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	)	
	)	CS Docket No. 00-96
Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues and Retransmission Consent Issues	)	CSR-5978-M

To: The Commission

REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS

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I. Introduction and Summary

The National Association of Broadcasters ("NAB")[1] submits these reply comments on the Commission's *Second Further Notice of Proposed Rulemaking* in this proceeding.[2]

In a joint pleading filed just four months ago, DIRECTV and DISH stated: "[c]arrying a broadcaster's signal in SD format would ensure that our subscribers receive all of the broadcast stations in a market."[3] Both companies now

[1] NAB is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the FCC and other federal agencies, and the Courts.
[2] Carriage of Digital Television Broadcast Signals; Implementation of the Satellite Home Viewer Improvement Act of 1999; Local Broadcast Signal Carriage Issues and Retransmission Consent Issues; *Second Further Notice of Proposed Rulemaking*, 73 FR 24515 (May 5, 2008) ("*Second Further Notice*").
[3] Ex Parte filing of DISH Network and DIRECTV in MB Dkt. Nos. 98-120, 00-96 and 07-91, filed Feb. 15, 2008.

steadfastly refuse to do so for reasons highly suspect and far from compelling, and provide no alternative to establish just such an assurance.

In its Comments in this proceeding,[4] NAB urged that the Commission consider the best interests of consumers when addressing whether satellite providers should be required to 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. One of those interests – the ability to access all stations in the market – was precisely what Congress sought to further in the Satellite Home Viewer Improvement Act of 1999 ("SHVIA").[5] Specifically, SHVIA specifies that if a satellite carrier chooses to use the local-to-local license to carry signals in a particular market, it must carry *all* qualified local stations. 47 U.S.C. § 338(a)(1).

The purposes of the "carry one, carry all" principle are to ensure the continued availability of a wide variety of different over-the-air channels, and to prevent the local-to-local compulsory license from interfering with existing vigorous competition among all of the broadcast stations in each local market. This careful balance would be upset if satellite subscribers without HD capable set-top boxes are unable to watch the programming of some stations in a market because the carrier discriminates in its carriage of digital signals.

In its Comments, NAB also urged adoption of the "viewability" rules to provide all subscribers in a local-into-local market with the ability to view all stations carried pursuant to carry-one, carry-all that are comparable to rules

[4] Comments of the National Association of Broadcasters in CS Docket No. 00-96 filed June 4, 2008 ("NAB Comments").
[5] Pub.Law. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

governing cable carriage of digital signals. NAB endorsed the request of Rancho Palos Verdes Broadcasters Inc. ("RPV") in its rule making petition:

> "that the Commission promulgate carriage rules in the Satellite carrier context that approximate the "all-digital" signal availability provisions of the cable television digital carriage rules recently adopted in the *Third Report and Order and Third Further Notice of Proposed rule making*, CS Docket No. 98-120, FCC 07-170, ¶¶ 15-21, released November 30, 2007 ("Cable Carriage Order").[6]

Such rules are necessary to assure that no viewers, including those with analog sets, are unable to receive any local stations carried pursuant to the mandatory carriage provisions, 47 U.S.C. § 338.

The Comments of DBS providers DIRECTV, Inc.[7] and DISH Network[8] are as significant for what they do <u>not</u> address as for what they do address. In the *Second Further Notice*, the Commission expresses justifiable concern that subscribers in markets not having HD-capable set top boxes "would not be able to view the programming" of some stations if DBS providers carried only HD signals.[9] Stunningly, neither DIRECTV nor DISH seem to care about these subscribers. Neither company provides any clear answer in its Comments for how it will address this important issue.

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[6] Petition for Rule Making filed in Rancho Pales Verdes Broadcasters, Inc. (filed January 5, 2008)("RPV Petition") at 1.
[7] Comments of DIRECTV, Inc. In Response to Second Further Notice of Proposed Rule Making in CS Dkt. No. 00-96 filed June 4, 2008 ("DIRECTV's Comments").
[8] Comments of DISH Network in CS Dkt. No. 00-96 filed June 4, 2008 ("DISH's Comments").
[9] *Second Further Notice* at 34516.

