

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

In the Matter of:

**CARRIAGE OF DIGITAL TELEVISION BROADCAST
SIGNALS: AMENDMENT TO PART 76 OF THE
COMMISSION'S RULES**

**IMPLEMENTATION OF THE SATELLITE HOME
VIEWER IMPROVEMENT ACT OF 1999: LOCAL
BROADCAST SIGNAL CARRIAGE ISSUES AND
RETRANSMISSION CONSENT ISSUES**

CS Docket No. 00-96
CSR-5978-M

**COMMENTS OF DIRECTV, INC. IN RESPONSE TO
SECOND FURTHER NOTICE OF PROPOSED RULEMAKING**

In this proceeding, the Commission recently adopted a new requirement for satellite carriage of local broadcast signals in high definition (“HD”) format.¹ It is now considering whether to impose an additional requirement that satellite operators carry all local broadcast stations in both HD and standard definition (“SD”) format if the signals of any local station in the same market are carried in both HD and SD. DIRECTV, Inc. (“DIRECTV”) believes that such a dual carriage requirement would impose an inordinate burden on satellite carriers, preempting carriage of other programming and mandating an extremely inefficient use of valuable spectrum resources. The Commission should not adopt such a constitutionally suspect regime.

¹ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues and Retransmission Consent Issues*, 23 FCC Rcd. 5351 (2008) (“*SFNPRM*”).

BACKGROUND

Less than two months ago, the Commission once again confirmed the “serious technical difficulties” faced by satellite carriers in retransmitting the signals of thousands of local broadcast stations throughout the country.² It found that “the capacity used for local channels is separate from the capacity used for national channels and the two are generally not interchangeable.”³ It “recognize[d] that satellite carriers face unique capacity, uplink, and ground facility construction issues” in connection with offering local service.⁴ It noted that, if faced with onerous carriage requirements, satellite carriers might be “forced to drop other programming, including broadcast stations now carried in HD pursuant to retransmission consent, in order to free capacity,” or might be “inhibited from adding new local-into-local markets.”⁵ Thus, the Commission recognized that it had a duty to “implement[] the statutory [broadcast carriage] requirements in light of the severe technical limitations faced by satellite carriers.”⁶

The Commission has thus repeatedly acknowledged the indisputable fact that mandatory carriage requirements have more severe consequences for satellite carriers and their subscribers than for cable operators and their subscribers.⁷ The Commission found that cable carriage requirements have little appreciable impact on the cable business.⁸

² *SFNPRM*, ¶ 8.

³ *Id.*, ¶ 11.

⁴ *Id.*, ¶ 7.

⁵ *Id.*, ¶ 8 (citations omitted).

⁶ *Id.*

⁷ *Id.*, ¶ 9.

⁸ *See, e.g., Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, 22 FCC Rcd. 21064, ¶ 69 (2007) (“Given that the cable channels devoted to the mandatory carriage of commercial broadcast signals is capped at one-third of the cable system’s usable

But as satellite carriage requirements increase within a particular market, the number of markets that can be served (or served in HD format) under the “carry one, carry all” rule necessarily decreases.⁹

And yet, in the face of these unique capacity constraints, the Commission has recently endorsed a host of *new* satellite carriage requirements. First among these is the requirement to implement HD carry-one, carry-all within four years of the digital transition.¹⁰ On top of HD carry-one, carry-all, the Commission has also stated that satellite delivery of local broadcast channels into all 210 markets nationwide would be in the public interest.¹¹ Were Congress ever to enact such a sweeping requirement DIRECTV would have to allocate yet more of its limited capacity to carriage of local stations, assuming it could comply at all.

Now the Commission asks whether satellite carriers must “carry the signals of *all* local broadcast stations in HD and SD if they carry the signals of *any* local station in the same market in both HD and SD.”¹² (A proposal by Rancho Palos Verdes is even stricter: DIRECTV would simply have to offer SD service in all markets, even if it otherwise would not carry the signals of any local station in SD format.¹³)

capacity and in practice is likely to be significantly less than one-third, we find the economic burden on cable operators to be modest.”) (“*Cable Dual Carriage Order*”).

