

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

In the Matter of)	
)	
Implementation of the Satellite Home Viewer Implementation Act of 1999)	CS Docket No. 00-96
)	
Broadcast Signal Carriage Issues)	

**REPLY COMMENTS OF THE
NATIONAL CABLE TELEVISION ASSOCIATION**

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SUMMARY

Cable operators and satellite carriers should be subject to comparable must carry rules, as Congress intended. Satellite carriers have no case for preferential treatment.

The FCC should reject the calls for differential must carry rules advanced by certain commenters, specifically in the areas of:

- the definition of a broadcaster's local must carry market;
- the determinations of when a local station "substantially duplicates" another;
- the extent of non-commercial educational station carriage obligations; and
- the carriage of local broadcasters' digital signals.

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The National Cable Television Association (“NCTA”), by its attorneys, hereby submits its Reply Comments in the above-captioned proceeding.

DISCUSSION

NCTA’s initial comments explained that the Satellite Home Viewer Improvement Act’s (“SHVIA”) language and legislative history, as well as sound regulatory policy, require parity between cable and satellite must carry rules. The comments filed by certain satellite carriers in this proceeding seek regulatory advantages in a variety of different ways – both procedural and substantive – wholly at odds with this principle. The Commission cannot grant DBS operators the flexibility that they seek without correspondingly liberalizing the cable must carry rules.

The DBS commenters attack the logic and fairness of the whole concept of protecting broadcasters with a guarantee of carriage that no non-broadcast program networks enjoy – and we agree. But that hardly justifies granting satellite carriers a competitive advantage over cable operators by adopting the much less rigorous must carry requirements that they seek. DBS operators seek special, more favorable treatment based on their nationwide service areas and

unique technological characteristics. But Congress already took these arguments into account – and has already chosen to delay the onset of satellite must carry obligations until 2002 in markets served with local signals. Nevertheless it still chose to impose must carry obligations on satellite carriers. And it mandated that those obligations be comparable to cable’s.

To be sure, differences in the statute and in the technology used by the particular operations of satellite and cable may necessitate slightly different must carry obligations. But those technological differences do not mean, as some commenters assert, that it is easier or more convenient for cable operators to cede valuable capacity to undesirable television stations than it is for satellite carriers. And these technological differences cannot mask that while the average cable system has fewer than 60 channels,¹ DirecTV offers nearly four times as many channels² to its 8.7 million customers nationwide, and EchoStar has the capacity to provide over 500 channels of video, audio and data services.³ Both DBS operators plan to increase their capacity exponentially in the next few years and to expand their fleet of satellites to include “spot beams” capable of servicing discrete geographic areas with local-to-local service.⁴

Thus, satellite carriers have no case for preferential treatment. The Commission can and should adapt its existing cable rules so that they apply even-handedly to satellite carriers. It cannot and should not create artificial regulatory disadvantages for cable operators by adopting wholesale revisions that apply to satellite carriers alone.

¹ See Sixth Annual Report, CS Docket No. 99-230 at Table B-3, (rel. Jan. 14, 2000) (77% of cable systems as of October 1999 have 53 or fewer channels.)

² DirecTV Comments at 2 (DirecTV currently offers more than 225 channels).

³ www.dishnetwork.com

⁴ DirecTV Comments at 6; EchoStar Press Release, dated Feb. 23, 2000 (“EchoStar VII and VIII will be advanced, high-powered direct broadcast satellites. Each will include spot-beam technology that will allow DISH network to offer local channels in as many as 60 or more markets across the United States. . . .”)