DIRECTV complains about the prospect of having "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 an HD equipment upgrade."[10] This response raises more questions than it answers. How many subscribers is a "handful?" How did DIRECTV ascertain that "few" of this "handful" of subscribers would watch the station made available only if DIRECTV provided a "duplicative SD version" of their signals? If the digital signals of all local into local stations in a market can be provided through an "HD equipment upgrade" why does DIRECTV not provide such upgrades to solve the problem? How much do such equipment upgrades cost? Are subscribers aware that absent an equipment upgrade, they will lose access to some local signals? DIRECTV alleges carriage of "duplicative" SD versions of signals will require its subscribers to "forgo other services that they would value more highly." On what basis did DIRECTV come to its conclusion that "other services" – ones it presumably has not yet offered – would be more "highly valued" by its subscribers? Is it that these other services would be more highly valued by DIRECTV's subscribers or that they would be more lucrative for DIRECTV?

DISH cryptically states that: "current satellite transponder space is maximized, and compression and modulation efficiencies are generally exhausted. There is, therefore, very limited capacity available to satellite companies to meet their own internal demands, let alone new government

[10] DIRECTV Comments at 5. DIRECTV again refers to these "handful of subscribers that decline equipment upgrades" at page 7 of its Comments.

mandates."[11] But then, in the next sentence, DISH concedes that: "[g]oing forward, as DBS providers are able to expand available capacity through satellite launches, compression and modulation improvements, and marshalling new spectrum resources, choices will have to be made as to how that new capacity is dedicated. Within the finite spot beam capacity available for serving local markets, providers will need to decide whether to launch new HD local markets, new SD local markets, or provide multiple versions of the same broadcasters in a market." Again, DISH provides no facts relevant to the issues here; rather it raises many unanswered questions. How much is "limited capacity?" What "internal demands?" What does "generally exhausted" efficiencies mean? When and how much "expanded capacity" will become available? In this regard, on March 8, 2008, DISH provided the Commission with some detail as to how, in fact, "with advances in technology" it planned to expand capacity between now and 2013.[12]

If DISH and DIRECTV do not wish to devote the necessary capacity to carrying both the HD and SD signals of all stations in a market, it appears another option available to them is providing upgraded boxes to all subscribers in need of them. If this option is chosen, of course, "the non-discrimination provisions of Section 338(d) of the Communications Act would prohibit carriers

[11] DISH Comments at p. 6.
[12] *Ex Parte* Letter to Marlene Dortch from Linda Kinney in CS Dkt. Nos. 98-120, 00-96 dated Mar. 12, 2008.

from requiring subscribers to purchase additional equipment to gain access only to some, but not all of the local signals in a market."[13]

II. The DBS Industry's Claimed Capacity Constraints Are Not To Be Believed

At virtually every juncture in the history of DBS carriage of broadcast signals, when reasonable rules and regulations relating to that carriage have been proposed, DBS has resisted on the basis of claimed capacity limitations. Similarly, at virtually every juncture when such rules and regulations have been imposed, the claimed capacity limitations have not materialized or have been surmounted. DIRECTV and DISH raise the same capacity arguments here. Absent independent verification, such claims simply cannot be accepted at face value.

EchoStar and DIRECTV have repeatedly claimed that insurmountable capacity constraints would severely limit their ability to offer local-to-local service to more than a small number of markets. The DBS firms used that argument – unsuccessfully – in 1999 in attempting to persuade Congress that it should permit DBS companies to use a new compulsory license to "cherry-pick" only the most heavily-watched stations in each market. They used it again in arguing – again unsuccessfully – in 2000 and 2001 that the courts should strike down

[13] Order on Reconsideration in Implementation of the Satellite Home Viewer Act, 16 FCC Rcd, 16, 544, ¶ 37 (2001), *See*, Report and Order in Implementation of the Satellite Home Viewer Improvement Act of 1999, 16 FCC Rcd 1918, 1959-61 (2000). The prohibition against charging subscribers would include requiring them to purchase a package of HD programming in order to obtain an HD box for the purpose of viewing SD down converted programming.

