

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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)	

REPLY COMMENTS OF DISH NETWORK

The Commission should maintain its current policy and foster a steady digital transition by refraining from increasing the already aggressive DBS high definition (HD) carry-one, carry-all obligation. Mandating duplicative carriage of broadcast stations – based on either viewability considerations or claimed discriminatory conduct – would be even more burdensome on satellite providers, and could result in fewer independent voices and standard definition (SD) and HD local markets available to satellite subscribers.

I. THE BROADCAST INDUSTRY FAILS TO OFFER ANY VALID STATUTORY BASIS FOR A DUAL CARRIAGE BURDEN

Both the Commission and commenters acknowledge that the Commission lacks a clear statutory grant of authority to impose a dual carriage obligation.¹ In the cable context, the broadcast industry was adamant that the cable statute was straightforward and required viewability. The satellite statute is equally clear with the opposite result: there is no authority over DBS providers to

¹ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Second Report and Order, Memorandum Opinion and Order, and Second Further Notice of Proposed Rulemaking, FCC 08-86, ¶ 24 (Mar. 27, 2008) (“Order” or “Notice”); *Comments of KVMD* at 4; *Comments of RPVB* at 4; *Comments of DIRECTV* at 4.

impose a viewability or dual carriage obligation. The broadcast industry is left to offer inconsistent and strained readings of Section 338 and the Communications Act to divine authority where none exists.

NAB offers no clear statutory authority to support its dual carriage proposals, and other broadcast commenters go further and concede that “there are no explicit provisions under governing DBS statutes that are equivalent to the statutory viewability mandate in the cable context.”

Comments of KVMD at 4. Instead, NAB is left to resorts to the “spirit” of Section 338 for its basis of authority. *Comments of NAB* at 8. NAB does not contend that the satellite carriage rules include a viewability provision. Nonetheless, NAB seeks to shoehorn viewability within the satellite comparability provision in Section 338(j) by suggesting the viewability is somehow related to material degradation and signal processing, two concepts that are cited under Section 338(j). *Id.*, at 12. Neither of these provisions was used as the basis for cable viewability rules, so it is unclear how they could form a basis for DBS rules under any standard.²

KVMD and RPVB take a different approach and avoid looking for authority in Section 338 altogether. Rather, they rely exclusively on the Commission’s ancillary jurisdiction to seek additional burdensome new DBS carriage rules. *See e.g., Comments of KVMD* at 4. The D.C. Circuit’s admonition that the Commission should steer clear of adopting rules “that appear to be ancillary to nothing” should be controlling here.³ The broadcast commenters fail to offer any compelling rationale by which the purpose of the carry-one, carry-all regime would be furthered by the forced carriage of multiple feeds of the same broadcast stations. As demonstrated throughout this proceeding, an additional carriage requirement could reduce the total number of local-into-local

² *Third Report and Order*, ¶ 22 (finding that “[t]he ‘viewability’ requirement that we adopt today is based on a straightforward reading of the relevant statutory text.”).

³ *American Library Association v. FCC*, 406 F.3d 689, 702 (D.C. Cir. 2005).

markets and HD local-into-local markets available to consumers.⁴ It would be also paradoxical that the Commission’s implementation of the digital transition – which seeks to make over-the-air broadcasters more efficient – would result in such inefficient and costly carriage of those same broadcasters on satellite platforms.

Lastly, NAB’s strained reading of the *SBCA* decision – effectively reading the First Amendment burden out of the decision – should be rejected outright. *Comments of NAB* at 5-7. In contrast, DIRECTV offers a thoughtful analysis of the new and substantial constitutional burdens these proposals raised consistent with *SBCA*, and that “the case for a government interest is more tenuous” here. *Comments of DIRECTV* at 7. Particularly in this case where there is no clear statutory authority to act, the Commission should seek to ensure its interpretation of Section 338 is consistent with the Constitution.