⁹ 47 U.S.C. § 338(a)(1).

¹⁰ *SFNPRM*, ¶ 7. This schedule, of course, is one proposed by the satellite industry, as informed by current carriage requirements.

¹¹ *Id.*, ¶ 14 (concluding that “expanded satellite-delivered local-into-local service in all 210 television markets would serve the public interest”).

¹² *Id.*, ¶ 22 (emphasis in original).

¹³ *See id.* (seeking comment on whether satellite carriers have an obligation “to provide *all subscribers* in a local-into-local market with the ability to view all stations carried pursuant to carry-one, carry-all requirements” (emphasis added)).

This proposal appears to be based on a rule adopted last year requiring most cable operators to carry both the analog and digital versions of broadcast signals for a period of three years.¹⁴ The cable rule relied upon a statute that the Commission recognizes does not apply to satellite operators.¹⁵ The Commission, moreover, issued that rule after determining that it would not impose a significant burden on cable operators or their customers, in part because cable operators need devote no more than one third of their capacity to broadcast carriage.¹⁶ No similar limit applies to satellite operators. Indeed, DIRECTV already devotes nearly half of its capacity to the carriage of broadcast signals.¹⁷

DISCUSSION

I. The Proposed Satellite Dual Carriage Requirement Will Hinder the Rollout of Services that Subscribers Desire.

Since launching satellite multichannel video service over a decade ago, DIRECTV has provided its subscribers with all-digital service. This all-digital architecture is very different from that of cable television, which began as an analog service and is only slowly migrating toward digital technology. As part of its all-digital programming, DIRECTV retransmits the signals of local broadcast stations.¹⁸ Moreover, DIRECTV's HD equipment is capable of downconverting signals for display on analog

¹⁴ *Cable Dual Carriage Order*, ¶ 16. This requirement would not apply to cable operators with “all-digital” systems. *Id.*, ¶ 15.

¹⁵ *SFNPRM*, ¶ 24 (declaring that the “[t]he statutory bases for the cable viewability rules do not appear to have express DBS equivalents”).

¹⁶ *See* n.26, *infra*.

¹⁷ DIRECTV has devoted 50 of its 122 total transponders to local capacity. When measured on a channel by channel basis (number of total local channels as a percentage of total channels), as the Commission did in the *SFNPRM*, the figure is over eighty percent.

¹⁸ DIRECTV provides both signals that originate in over-the-air analog format and, more recently, those that originate in over-the-air digital format. It digitizes over-the-air analog signals before transmitting them over its system. Thus, subscribers receive even “analog” signals in digital format.

and non-HD digital television sets, rendering the parallel transmission of SD signals increasingly superfluous as subscribers upgrade to HD equipment.

Retransmitting thousands of broadcast signals is an extraordinarily burdensome and technically complex undertaking. DIRECTV has invested billions of dollars in the design, construction, launch, and operation of a fleet of advanced spot beam satellites and associated ground infrastructure capable of making highly efficient use of its licensed spectrum. Yet, even having done so, DIRECTV faces significant difficulties as it transitions to carrying local signals in HD, which, as the Commission has acknowledged, require far more capacity than does the retransmission of those same signals in SD format. Indeed, the Commission found that “satellite carriers realize a net loss in the total number of program streams they may carry in a given bandwidth as they transition from standard definition to high definition signals. Where a satellite carrier previously carried approximately four standard definition streams, it is now capable of carrying only one high definition stream.”¹⁹

At this point, the capacity DIRECTV uses for SD service is severely constrained and will not support significant expansion of local services. Every bit of that capacity is needed, especially as new stations commence service and low-power stations with programming of interest to our subscribers (Spanish-language stations, for example) seek carriage. Under the Commission’s proposal, DIRECTV must continue to use valuable capacity to provide a relative handful of subscribers with duplicative SD versions of stations few of them will watch, even though all signals are already available to these very subscribers through a HD equipment upgrade. In order to make room for such

¹⁹ *SFNPRM*, ¶ 9.

carriage, DIRECTV subscribers would have to forego other services that they would value more highly. The Commission should not require such a misallocation of scarce orbital and spectrum resources.