SHVIA's "carry one, carry all" principle as somehow unconstitutional.[14] And, they trotted out the same claims as a justification for the proposed horizontal merger of the nation's only two major DBS firms, DIRECTV and EchoStar.[15]

Paralleling their continuing claims of limited capacity have been DIRECTV and DISH's regular predictions that technological developments would never improve their capacity dilemmas. To mention one example: even as DirecTV was doubling its "compression ratio" between 1998 and 2001 – enabling it to carry twice as many channels in the same amount of spectrum – it repeatedly told the FCC that it had hit a brick wall as far as any further progress in compression technology:

- July 31, 1998: "DIRECTV has *substantially reached current limits* on digital compression with respect to the capacity on its existing satellites. Therefore, the addition of more channels will necessitate expanding to additional satellites …."

- Aug. 6, 1999: "DIRECTV has *substantially reached current limits* on digital compression with respect to the capacity on its existing satellites."

- Sept. 8, 2000: "DIRECTV has *substantially reached current technological limits* on digital compression with respect to capacity on its existing satellites. Although there are potentially very small gains still possible through the use of advanced algorithms, such

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[14] Satellite Broadcasting and Communications Association v FCC, 275 F3d 337 (4th Cir. 2001) ("SBCA").

[15] In 2002, for example, the two DBS firms claimed that unless they were permitted to merge, neither firm could offer local-to-local in more than about 50 to 70 markets. *EchoStar, DIRECTV CEOs Testify On Benefits of Pending Merger Before U.S. Senate Antitrust Subcommittee,* www.spacedaily.com/news/satellite-biz-02p.html ("Without the merger, the most markets that each company would serve with local channels as a standalone provider, both for technical and economic reasons, would be about 50 to 70.") (quoting DIRECTV executive).

technological developments can neither be predicted nor relied upon as a means of increasing system channel capacity."

- Aug. 3, 2001: "DIRECTV has offered digitally compressed signals from its inception, and *has substantially reached current technological limits* on digital compression with respect to capacity on its existing satellites. Although there are potentially very small gains still possible through the use of advanced algorithms, such technological developments can neither be predicted nor relied upon as a means of increasing system channel capacity."[16]

Contrary to these pessimistic predictions, the two DBS firms offer local-to-local programming to the overwhelming majority of U.S. television households. Although the DBS firms claimed they would *never* be able to serve more than 70 markets unless they merged, today, EchoStar serves 174 Designed Local Markets ("DMAs"), which collectively cover more than 98% of all U.S. TV households;[17] and DIRECTV offers local-to-local to 150 markets covering more than 94% of all U.S. television households.[18]

In 2005, DIRECTV and DISH both told the FCC that, due to capacity constraints, they would be unable to comply with the Satellite Home Viewer

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[16] *See, e.g.,* Comments of DIRECTV, Inc., [1998] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 98-102, at 5 (filed July 31, 1998); Comments of DIRECTV, Inc., [1999] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 99-230, at 9 (filed Aug. 6, 1999); Comments of DIRECTV, Inc. [2000] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 00-132, at 16 (filed Sept. 8, 2000); Comments of DIRECTV, Inc. [2001] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 01-129, at 16 (filed Aug. 3, 2001) (emphasis added in all cases).

[17] *Ex Parte* Letter to Marlene Dortch from Linda Kinney in CS Dkt Nos. 98-120, 00-96 dated Feb. 11, 2008.

[18] *See* www.directv.com/DTVAPP/packProg/localChannels.jsp?assetID=900018.

Extension and Reauthorization Act's requirement to provide full digital and high definition local-into-local service in Alaska and Hawaii. Yet today, one already does so and the other has committed to do so by June 20, 2008.

In 2005, the ABC, CBS and NBC Television Affiliate Associations demonstrated in a filing with the FCC that both satellite carriers had the bandwidth to retransmit the *full digital signal of every television station in the United States*.[19]

Similarly, in 2006, the Association of Public Television Stations ("APTS") demonstrated that "both DIRECTV and EchoStar possess or will soon possess ample ability to carry the digital signals of local television stations in all 210 markets in the near future."[20]

DIRECTV and DISH have consistently proved wrong their own predication of insufficient satellite bandwidth capacity, as well as their ability to expand that capacity. In this regard, DISH has told the Commission that the burden on DBS to carry both HD and SD would increase substantially if it were forced to carry both channels "in perpetuity,"[21] thereby suggesting that carriage of both signals for some period of time, perhaps until all subscribers were provided with MPEG4 boxes, would not be unduly burdensome. In their "joint proposal," which the

