 116.

meaningful for the analog carriage election deadline adopted in this Order.¹⁴³ We note that EchoStar currently provides local-into-local service in the Honolulu and Anchorage DMAs, assuring that the stations in those markets are aware that they should make carriage elections no later than October 1, 2005 to ensure continued carriage. With respect to the other local markets in Alaska and Hawaii, if satellite carriers follow the existing rule for initiating local service, the notifications, elections, and carriage would come too late to satisfy the statutory requirement of commencing carriage of analog signals by December 8, 2005.¹⁴⁴ We will instead rely on the publication of this Order and the existing carriage election deadline to assure that stations in Alaska and Hawaii receive adequate notice for the October 1, 2005 carriage election deadline.

39. We will adopt the second notification requirement to ensure that local stations in Alaska and Hawaii are reminded of their digital carriage rights commencing in June 2007. We will require satellite carriers with more than 5 million subscribers to notify all television broadcast stations located in local markets in Alaska and Hawaii that they are entitled to carriage of their digital signals as of June 8, 2007, and that they must elect mandatory carriage or retransmission consent by April 1, 2007, to be assured of carriage, as provided in Sections 76.66(b)(2) and (c)(6). This notification will be required by March 1, 2007, with respect to the carriage election for digital signals.¹⁴⁵

40. As further described in the *Notice*, a new satellite carrier that meets the definition in Section 338(a)(4) in the future will be required to comply with Section 76.66(d)(2) of the Commission's rules regarding "new local-into-local service" (imposes requirements when a new satellite carrier intends to retransmit a local television station back into its local market).¹⁴⁶

IV. PROCEDURAL MATTERS

41. *Accessibility Information.* To request this *Report and Order* or other materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty). This document can also be downloaded in Word and Portable Document Format (PDF) at: <http://www.fcc.gov>.

42. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office (GAO) pursuant to the Congressional Review Act, see U.S.C. 801(a)(1)(A).

A. Final Regulatory Flexibility Certification [to be revised per OCBO]

43. The Regulatory Flexibility Act of 1980, as amended (RFA),¹⁴⁷ requires a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency

¹⁴³ The deadline for stations to make carriage elections is October 1, 2005, for the carriage cycle that commences January 1, 2006, and that will govern carriage for local stations' analog signals in Alaska and Hawaii beginning December 8, 2005. Thus, satellite carriers would have to send the proposed 30 day notification before September 1, which would require Federal Register publication of this Order no later than August 1, 2005.

¹⁴⁴ See 47 C.F.R. § 76.66(d)(2) (Requires 60 day notice prior to commencing service in a new market, gives stations 30 days to elect carriage, requires carriage to commence 90 days later).

¹⁴⁵ See adopted section 76.66(d)(2)(iii) in Appendix B. The amended rule provides for carriage requests from both commercial and noncommercial television broadcast stations.

¹⁴⁶ *Notice*, 20 FCC Rcd at 9327, ¶ 19; 47 C.F.R. § 76.66(d)(2).

¹⁴⁷ The RFA, see 5 U.S.C. §§ 601 - 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."¹⁴⁸ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹⁴⁹ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹⁵⁰ A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹⁵¹

44. We are amending Section 76.66 of the Commission's rules as required by Section 210 of the SHVERA. We expect these rule amendments will not have a significant economic impact on a substantial number of small entities. The rules are required by statute and will allow for local television stations to elect carriage pursuant to retransmission consent or mandatory carriage with respect to satellite carriers with more than 5 million subscribers in a non-contiguous state. "Satellite carriers," including Direct Broadcast Satellite (DBS) carriers, will be directly and primarily affected by the rules.

45. The satellite carriers covered by these rules are governed by the SBA-recognized small business size standard of Cable and Other Program Distribution.¹⁵² This size standard provides that a small entity is one with \$12.5 million or less in annual receipts.¹⁵³ The two satellite carriers that are subject to these rule amendments because they currently have more than five million subscribers, DIRECTV¹⁵⁴ and EchoStar,¹⁵⁵ report annual revenues that are in excess of the threshold for a small business. We anticipate that any satellite carrier that, in the future, has more than five million subscribers would necessarily have more than \$12.5 million in annual receipts. Thus, the entities directly affected by the proposed rules are not small entities.

46. We also note that, in addition to satellite carriers, television broadcast stations are indirectly affected by the amended rule in that they potentially benefit from the satellite carriage required by the rule and must elect between mandatory carriage and retransmission consent. This carriage election, however, follows the existing Commission rules. These existing rules currently permit stations in Alaska and Hawaii to elect carriage if and when a satellite carrier offers local-into-local service in their market. The amended rules affect these election rights by merely providing a date certain for carriage in these specified markets, and this change does not amount to a significant economic impact.