II. A DUAL CARRIAGE OBLIGATION WOULD INCREASE THE ALREADY SUBSTANTIAL BURDEN ON DBS PROVIDERS.

The broadcast commenters also neglect to appreciate the burdensome nature of their requests. In doing so, they misstate and misrepresent the realities of today’s satellite service. In the *Order*, the Commission adopted a phased-in HD carriage requirement based on “the capacity and technological constraints faced by satellite carriers.” *Order*, ¶ 1.

To satisfy the dual carriage demands of broadcasters, DBS providers would likely be required to carry a second channel of the same content for each local broadcast station carried in

⁴ For example, a dual carriage regime would inhibit DBS providers from offering programming of greater interest to subscribers such as low-power Spanish-language channels. *Comments of DIRECTV* at 5. Similarly, in declining to adopt cable must carry obligations with respect to multicast streams, the Commission noted that “there is little to suggest that requiring cable operators to carry more than one programming stream of a digital television station would contribute to promoting ‘the widespread dissemination of information from a multiplicity of sources’” and that “mandatory multicast carriage would arguably diminish the ability of other, independent voices to be carried on the cable system.” *Second Report and First Order on Reconsideration*, ¶ 39.

HD in any HD carry-one, carry-all market. It is this layering on of a second obligation – the standard definition version of that HD channel – that would create a new burden for DBS providers, as it would require the dedication of more finite transponder capacity to each broadcast station above and beyond the substantial capacity required to retransmit the HD broadcast signal.

It appears that NAB misunderstands that satellite capacity can be used for either SD or HD content, and that today’s SD transponders could be repurposed to carry HD content to satisfy a HD carry-one, carry-all obligation. Specifically, NAB focuses on the fact that DIRECTV typically uses different satellites (Ku-Band versus Ka-Band) for SD and HD services. *Comments of NAB* at 7. Satellite providers, however, can offer HD and SD services on the same satellites with the same satellite transmission technology (Ku-Band or Ka-Band). For instance, DISH Network provides both SD and HD broadcast signals from Portland, Oregon from the same spot beam on the same DBS Ku-Band satellite, Echo 10.

The relevant inquiry for each DBS provider is not what type of satellite is used, it is how much spot beam capacity is available to serve any particular local market. Under the broadcasters’ proposals, the DBS providers would need to allocate transponder space within the fixed spot beam capacity available to any market to provide both a HD channel and a SD channel of every broadcast station. This extra requirement would place greater pressure on an already strained system and inhibit the ability of DBS providers to maximize the number of markets served consistent with carry-one, carry-all. DIRECTV accurately notes that “[e]very bit of that capacity is needed” to meet the exiting HD burden. *Comments of DIRECTV* at 5-6.

Similarly, NAB’s reference to a forced roll-out of MPEG-4 technology as a potential solution to address its viewability concerns is unrealistic. *Comments of NAB* at 7. MPEG-4 is a more advanced and more expensive compression technology than used by most, if not all, broadcasters, and cable companies today. Given those costs and complexities, MPEG-4 compliant

boxes are provided to only HD satellite subscribers today. NAB's suggestion that such advanced boxes should be rolled out to all subscribers immediately – a multi-billion dollar proposition – is impractical. The broadcast industry itself does not use this more advanced MPEG-4 technology for its own HD signals, but seeks to mandate its use for DBS providers. Scientific Atlanta only this year announced the availability of its first MPEG-4 cable set-top box.⁵ Mandating a forced MPEG-4 roll-out is not viable, and would inhibit significantly the ability of DBS providers to offer an affordable competitive offering.

III. CONCLUSION

The Commission should not expand or augment its burdensome satellite digital carriage rules. DBS providers should have the flexibility to satisfy the existing substantial HD carriage obligation already imposed by the Commission in a manner that maximizes video competition and the efficient use of limited satellite capacity.

Respectfully submitted,

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⁵ COMMUNICATIONS DAILY, 2008 WLNR 12117872 (Jan. 18, 2008) (noting that Scientific-Atlanta announced its first MPEG-4 cable set-top box delivery).