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[19] *See* Reply of the ABC, CBS and NBC Television Affiliate Associations in Support of the Opposition of the National Association of Broadcasters to Petitions for Partial Reconsideration, MB Docket No. 05-181 (Dec. 19, 2005).
[20] *See* Ex Parte Presentation, CS Docket No. 98-120; 00-96 filed by the Association of Public Television Stations (March 31, 2006) p. 11.
[21] *Ex Parte* Letter to Marlene Dortch from Linda Kinney in CS Dkt Nos. 98-120 and 00-96, dated Feb. 11, 2008 at footnote 1.

Commission adopted in its *Second Report and Order* in this proceeding,[22] DIRECTV and DISH laid out elaborate plans to expand their capacity over the next five years. It is reasonable, given past experience, to assume that those plans include accommodation for carriage of the HD and the SD signals.

NAB repeats its strong request[23] that the FCC should fully investigate, including allowing third party verification, the satellite carriers' most recent claims of lack of capacity before placing any reliance on them in this proceeding.

III. DBS Objections To Rules Designed To Assure Non-Discrimination Carriage Of Local Stations To All Subscribers In Local Markets Ignores The Extraordinary Growth They Have Enjoyed Resulting From Local-Into-Local Carriage

As the FCC recognized in its 2005 Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming,[24] the DBS industry is thriving – and offering potent competition to cable. The DBS industry, which signed up its first customer only about 15 years ago, grew to more than 26 million subscribers as of June 2005.[25] Just in the 12 months between June 2004 and June 2005, the DBS industry added almost three million new subscribers, surging from 23.16 million to 26.12 million households, for an increase of 12.8%. *Id.*

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[22] *Second Report and Order* at ¶ 7.
[23] *See* Letter from Jerianne Timmerman to Marlene Dortch, CS Dkt. Nos. 98-120 and 00-96, MB Dkt. 03-30 (Mar. 4, 2008); Letter from Jane Mago to Marlene Dortch, CS Dkt. No. 98-120, MB Dkt. No. 00-96 and 03-30 (Mar. 6, 2008).
[24] Twelfth Annual Assessment, MB Dkt. No. 05-255, 21 FCC Rcd 2503 ¶ 72 (2006) ("2005 Annual Assessment").
[25] While the FCC adopted its 13th Annual Report to Congress on Video Competition on November 27, 2007, that report has not yet been released. The press release for that Report ("13th Annual Report Press Release") states that as of June 2006, 29% of total MVPD subscribers were DBS subscribers.

DIRECTV is currently the second-largest multichannel video programming distributor ("MVPD"), while EchoStar is the third-largest MVPD. *Id.*, ¶ 73.

As the FCC has repeatedly pointed out, delivery of local stations by satellite has been a major spur to this explosive growth. *E.g.,* 2005 Annual Assessment, ¶ 72. In June 1999, just before the enactment of the new local-to-local compulsory license in the SHVIA, the DBS industry had 10.1 million subscribers. 2000 Annual Assessment, 15 FCC Rcd, 978 ¶ 8. Only five years later, the industry had more than doubled that figure to 26.12 million subscribers. 2005 Annual Assessment, ¶ 72. That this growth has been spurred by the availability of local-to-local is beyond doubt. As DIRECTV itself has conceded: "The ability to retransmit local signals has been one of the most important factors in making DIRECTV a more formidable competitor to cable operators (indeed, DIRECTV believes that at least <u>six</u> <u>percent</u> of its customers keep cable service just to get local channels). DIRECTV has seen its subscribership jump <u>dramatically</u> in markets where it offers local-into-local service."[26]

The DBS industry's own trade association, the Satellite Broadcasting & Communications Association, stressed that "[t]he expansion of local-into-local service by DBS providers *continues to be a principal [sic] reason that customers subscribe to DBS."* SBCA Comments at 4, Dkt. No. 03-172 (filed Sept. 11, 2003) (emphasis added).