II. The Commission’s Dual Carriage Proposal Would, at a Minimum, Raise Grave Constitutional Concerns.

The Commission has an established “duty” to implement the Communications Act so as to minimize constitutional concerns.²⁰ Here, however, the Commission proposes an intrusion on satellite carriers’ First Amendment rights that is far from “minimal,” and would be far greater than that imposed on cable operators. For this reason as well, the Commission should not impose a dual carriage requirement here.

As the Commission is aware, carriage requirements are always constitutionally suspect.²¹ Such directives can only be upheld if the asserted government interest in mandatory carriage of local signals outweighs the corresponding burden on MVPDs’ free speech rights.²² In the cable context, the Commission found that the government interest

²⁰ See *Telephone Company – Cable Television Cross-Ownership Rule*, 10 FCC Rcd. 7887, ¶ 4 (1995); *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001) (“Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.” (citation omitted)).

²¹ All carriage requirements, by their very nature, interfere with carriers’ editorial judgment as to the programming they will and will not carry. As such, they inevitably raise First Amendment concerns. In *Turner I*, the Supreme Court began its analysis of the cable must-carry requirements by stating: “There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. Through ‘original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,’ cable programmers and operators ‘seek to communicate messages on a wide variety of topics and in a wide variety of formats.’” *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“*Turner I*”) (citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991), and *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986)).

²² Courts will uphold a carriage requirement if: (1) it furthers an important or substantial government interest; (2) the government interest is unrelated to the suppression of free expression; and (3) the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of

outweighed the burdens that such a rule would impose on cable operators. Here, however, the burdens of a dual carriage requirement on satellite operators would far outstrip those on cable, while the case for a government interest is more tenuous.

As described in more detail above, the burden of a satellite dual carriage requirement is indisputable. As the Commission has recognized, satellite carriage of a station in HD takes up to four times the capacity of carriage of the same station in SD.²³ A dual carriage requirement adds to this burden. Such a rule would prevent DIRECTV from devoting scarce capacity for uses that, in its editorial judgment, are more valuable to subscribers than providing duplicative SD feeds of some local channels to a handful of subscribers that decline equipment upgrades.

There is also a more fundamental sense in which dual carriage rules would burden satellite carriers more than cable operators. Cable operators need carry local commercial television stations only “up to one-third of the aggregate number of usable activated channels of such system[s].”²⁴ This was the key to the Supreme Court’s finding that the cable must-carry rules were constitutional. In particular, Justice Breyer, whose concurrence constituted the crucial fifth vote for upholding the statute, concluded that “the burden the statute imposes upon the cable system, potential cable programmers, and cable viewers, is limited and will diminish as typical cable system capacity grows over

that interest. In other words, courts must balance the asserted government interest in mandating carriage against the corresponding burden on distributors’ free speech rights. *Turner I*, 512 U.S. at 662 (citing *U.S. v. O’Brien*, 391 U.S. 367, 377 (1968)); see also *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180, 187 (1997) (“*Turner II*”); *Satellite Broadcast and Communications Association v. FCC*, 275 F.3d 337, 346 (4th Cir. 2001) (“*SBCA*”). In *Turner II*, Justice Breyer, who cast the critical fifth vote, was explicit about the need to balance the asserted government interest against the burden on free speech. *Turner II*, 520 U.S. at 227 (referring to “important First Amendment interests on both sides of the equation”).

²³ *SFNPRM*, ¶ 9.