I. MARKET MODIFICATIONS

DirecTV urges the Commission to adopt a rule that would limit the broadcasters' markets for purposes of the satellite must carry rules. It argues that "there is little evidence that Congress intended for satellite carriage markets to correspond with those the Commission has applied to cable."⁵ DirecTV proposes that where a local television station has been able to obtain a market modification to expand its rights to cable carriage in communities outside its DMA, a DBS operator need not carry that station outside its DMA. But it proposes that a DBS operator could initiate a market modification proceeding to eliminate television stations' satellite carriage rights throughout the station's entire DMA.⁶ DirecTV also proposes a satellite rule that would essentially dispense with market modification determinations altogether, suggesting that a television station should have no right to satellite carriage at all outside its Grade B contour.⁷

Congress did not adopt a statute that authorizes this "heads I win, tails you lose" approach, nor should it be incorporated into FCC rules. SHVIA grants "all television broadcast stations located within [the] local market" must carry rights, and unlike the 1992 Cable Act, provides no mechanism for market modifications. But even if the Commission were to decide that it has discretion to permit changes to the complement of signals DBS is required to carry, its rule should not allow satellite carriers to take advantage of the benefit of market modifications that

⁵ Comments of DirecTV at 17.

⁶ DirecTV suggests that it could use these "ad hoc modifications" to remove "television broadcast stations that do not serve or that are not substantially viewed in the local market in which they are carried." DirecTV Comments at 17.

⁷ Id. at 23.

reduce carriage obligations while avoiding the burden of increased signal carriage where a market is modified to add a station.⁸

DirecTV's arguments in support of its one-sided regulatory approach are based on a misunderstanding of cable's must carry markets. DirecTV asserts that "a broadcaster's must carry coverage area is restricted to the cable franchise area – an area that in most cases does not encompass an entire DMA."⁹ To be sure, a single cable franchise area may not be coextensive with a DMA (although the rise in regional cable systems may result in a single system serving multiple franchise areas.) But every broadcast station in the DMA has the right to demand carriage on every cable system in the DMA. That cable operators serve franchise areas by wire, rather than the entire country by satellite, hardly justifies a shrunken satellite must carry local market. There is no reason why the DBS operators that compete with cable should not be required to carry all these broadcasters, too.¹⁰

As DirecTV points out, in some cases a cable operator may avoid carriage of a particular station in its franchise area where that station does not provide a Grade B signal over the system.¹¹ But Grade B coverage is only one factor among many that the FCC considers in

⁸ In any event, the cable market modifications apply on a community-specific basis, and do not result in elimination of must carry rights for a television station throughout its entire market.

⁹ Id. at 24.

¹⁰ A commercial broadcaster must also deliver a good quality signal to the cable headend. DirecTV makes a variety of arguments in favor of using the corresponding "good quality signal" provision of SHVIA to impose stringent obligations on broadcasters in order to qualify for mandatory carriage. See DirecTV Comments at 24–33. DirecTV provides no evidence that, in adopting this provision in SHVIA, Congress intended to create a loophole by which satellite carriers could seek to avoid significant carriage obligations in the market it serves. The Commission should avoid adopting rules that would undo the must carry regime that Congress intended.

¹¹ DirecTV Comments at 23 n. 46.

evaluating a market modification request.¹² That is a far cry from automatically stripping a station's must carry coverage area to its Grade B contour, as DirecTV seeks.¹³

This is not an interpretive issue. Congress provided local commercial television stations with rights to carriage – both on satellite and cable – throughout their local market, which it defined to be the DMA. Neither the statute nor cable carriage rules justify redefining a broadcaster's market for satellite carriage purposes in the manner suggested by DirecTV.¹⁴

II. SUBSTANTIAL DUPLICATION

A. Non-Network Station Duplication – Definition of “Substantial Duplication”

Neither satellite carriers nor cable operators are required to carry the signal of “any local commercial television broadcast station that substantially duplicates the signal of another local commercial television broadcast station” carried by the satellite operator.¹⁵ Even though the language of SHVIA and the Cable Act¹⁶ are identical with respect to substantial duplication, DirecTV and BellSouth claim that the FCC should adopt more lenient rules regarding duplication in the satellite context than those applied to cable operators. Those rules define “substantial

¹² See 47 C.F.R. §76.59(b)(requiring information on, among other things, mileage, geographic features, shopping and labor patterns, programming, cable channel line-ups, and audience data).

¹³ In fact, cable operators cannot delete a station from carriage during the pendency of a market modification request. 47 C.F.R. §76.59(c).