It is fair to say that DIRECTV and DISH have derived tens of millions of dollars of profits (if not more) from the carriage of local broadcast signals. Part of

[26] Comments of the DIRECTV Group, Inc. in MB Dkt. No. 04-227, filed July 23, 2004 at p. 28 (emphasis supplied) (cited omitted).

this profit is derived from the fact that the compulsory license provided by 17 U.S.C. § 122 provides these companies the opportunity to carry local signals copyright free. It is disheartening that despite the enormous gains local-into-local carriage has provided to DBS, its carriers provide nothing but objections to fulfilling their statutory obligations to provide access to all stations to all subscribers where local-into-local is offered.

Particularly extraordinary in this regard is DISH's suggestion that unlike cable subscribers, satellite subscribers have "no expectations" that their satellite service "will provide access to local news and content."[27] Is this the same DISH that in 2004 testified before Congress on behalf of the entire satellite industry that:

> "The provision allowing DBS providers for the first time to retransmit local broadcast stations was certainly a catalyst in the industry's recent growth."[28]
>
> "Congress' decision to allow DBS providers to offer local-into-local service, and the subsequent roll out of that service by DBS providers, continues to be a principal reason that customers subscribe to DBS. This permanent statutory provision has given DBS providers the ability to compete with cable head-to-head, on a level playing field, in many markets."[29]
>
> "Satellite television providers have invested significant capital to improve the technology used to offer local-into-local service and to expand their satellite fleets, which has resulted in the ability to offer local broadcast stations to an increasing portion of the country,

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[27] DISH Comments at 4-5.
[28] Testimony of David Moskowitz, Executive Vice President and General Counsel of DISH Network and Chairman of the Board of the Satellite Broadcasting and Communications Association Before the House Subcommittee on Courts, the Internet and Intellectual Property, Feb. 24, 2004 at p. 3.
[29] *Id.*

thereby creating a more competitive multichannel video programming distribution (MVPD) market."[30]

DISH's suggestion that its subscribers in local-into-local markets have "no expectation" of receiving local broadcast stations from them is simply not true. Indeed, given the massive disconnects of broadcast signals DISH's past illegal conduct has caused, and subscribers' reaction to these disconnects, DISH, more than anyone, should know the frivolity of this assertion. As the Commission has noted, the purpose of these proceedings are to "ensure that broadcasters and satellite subscribers can be confident of uninterrupted satellite carriage of local stations after the transition to digital broadcasting."[31]

IV. DBS Claims That Required Carriage Of HD And SD Signals Raise Constitutional Concerns Are Without Merit

Almost as consistent and predictable as DBS' raising the specter of capacity limitations to oppose any reasonable regulation of the carriage of broadcast signals, is its opposition based upon alleged "grave" constitutional concerns with any such regulation. DIRECTV and DISH do no disappoint in this proceeding.

DISH proclaims that "any attempt to increase further the capacity burden on satellite providers would conflict with the First Amendment" and would "raise Fifth Amendment takings issues."[32] DIRECTV bases its constitutional objections primarily on an analysis of First Amendment principles applied to cable carriage of broadcast signals and concludes that since "no cable carriage requirements

[30] *Id.* at p. 4.
[31] *Second Report and Order* at ¶ 4 (emphasis supplied).
[32] DISH Comments at pp. 11-12 (emphasis supplied).

demanding ninety percent of an operator's capacity could possibly survive First Amendment . . . nor . . . could the aggregation of the Commission's recent satellite requirements."[33]

The constitutional objections of DBS are just as flawed and without merit here as they have been in every other proceeding in which they have been raised.

First, DIRECTV, suggests that a requirement to dedicate over ninety-one percent of its capacity to local-into-local carriage in all 210 markets would be unconstitutional. While not conceding the accuracy of this capacity estimate, even if true, it is purely hypothetical since the Commission has refused to impose a requirement of local-into-local carriage in all 210 markets.

Second, DIRECTV's claim that since compliance with a purely hypothetical non-existent requirement to devote ninety-one percent of its capacity to local-into-local carriage would be unconstitutional, so would "the aggregation of the Commission's recent satellite requirements"[34] is a non-sequitur and completely unfounded. What exactly are the capacity demands that would be imposed by having to carry the HD and SD signals? Could providing a "handful" of subscribers with upgraded boxes solve the problem such that no additional capacity would have to be used?