²⁴ 47 U.S.C. § 534(b)(1)(B).

time.”²⁵ The one-third limit was also the key to the Commission’s justification for imposing dual carriage requirements on cable operators.²⁶

Satellite carriers, by contrast, are not protected by a one-third capacity limit. And, today, “a higher percentage of a satellite carrier’s capacity is dedicated to local channel carriage relative to the percentage necessary for a cable operator.”²⁷ Indeed, the Commission has estimated that, were satellite carriers to serve all 210 markets, they would have to “dedicate *over 91 percent* of [their] capacity to local programming,”²⁸ even if they did so in only one format. No cable carriage requirement demanding ninety percent of an operator’s capacity could possibly survive First Amendment scrutiny. Nor, DIRECTV submits, could the aggregation of the Commission’s recent satellite requirements.²⁹

Nor can this burden be said to be narrowly tailored to a government interest as important as in the cable context. The Commission has argued that a dual carriage

²⁵ *Turner II*, 520 U.S. at 228 (Breyer, J., concurring); *see also id.* at 219 (“While we acknowledge appellants’ criticism of any rationale that more is better, the scheme in question does not place limitless must-carry obligations on cable system operators.”).

²⁶ *Cable Dual Carriage Order*, ¶ 30 (“Congress recognized the importance of preserving cable bandwidth for non-broadcast programmers when it mandated that systems with more than 12 usable activated channels need carry local commercial television stations only “up to one-third of the aggregate number of usable activated channels of such system[s].”); *id.*, ¶ 36 (“Downconverted signals will, however, count toward the one-third carriage cap . . . [b]eyond this requirement, the carriage of additional commercial television stations is at the discretion of the cable operator.”); *id.*, ¶ 60 (“We believe that the typical cable operator electing to down-convert digital signals will devote significantly less than one-third of its channel capacity to local broadcasters, the cap that was upheld in *Turner II*.”); *id.*, ¶ 69 (“Given that the cable channels devoted to the mandatory carriage of commercial broadcast signals is capped at one-third of the cable system’s usable capacity and in practice is likely to be significantly less than one-third, we find the economic burden on cable operators to be modest.”).

²⁷ *SFNPRM*, ¶ 11.

²⁸ *Id.*, ¶ 11 n.48.

²⁹ For that matter, the burdens on satellite carriers also far outweigh the burdens found by the Fourth Circuit when it upheld the constitutionality of the carry-one, carry-all rules. First, the court never considered the displacement at issue here, where local service in some markets are not carried in order to make way for other, government-mandated services in other markets. Second, the percentage of capacity devoted to local programming is now overwhelmingly greater now than it was then. *SBCA*, 275 F.3d. at 353.

requirement for cable would be considered content-neutral despite the changed structure of today's market, and would serve three government interests: preserving the benefits of free, over-the-air local broadcast television, promoting the widespread dissemination of information from a multiplicity of sources, and promoting the digital transition.³⁰

DIRECTV disagrees with these arguments for the reasons cited by cable operators in that proceeding, and incorporates those arguments herein by reference.³¹

But even were the Commission correct with respect to cable operators, this reasoning does not hold true for satellite carriers. DIRECTV serves approximately fifteen percent of TV households nationwide. Thus, if DIRECTV were to retransmit all local stations in HD format but only some stations in SD format in a market, no reasonable observer would conclude that this would threaten the benefits of free, over-the-air broadcast television, the widespread dissemination of information, or the digital transition. Satellite carriers simply lack the market power to cause any of the consequences to broadcasters, localism, or the public interest that the Commission cited in the case of cable operators. This is particularly so where subscribers can obtain the signals they want both over-the-air for free *and* by satellite through a simple upgrade.