¹⁴ Whichever local television stations are carried, they must be offered on “contiguous channels” and provided “at a nondiscriminatory price and in a nondiscriminatory manner on any navigational device, on-screen program guide, or menu.” Section 338(d). These obligations are not identical to cable's. But at a minimum, satellite carriers should be required to offer all local broadcasters on contiguous channels in a single package, rather than on an a la carte basis.

¹⁵ SHVIA, Section 338(c).

¹⁶ See Section 614(b)(5).

duplication” for cable to mean that a commercial station “regularly simultaneously broadcasts the identical programming as another station for more than 50 percent of the broadcast week.”¹⁷

DirecTV proposes to eliminate the simultaneous broadcast element of the rule for satellite carriers, and to rewrite the rule to encompass either 50 percent of a television broadcast station’s total weekly programming or 50 percent or more of its prime-time programming.¹⁸ BellSouth argues for a 30 percent “duplicating programming” test in lieu of the 50 percent test applied to cable.¹⁹ Their arguments in support of this wholly-invented differential treatment are unpersuasive.²⁰

DirecTV claims that a satellite-only definition is warranted because “satellite carriers provide service on a national basis, whereas cable operators’ coverage is limited geographically.”²¹ But DirecTV does not – and cannot – explain how this difference justifies a more expansive definition of substantial duplication in the satellite context. The test does not address whether a station in New York substantially duplicates a station in Los Angeles – rather, it is designed to identify local television stations within the New York or Los Angeles DMA that duplicate each

¹⁷ 47 C.F.R. §76.56(b)(5). Only “identical episodes of a television series are considered duplicative and commercial inserts are excluded from the comparison. When the stations being compared are licensed to communities in different time zones, programming aired by a station within one hour of the identical program being broadcast by another station will be considered duplicative.”

¹⁸ DirecTV Comments at 35.

¹⁹ BellSouth Corp. Comments at 21.

²⁰ The Commission’s definition of substantial duplication for non-commercial educational (“NCE”) stations provides that one local NCE station is duplicating the programming of another “if it broadcasts the same programming, simultaneous or non-simultaneous, for more than 50 percent of prime time ... and more than 50 percent outside of prime time over a three-month period.” DirecTV suggests that the FCC turn this into a disjunctive test – either programming is duplicating for more than 50 percent of prime time or more than 50 percent outside prime time. DirecTV Comments at 35. We do not oppose the more realistic substantial duplication test proposed by DirecTV – but any such redefinition should apply to cable as well.

²¹ DirecTV Comments at 34. See also BellSouth Comments at 20 (“[t]he market for a cable system is generally much smaller than the DMA market applied under SHVIA to satellite providers.”)

other. Cable operators and satellite carriers are in the identical position with respect to that determination.

DirecTV also points to another distinction that fails to justify a difference – spot beam coverage areas. It explains that satellite carriers plan to cover larger geographic “spots.”²² But again, the substantial duplication to which the statute refers addresses duplication between local commercial television stations in the same DMA. A satellite carrier’s use of spot beams is entirely irrelevant to this determination.²³

Finally, BellSouth claims that satellite technology is “less efficient than cable in carrying local signals into numerous smaller markets as justification for a more relaxed substantial duplication test.”²⁴ But even accepting the truth of that assertion,²⁵ it hardly follows that cable operators should be forced to devote 6 MHz of valuable channel capacity to providing essentially the same programming as can be viewed on another channel carried on the system – particularly if satellite carriers competing for the same customers are not so required.

In short, if the Commission chooses to adopt a new, more encompassing definition of “substantial duplication” for satellite carriers, it should extend the same definition to cable operators.

²² DirecTV Comments at 34.

²³ To the extent that a DMA contains stations located in different time zones, the FCC’s cable rules already address duplication in that instance.

²⁴ BellSouth Comments at 20.

²⁵ In fact, the satellite carriers’ comments suggest otherwise. According to DirecTV, it can use digital compression to squeeze analog channels into a smaller portion of their spectrum – providing four digitally compressed signals per each 6 MHz of spectrum. DirecTV Comments at 48-49.