Stripped of their rhetoric, neither the Comments of DIRECTV nor DISH provide any facts concerning precisely what the added capacity burden, if any,

[33] DIRECTV's Comments at p. 8.
[34] DIRECTV Comments at 8.

would be to assure that all subscribers in all local-into-local markets would have access to all stations in those markets.

Third, DBS attempts to draw upon cable carriage First Amendment jurisprudence is unavailing for several reasons. As the Fourth Circuit observed in *SBCA*,

> "It is important to be clear, at the outset, however, that some of the speech interests present in the Turner cases are absent here . . . . In sum, the carry one carry all rule burdens speech only to the extent that it affects satellite carriers decisions about how to allocate their capacity for offering local-into-local service by inducing them to carry a different set of local broadcasters than the carriers would have preferred."[35]

While DBS asserts that a requirement to carry HD and SD signals of local stations would require them to omit programming their subscribers would prefer, absolutely no facts are provided to demonstrate this bald assertion is, in fact, true. Moreover, the Court in *SBCA* debunked this theory, for as it observed: "[t]he burdens of the rule do not depend on a satellite carrier's choice of content, but on its decision to transmit that content by using one set of economics [the compulsory license] rather than another."[36]

DIRECTV also claims that even if it discriminated among stations in a market by carrying the HD and SD signal of some, but not all, stations, because the benefits of free, over-the-air broadcasting would not be threatened, no substantial governmental interest would be affected,. This is so, according to DIRECTV, because "satellite carriers simply lack the market power to cause any

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[35] *SBCA*, 275 F3rd at 337.
[36] *Id.* at 354.

consequences to broadcasters, localism, or the public interest that the Commission cited in the case of cable operators."[37]

The court in *SBCA* also correctly dispensed with this so-called "substantial deterioration" theory. It flat out rejected the argument that because DBS would deny access to some stations to only 15% of their audience, that no substantial governmental interest was implicated.[38]

> The satellite carriers' arguments boil down to the claims that even if both cable and satellite jointly contribute to a common threat to the government's interest in protecting a multiplicity of broadcast outlets for over-the-air viewers, Congress may not impose carriage rules on satellite carriers because their contribution to that common threat is smaller and because cable is already regulated. The First Amendment does not require this result. It is more sensible to allow Congress the latitude to view the regulatory landscape as a whole by considering the cumulative effects of cable and satellite without making fine distinctions regarding their relative contributions in creating those effects. Where multiple competitors jointly pose a common threat with a common structure, the First Amendment permits Congress to protect important government interests from that threat by imposing reasonable content-neutral restrictions on every competitor who significantly contributes to that threat.[39]

DISH raises the additional constitutional challenge that requiring HD and SD carriage would raise Fifth Amendment takings issues by forcing it to dedicate DBS transponder space to "economically impractical uses" and by interfering with its "reasonable, investment-backed expectations with regards to the effective reach of spot beam satellites."[40]

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[37] DIRECTV Comments at 9.
[38] Of course, today DBS serves 29% of the MVPD marketplace. 13th Annual Report Press Release at p. 3.
[39] *SBCA,* 275 F3rd at 362.
[40] DISH Comments at 12.

The simple answer to this Fifth Amendment challenge is again provided by the Court in *SBCA*. Because this so-called "dual carriage" requirement and, indeed, the entire carry one, carry all provision is not mandatory, DISH can avoid any alleged illegal taking simply by choosing not to avail itself of the Section 122 compulsory license. As the Court stated: "Here, the statute does not *require* the satellite carriers to do anything. It merely places conditions on their use of a benefit (the statutory license) the government need not have conferred. This cannot be an unconstitutional taking of the satellite carriers' property."[41]

V. The Commission Has The Statutory Authority To Impose HD/SD Carriage And Viewability Requirements

DISH asserts that the Commission has no authority, statutory or otherwise, to impose HD/SD carriage and viewability requirements. In its Comments, NAB demonstrated why this is not so.[42]