³⁰ *Cable Dual Carriage Order*, ¶ 47-55; *see also Turner II*, 520 U.S. at 235 (suggesting that, without cable must-carry, broadcasters lacking carriage would “deteriorate . . . or fail altogether”); *SBCA*, 275 F.3d at 356, 363 (upholding the carry-one, carry-all rule because, in the court’s view, DBS carriage of favored broadcast stations within a market would harm independent broadcasters – thus threatening the “multiplicity of broadcast outlets for over-the-air viewers”); *Turner II* at 189-90 (also identifying a governmental purpose of the highest order in ensuring public access to a multiplicity of information sources). The Supreme Court has also identified a government interest in “promoting fair competition in the market for television programming,” although only four justices found that this interest was achieved by the statutory must-carry requirements. *See id.* at 225-30 (Breyer, J., concurring in part). Such an interest, based largely on cable’s “bottleneck” control, is plainly inapposite to rules directed at satellite carriers.

³¹ *See, e.g.*, Comments of Comcast Corporation, CS Docket No. 98-120, at 25-36 (filed July 16, 2007) (arguing that a cable dual carriage requirement would not further any important government interest, would unduly burden cable operators and programmers, and would constitute an unconstitutional taking under the Fifth Amendment); Reply Comments of the National Cable and Telecommunications Association, CS Docket No. 98-120, at 1-13 (filed Aug. 16, 2007) (same).

Indeed, if market power is an issue in this context, it is the undisputed market power of the local network affiliates. The Commission has recognized that network affiliates possess significant market power because they control “must have” programming, without which an MVPD cannot compete effectively in the marketplace.³² And it has, for the moment at least, shown no inclination to intervene when broadcasters exercise this market power to insist on unitary, “take-it-or-leave-it” offers to MVPDs.³³ In these circumstances, one can easily imagine network affiliates insisting on SD carriage as a prerequisite to carriage of their HD signals, leaving a satellite carrier no real choice under the proposed rule but to carry *all* stations in the market in SD and HD. If the Commission adopts its proposal, this harm to DIRECTV and its subscribers is very likely, unlike the harms to broadcasters often cited in mandatory carriage proceedings.

The proposed dual carriage rule would thus harm satellite carriers and their subscribers far more than does the corresponding rule for cable operators. And it would be far less likely to serve any cognizable government interest. As both a constitutional matter and a policy matter, the Commission should not adopt a dual carriage requirement for satellite carriers.

III. The Rancho Palos Verdes Proposal Is Even More Onerous and Is Entirely Unnecessary.

Rancho Palos Verdes has proposed an even more draconian regime under which satellite carriers would be precluded from providing HD-only service in a local market. Such a requirement, however, is completely unnecessary. DIRECTV’s HD equipment

³² See, e.g., *General Motors Corp., Hughes Electronics Corp., and The News Corporation Limited*, 19 FCC Rcd. 473, ¶¶ 201-202 (2004) (finding that a broadcast station owner “currently possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations”).

³³ *Mediacom Commc’ns Corp. v. Sinclair Broadcast Group, Inc.*, 22 FCC Rcd. 35, ¶¶ 16-19 (Med. Bur. 2007) (denying complaint for failure to negotiate retransmission consent rights in good faith).

downconverts HD signals to SD format for analog televisions. Thus, subscribers in HD-only markets seeking any local-into-local service would receive upgraded equipment, with which they would have access to all satellite-delivered local signals. A dual carriage requirement in such markets would require duplication of signals that all local-into-local subscribers could already receive. There is no reason to require satellite operators to waste valuable spectrum on a dual carriage requirement in perpetuity without any corresponding benefit.

CONCLUSION

A dual carriage requirement has dramatically different effects for satellite carriers as compared to cable operators. The burden of such carriage is much higher, while the rationales that could justify such carriage are very attenuated at best. In these circumstances, such a requirement would be unsound policy and would be constitutionally suspect. For the foregoing reasons, DIRECTV urges the Commission not to adopt a dual carriage requirement.

Respectfully Submitted,

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

Counsel for DIRECTV, Inc.

June 4, 2008

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