B. Network Station Duplication – Definition of “Television Network”

Neither satellite carriers nor cable operators must carry more than one local affiliate of a television network.²⁶ Section 339(d) defines a “television network,” for purposes of SHVIA, as any U.S. television network that offers an interconnected program service on a regular basis “for 15 or more hours per week to at least 25 affiliated broadcast stations in 10 or more states.” This is identical to the “television network” definition that the FCC uses for cable must carry purposes.²⁷ DirecTV, however, alleges that a different definition is warranted in its case. It claims that the Commission must “construe[] this term broadly so that it encompasses both traditional television networks as well as nationally carried satellite stations. For example, a shopping channel that is provided on a national basis on a satellite carrier’s system may have local affiliates in several markets. It would make no sense for the Commission to mandate carriage of local affiliates if they substantially duplicate the programming provided by the same channel which is carried nationally.”²⁸

NCTA does not disagree that forced carriage of local programming that duplicates programming of a national service carried by a multichannel video programming distributor – either cable or satellite – makes little sense. The Commission, however, has found otherwise in the context of the carriage of local broadcast signals. In granting home shopping stations must carry rights on cable, for example, the Commission rejected duplication of national home shopping services as a reason to deny carriage rights to local home shopping stations.²⁹ A fresh

²⁶ SHVIA, Section 338(c)(1); 47 U.S.C. §534(5).

²⁷ 47 C.F.R. §76.55(f).

²⁸ Id. at 35-36.

²⁹ Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd. 5321, 5329 (1993).

look at this policy may well be warranted. But any determination to change the rules must be applied to cable as well.

III. CARRIAGE OF NON-COMMERCIAL STATIONS

Congress did not dictate how many local non-commercial educational stations a satellite carrier must offer in each local market. Instead, it gave the Commission that task, with the charge that “to the extent possible, such regulations shall provide the same degree of carriage by satellite carriers of such multiple stations as is provided by cable systems under section 615.”³⁰

Cable operators with more than 36 channels have no cap on the number of non-duplicating local non-commercial educational (“NCE”) stations they must carry under section 615 of the 1992 Cable Act.³¹ EchoStar’s comments point out³² that in some markets this means cable systems must carry at least three local non-commercial educational television stations. (Indeed, cable operators may be forced to make room for five NCE stations in certain areas.)

The satellite carriers suggest that their NCE carriage requirement should be significantly more limited. For example, EchoStar proposes that the Commission “should require satellite carriers to devote no more than 2% of channel capacity to carriage of local NCEs as part of the existing 4% capacity set-aside requirement for noncommercial programming of an informational and educational nature.”³³ DirecTV argues that the “threshold for must carry NCE stations should require DBS carriers to carry a number of NCE stations that would bring the total number of noncommercial educational channels (defined to include national educational channels)

³⁰ SHVIA, Section 338(c)(2).

³¹ Section 615(b)(3)(D).

³² EchoStar Comments at 5.

³³ *Id.* Cable has distinctive non-commercial requirements, such as PEG channel carriage under Section 611, but that does not excuse cable’s NCE station carriage obligation.

available in a local market to a maximum of four percent of the local must carry channels offered by the satellite carrier in the market.”³⁴ Both formulations would lead to NCE must carry requirements for satellite carriers that do not remotely resemble cable’s – both in the nature of the signal (national versus local) and in the number of stations carried.³⁵

Such a result is impossible to square with Section 338(c)(2), which mandates rules requiring, to the extent possible, “the same degree of carriage by satellite carriers of such multiple [NCE] stations as is provided by cable systems under Section 615.”³⁶ Adopting a formula that would result in only one non-commercial station being carried, regardless of the number of local, non-duplicating NCE stations in the market, violates this statutory provision. Again, it simply is not fair to impose unequal must carry burdens on cable and DBS operators that compete for the same customers – and the law does not allow it.

IV. CARRIAGE OF DIGITAL STATIONS

Several commenters agree with NCTA that there is no statutory obligation to carry both analog and digital broadcast signals during the transition to digital television.³⁷ And given that the transition’s end is not even on the horizon, it makes little sense for the Commission to attempt

³⁴ DirecTV Comments at 39.