DISH argues that since Congress imposed specific viewability requirements on cable but not on satellite, it must have intended none for satellite. It also argues that the "non-discrimination" provisions of Section 338 must be read very narrowly to include only price and manner of carriage on any navigational device, and that, even if the non-discrimination proscription is to be read more broadly, only carry one, carry all for HD signals would be required.[43]

As set forth in NAB's Comments, while Congress did not provide specific statutory viewability requirements for DBS comparable for cable, that does not

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[41] *SBCA*, 275 F3rd at 368, (emphasis in the original).
[42] *See*, NAB Comments at pp. 3-8.
[43] DISH Comments, 7-10.

mean, as DISH would have it, that DBS operators can with impunity, discriminate against some stations and, effectively, deny some subscribers access to them.[44]

As a practical matter, the DBS position in this proceeding is that: (1) it can choose to carry only the HD signal of stations in local-into-local markets and refuse to carry the SD signals of some stations; (2) this discriminatory treatment may result in the programming of some stations not being accessible to some subscribers; and (3) the FCC is powerless to do anything to prevent this result. The Court in *SBCA* found that this result is clearly not what Congress intended. In explaining the benefits and burdens of the carry one, carry all provisions of Section 338, the Court held that:

> "In sum, Congress either could have allowed satellite carriers to cherry pick by retransmitting *some* stations (the major network affiliates) in *many* markets, or it could have allowed satellite carriers to retransmit *all* of the stations in *some* markets. While satellite carriers would have preferred (and now argue for) the first result, Congress chose the second because it feared that cherry picking of major network affiliates within local markets would make it more difficult for non-carried stations in those markets to reach their audiences . . . . Non-carried stations in cherry-picked markets would 'face the same loss of viewership Congress previously found with respect to cable noncarriage.' Congress therefore concluded that the carry one, carry all rule would protect the ability of all local broadcasters to reach their audiences and thereby 'preserve free television for those not served by satellite or cable systems and … promote widespread dissemination of information from a multiplicity of sources.'"[45]

DISH seeks to obfuscate this clear Section 338 prohibition against cherry picking by attempting to characterize a requirement to carry the SD signals of a must carry station as a requirement to carry "additional feeds," akin to a

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[44] NAB Comments at pp. 3-8.
[45] *SBCA*, 275 F.3rd at 351 (emphasis in the original) (cites omitted).

retransmission consent arrangement under which it would be required to carry FX or FOX Business in exchange for carrying a FOX affiliate's primary HD signal. That analogy is transparently false. The requirement to carry the SD signal is premised on the fact that absent such carriage, some of DISH's subscribers will not receive the must carry station's signal. The more apt analogy to the current situation is to DISH's infamous "two dish" scheme in which it effectively precluded some of its subscribers from accessing these very same must carry signals by requiring them to acquire a second dish. The Commission clearly had the power to prohibit that discriminatory behavior[46] just as it does the non-carriage of SD signals here.

VI. Conclusion

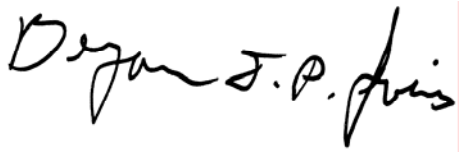
The transition to digital is crucial for the continued well being, indeed the survival, of free, over-the-air television. Having derived such tremendous benefits and growth on the backs of over-the-air analog television broadcasters, it is unseemly now for the satellite industry to suggest that, at best, it can only provide selected carriage as stations transition to digital.

For the reasons set forth herein, the Commission should adopt rules requiring satellite carriers to carry the signals of all local broadcast stations in HD and SD if they carry the signals of any local station in the market in both HD and SD so that subscribers without HD capable equipment will be able to view all

[46] Declaratory Ruling & Order, *In re: National Association of Broadcasters and Association of Local Television Stations Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers*, Dkt. No. CSR-5865-Z (Media Bureau April 4, 2002). While the Commission had the power to address the two dish scheme, it did so ineffectively, prompting Congress to adopt 47 U.S.C. § 338(g).

stations. Satellite "viewability" rules should also be adopted to assure that all carry-one, carry-all stations will be viewable in the analog sets of satellite subscribers. Alternatively, carriers can provide customer premises equipment to all subscribers requiring them without charge to assure their ability to receive all stations in all local-into-local markets.

Respectfully submitted,



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