47. Therefore, we certify that the adopted rules will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of this Report and Order,

¹⁴⁸ 5 U.S.C. § 605(b).

¹⁴⁹ 5 U.S.C. § 601(6).

¹⁵⁰ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

¹⁵¹ 15 U.S.C. § 632.

¹⁵² 13 C.F.R. § 121.201, NAICS code 517510.

¹⁵³ *Id.*

¹⁵⁴ DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 13.04 million subscribers nationwide; *see* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Eleventh Annual Report*, FCC 05-13, ¶ 55 (rel. Feb. 4, 2005) ("*2005 Cable Competition Report*").

¹⁵⁵ EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and the fourth largest MVPD, serving an estimated 10.12 million subscribers nationwide. *2005 Cable Competition Report*.

including a copy of this Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the SBA.¹⁵⁶ This certification will also be published in the Federal Register.¹⁵⁷

B. Final Paperwork Reduction Act of 1995 Analysis

48. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA),¹⁵⁸ Public Law 104-13. The Commission received approval for the information collection requirements contained in this Order from the Office of Management and Budget on June 14, 2005. There have been no changes to the information collection requirements since receiving OMB approval. In addition, we note that there is no new or modified "information burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* U.S.C. 3506(c)(4). As described in the Final Regulatory Flexibility Certification, *supra*, the businesses affected by our action are not small.

49. *Further Information.* For additional information concerning the PRA information collection requirements contained in this Order, contact Cathy Williams at 202-418-2918, or via the Internet to Cathy.Williams@fcc.gov.

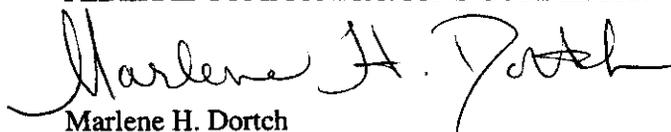
50. *Additional Information.* For additional information on this proceeding, contact Eloise Gore, Eloise.Gore@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

V. ORDERING CLAUSES

51. Accordingly, **IT IS ORDERED** that pursuant to Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, and Sections 1, 4(i) and (j), and 338(a)(4) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), and 338(a)(4), that this Report and Order **IS ADOPTED** and the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix B, and shall become effective 30 days after publication in the Federal Register.

52. **IT IS FURTHER ORDERED** that the Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Report and Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

¹⁵⁶ 5 U.S.C. § 605(b).

¹⁵⁷ 5 U.S.C. § 605(b).

¹⁵⁸ The Paperwork Reduction Act of 1995 ("PRA"), Pub. L. No. 104-13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

Appendix A

Comments

DIRECTV, Inc.

EchoStar Satellite L.L.C.

Encuentro Christian Network and Eastern Television Corporation

International Broadcasting Corporation and R y F Television, Inc.

Microcom

Reply Comments

DIRECTV, Inc.

EchoStar Satellite L.L.C.

State of Hawaii

International Broadcasting Corporation and R y F Television, Inc.

Microcom

APPENDIX B

Amended Rules

Part 76 of title 47 of the Code of Federal Regulations is amended to read as follows:

Revise Part 76, Subpart D, Section 76.66, to replace paragraph 76.66(b)(2), amend paragraphs (c)(4) and (e)(2) and (3), and add new paragraphs (c)(6) and (d)(2)(iii) as follows:

Subpart D – Carriage of Television Broadcast Signals**§76.66 Satellite broadcast signal carriage**

(b) Signal carriage obligations.

(1) Each satellite carrier providing, under section 122 of title 17, United States Code, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station, shall carry upon request the signals of all television broadcast stations located within that local market, subject to section 325(b) of title 47, United States Code, and other paragraphs in this section.

(2) A satellite carrier that offers multichannel video programming distribution service in the United States to more than 5,000,000 subscribers shall, no later than December 8, 2005, carry upon request the signal originating as an analog signal of each television broadcast station that is located in a local market in Alaska or Hawaii; and shall, no later than June 8, 2007, carry upon request the signals originating as digital signals of each television broadcast station that is located in a local market in Alaska or Hawaii. Such satellite carrier is not required to carry the signal originating as analog after commencing carriage of digital signals on June 8, 2007. Carriage of signals originating as digital signals of each television broadcast station that is located in a local market in Alaska or Hawaii shall include the entire free over-the-air signal, including multicast and high definition digital signals.

~~No satellite carrier shall be required to carry local television broadcast stations, pursuant to this section, until January 1, 2002.~~

(c) Election cycle. In television markets where a satellite carrier is providing local-into-local service, a commercial television broadcast station may elect either retransmission consent, pursuant to section 325 of title 47 United States Code, or mandatory carriage, pursuant to section 338, title 47 United States Code.