³⁵ EchoStar’s formulation would lead to a total of 6 NCE stations carried throughout the nation (assuming channel capacity of 300); it also argues that a satellite carrier should not have to carry more than one NCE station in any market. EchoStar comments at iv. DirecTV’s carriage formula would result in carriage of at most one NCE station even in the largest television market, with 25 television stations.

³⁶ Emphasis supplied.

³⁷ See, e.g., Satellite Broadcasting and Communications Association Comments at 7 (“There is no basis in SHVIA for requiring the dual carriage of broadcast signals.”); DirecTV Comments at 46 (“[t]here is no statutory basis for a requirement that satellite carriers carry digital broadcast signals in addition to analog broadcasting signals during the DTV transition period.”); Home Box Office Comments at 3-4 (“[t]he Commission’s authority to impose digital must carry requirements cannot survive statutory or constitutional review.”); BellSouth Comments at 27 (“BellSouth is strongly opposed to any such dual carriage obligation for DTH.”)

to fashion post-transition digital television carriage rules in this proceeding – or elsewhere – at this early stage.

But whenever the Commission does adopt rules for the post-transition carriage of digital signals, one thing is clear now: these rules must, as SHIVA requires, be “comparable” for satellite and cable.³⁸ Notwithstanding this unambiguous legislative intent, EchoStar seeks to be exempt from any new carriage requirements that the Commission might adopt. It claims that “what Congress intended, by directing the Commission to promulgate regulations within one year, was for the Commission to issue regulations comparable to those currently in existence – not to issue regulations based on what the Commission may or will do in the future regarding cable.”³⁹

EchoStar’s argument that Congress intended to freeze the “comparability” principle to those cable must carry regulations in effect on the date of SHVIA’s enactment finds no support in the language of the statute or its legislative history. In fact, it turns the requirement of comparability on its head by assuring that whenever the rules are amended for any reason in the future, the cable and DBS rules will not be comparable. Congress intended just the opposite.

Section 338(g) expressly refers to section 614(b)(4) of the 1992 Cable Act – which deals with regulations regarding “advanced television.” And it is pursuant to that provision that the Commission is currently examining whether and to what extent cable operators will be required to carry broadcasters’ signals that have been changed to the advanced television format. The legislative history of Section 338 suggests Congress’ awareness of the nature of that on-going

³⁸ 47 U.S.C. §338(g).

³⁹ EchoStar Comments at 10.

proceeding.⁴⁰ Under these circumstances, it strains credulity to argue that Congress intended a wholly different digital carriage scheme to apply to satellite.

EchoStar is joined by surprising allies – the broadcasters – in its argument that satellite and cable are differently situated with respect to digital must carry. NAB suggests that the FCC could adopt a “somewhat different” regime for satellite than for cable – because, it claims, “cable, of course, can readily carry local digital as well as analog signals,”⁴¹ whereas the satellite industry may have different “capacity and economic constraints.” And ALTV expresses concern with “avoid[ing] imposing enormous new costs on satellite carriers,” and suggests that transitional digital must carry might only apply to markets where a satellite carrier chooses to offer a station’s digital signal under retransmission consent.⁴²

The broadcasters’ newly-discovered solicitude for considerations of “capacity and economic constraints” of multichannel video providers (MVPDs) is ironic. Must carry by definition adversely impacts both, and on all MVPDs. Dual must carry obligations would increase those burdens on cable and satellite alike, occupying valuable channel capacity built at tremendous expense. Digital must carry during the transition is equally bad policy for either industry, and the FCC cannot and should not adopt it.

⁴⁰ See e.g., H.R. Rep. No. 106-464, 106th Cong. 1st Sess. 100 (1999).

⁴¹ NAB Comments at 22.

⁴² ALTV Comments at 50 (“Only if a satellite carrier already had demonstrated its ability to carry digital signals by retransmitting a local station’s digital signal in a market would the obligation to carry all stations in the market attach.”)

CONCLUSION

The Commission's task here is straightforward. It must adhere to the principles of parity expressed by Congress in SHVIA. Accordingly, it should not adopt the preferential must carry rules that satellite carriers seek without granting cable operators the same flexibility.

Respectfully submitted,

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