(1) The first retransmission consent-mandatory carriage election cycle shall be for a four-year period commencing on January 1, 2002 and ending December 31, 2005.

(2) The second retransmission consent-mandatory carriage election cycle, and all cycles thereafter, shall be for a period of three years (e.g. the second election cycle commences on January 1, 2006 and ends at midnight on December 31, 2008).

(3) A commercial television station must notify a satellite carrier, by July 1, 2001, of its retransmission consent-mandatory carriage election for the first election cycle commencing January 1, 2002.

(4) Except as provided in paragraphs (c)(6), (d)(2) and (d)(3) of this section, local commercial television broadcast stations shall 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.

(5) A noncommercial television station must request carriage by July 1, 2001 for the first election cycle and must renew its carriage request at the same time a commercial television station must make its retransmission consent-mandatory carriage election for all subsequent cycles.

(6) A commercial television broadcast station located in a local market in Alaska or Hawaii shall make its retransmission consent-mandatory carriage election by October 1, 2005, for carriage of its signal that originates as an analog signal for carriage commencing on December 8, 2005, and by April 1, 2007, for its signal that originates as a digital signal for carriage commencing on June 8, 2007 and ending on December 31, 2008. For analog and digital signal carriage cycles commencing after December 31, 2008, such stations shall follow the election cycle in paragraphs (c)(2) and (4). A noncommercial television broadcast station located in a local market in Alaska or Hawaii must request carriage by October 1, 2005, for carriage of its signal that originates as an analog signal for carriage commencing on December 8, 2005, and for its signal that originates as a digital signal for carriage commencing on June 8, 2007 and ending on December 31, 2008.

(d)(2) [as previously amended by the SHVERA Procedural Rules rulemaking] *New local-into-local service.* (i) A new satellite carrier or a satellite carrier providing local service in a market for the first time after July 1, 2001, shall inform each television broadcast station licensee within any local market in which a satellite carrier proposes to commence carriage of signals of stations from that market, not later than 60 days prior to the commencement of such carriage:

- (A) of the carrier's intention to launch local-into-local service under section 338 of title 47, United States Code, in a local market, the identity of that local market, and the location of the carrier's proposed local receive facility for that local market;
- (B) of the right of such licensee to elect carriage under this section or grant retransmission consent under section 325(b) of title 47, United States Code;
- (C) that such licensee has 30 days from the date of the receipt of such notice to make such election; and
- (D) that failure to make such election will result in the loss of the right to demand carriage under section 338 for the remainder of the 3-year cycle of carriage under section 325.

(ii) Satellite carriers shall transmit the notices required by paragraph (d)(2)(i) of this section via certified mail to the address for such television station licensee listed in the consolidated database system maintained by the Commission.

(iii) A satellite carrier with more than five million subscribers shall provide the notice as required by paragraphs (i) and (ii) to each television broadcast station located in a local market in Alaska or Hawaii, not later than March 1, 2007 with respect to carriage of digital signals; provided, further, that the notice shall also describe the carriage requirements pursuant to section 338(a)(4) of title 47, United States Code, and paragraph (b)(2) of this rule section.

(e) Market definitions.

- (1) A local market, in the case of both commercial and noncommercial television broadcast

stations, is the designated market area in which a station is located, and

- (i) In the case of a commercial television broadcast station, all commercial television broadcast stations licensed to a community within the same designated market area within the same local market; and
- (ii) In the case of a noncommercial educational television broadcast station, the market includes any station that is licensed to a community within the same designated market area as the noncommercial educational television broadcast station.

(2) A designated market area is the market area, as determined by Nielsen Media Research and published in the 1999–2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates or any successor publication. **In the case of areas outside of any designated market area, any census area, borough, or other area in the State of Alaska that is outside of a designated market area, as determined by Nielsen Media Research, shall be deemed to be part of one of the local markets in the State of Alaska.**

(3) A satellite carrier shall use the 1999–2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates to define television markets for the first retransmission consent-mandatory carriage election cycle commencing on January 1, 2002 and ending on December 31, 2005. The 2003–2004 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates shall be used for the second retransmission consent-mandatory carriage election cycle commencing January 1, 2006 and ending December 31, 2008, and so forth for each triennial election pursuant to this section. Provided, however, that a county deleted from a market by Nielsen need not be subtracted from a market in which a satellite carrier provides local-into-local service, if that county is assigned to that market in the 1999–2000 Nielsen Station Index Directory or any subsequent issue of that publication. **A satellite carrier may determine which local market in the State of Alaska will be deemed to be the relevant local market in connection with each subscriber in an area in the State of Alaska that is outside of a designated market, as described in section (e)(2).**

* * * * *