

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

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| In the Matter of   | ) |                                   |
|  | ) |                                   |
| Carriage of Digital Television Broadcast<br>Signals: Amendment to Part 76 of the<br>Commission's Rules   | ) |                                   |
|  | ) |                                   |
| Implementation of the Satellite Home<br>Viewer Improvement Act of 1999:<br>Local Broadcast Signal Carriage Issues and<br>Retransmission Consent Issues | ) | CS Docket No. 00-96<br>CSR-5978-M |
|  | ) |                                   |

To: The Commission

**COMMENTS OF  
THE NATIONAL ASSOCIATION OF BROADCASTERS**

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BROADCASTERS**

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**I. Introduction and Summary**

The National Association of Broadcasters (“NAB”)<sup>1</sup> submits these comments on the Commission’s *Second Further Notice of Proposed Rulemaking* in this proceeding.<sup>2</sup> In the *Second Further Notice*, the Commission seeks comment on the application of the statutory requirement for nondiscriminatory treatment by satellite carriers in the carriage of standard definition (“SD”) and high definition (“HD”) signals of local broadcast stations. Specifically the Commission asks whether carriers 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

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<sup>1</sup> 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.

<sup>2</sup> 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*”).

in the same market in both HD and SD so that subscribers without HD-capable equipment will be able to view all stations.

NAB urges the Commission to approach this issue in the way that best protects consumer interests. 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”).<sup>3</sup> In the same spirit as the requirement in the 1992 Cable Act that cable systems carry all qualified local stations in each market in which they operate, the 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). That requirement has been upheld against constitutional attack by satellite interests. *Satellite Broadcasting and Communications Ass’n v. FCC*, 275 F.3d 337 (4<sup>th</sup> Cir. 2001) (“SBCA”).

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.

The Commission also seeks comment on whether it should adopt “viewability” rules to provide all subscribers in a local-into-local market with the

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<sup>3</sup> Pub.Law. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

ability to view all stations carried pursuant to carry-one, carry-all that are comparable to rules governing cable carriage of digital signals.

In this regard, NAB endorses 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”).<sup>4</sup>

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.

## **II. Application of Carry One, Carry All to the Carriage of Both HD and SD Signals is Consistent with the Letter and Spirit of the Communications Act**

The *Second Further Notice* plainly identifies the practical consumer impact of *failing* to impose a carry-one, carry-all requirement for the carriage of a local station’s HD and SD signals. As described in the *Second Further Notice*:

In . . . markets [where HD carriage requirements have become effective], satellite carriers will be carrying the HD signals from all stations broadcasting in HD. But many subscribers in those markets may not have HD-capable set-top boxes on all sets connected to the DBS system. In such markets, carriage of only an HD signal would mean that those subscribers without HD-capable equipment would not be able to view the programming.<sup>5</sup>

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<sup>4</sup> Petition for Rule Making filed in Rancho Palos Verdes Broadcasters, Inc. (filed January 5, 2008)(“RPV Petition”) at 1.

<sup>5</sup> *Second Further Notice* at 34516.

This means that some local signals would not be available for some customers. And, if permitted to choose to provide both HD and SD formats only for some local signals, satellite carriers could discriminate against the very local stations that the anti-discrimination provisions of Section 338 were designed to protect, *i.e.*, those opting for mandatory carriage. In effect, carriers could “cherry pick” only certain stations to whom it would provide carriage of both HD and SD signals. SHVIA intended to prevent such behavior.

As the Court in *SBCA* observed:

Congress enacted the carry one, carry all rule to “preserve free television for those not served by satellite or cable systems and to promote widespread dissemination of information from a multiplicity of sources.” SHVIA Conf. Rep. at 101.<sup>6</sup>

With respect to Congress’ interests in the anti-discrimination or anti-“cherry picking” dimension of carry-one, carry-all, the Court in *SBCA* explained that:

Congress recognized that protecting independent broadcasters from the harmful effects of satellite cherry picking would further two substantial government interests. The first is the government’s interest in preserving a multiplicity of local broadcast outlets for over-the-air viewers, those who do not subscribe to satellite or cable service. The second is the government’s interest in preventing its grant of a statutory copyright license to satellite carriers from undermining competition in local markets for broadcast television advertising. Though these two interests are closely related because both would be threatened in the same manner without the carry one, carry all rule, they are distinct because the first involved harms to over-the-air viewers while the

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<sup>6</sup> *SBCA*, 275 F.3<sup>rd</sup> at 356.

second involves harms to local advertisers and to independent broadcasters themselves.<sup>7</sup>

Permitting satellite carriers to offer carriage of both HD and SD signals of some stations in a market, but not stations opting for mandatory carriage, would harm the stations Congress intended to preserve in order to enhance competition in the television markets. The loss of a portion of stations' in-market audiences would adversely affect stations in ways succinctly described by the Court in *SBCA*:

No rational doubt may exist that a local station denied access to a portion of its in-market audience is injured. Lack of carriage reduces potential audience and, therefore, actual audience. Reduced audiences translate to reduced revenue. Even where revenue reductions are less than fatal, they still affect a station's ability to provide the best practicable service to the public. At best, a local station which a satellite carrier refuses to carry would be placed at a demonstrable disadvantage vis-à-vis competing broadcast television stations which are carried.<sup>8</sup>

It is precisely for this reason that the terms of § 338 proscribe discrimination.

Section 338(d) provides that satellite carriers:

shall retransmit the signal of the local television broadcast stations to subscribers in the stations' local market on contiguous channels and provide access to such station's signals at a nondiscriminatory price and in a nondiscriminatory manner on any navigational device, on-screen program guide, or menu.<sup>9</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> *SBCA*, 275 F.3<sup>rd</sup> at 349.

<sup>9</sup> 47 U.S.C. § 338(d).

Satellite carriers will no doubt oppose any carry-one, carry-all requirement for HD and SD signals as a burden on them. NAB submits, however, that mere claims of burden cannot overcome the statutory ban on discrimination.

As the Court held in *SBCA*:

Satellite carriers do not deny carriage for independent broadcasters . . . for anti-competitive reasons . . . they do so because the national character of satellite delivery systems provides economic incentives to favor national nonbroadcast programming over local broadcast programming . . . [and because of] satellite carriers' efforts to make the most efficient use of their existing channel capacity.<sup>10</sup>

The Court went on to find that: "cherry picking major network affiliates in a local market threatens the non-carried broadcast stations in that market (and, ultimately the viewers who depend on them) in the same ways, regardless of whether the motive behind the cherry picking is anticompetitive or not."<sup>11</sup>

In other words, as applied in the current context, if the *effect* of denying SD carriage to some stations in a local market will be discriminatory and will harm subscribers who will be unable to receive these stations' programming, claiming capacity burdens as a motive for the discrimination is insufficient.<sup>12</sup>

In any event, it is not clear exactly how carrying both SD and HD versions of a local station's DTV signal imposes an increased burden on the DBS operators. Both carriers have noted that the HD channels are carried on different

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<sup>10</sup> *SBCA*, 275 F.3d at 366.

<sup>11</sup> *Id.*

<sup>12</sup> The Commission has already limited this burden, in this very proceeding, by delaying satellite's full HD carriage obligations until 2013. Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, Second Report & Order, Memorandum Opinion & Order, rel. 3/27/08 at ¶ 8.

satellites than their current SD offerings. For example DIRECTV carries its HD channels exclusively on their Ka-band satellites (Spaceway 1, Spaceway 2, DirectTV10 and DIRECTV 11) the SD channels are carried on their Ku-band spacecraft - a different set of satellites. . Indeed, DIRECTV has stated that:

... the launch of local HD service in a new market does not affect the DBS (Ku band) capacity already being used in that market to deliver local SD service<sup>13</sup>...

Conversely, providing SD service on the Ku-band satellites has no impact on the addition of HD channels to the Ka-band satellites. The DBS operators need only to create, at their central uplink facility, an SD version of broadcasters' HD signals and distribute those signals in place of the currently carried SD channels on the existing Ku-band infrastructure. This would require the implementation of simple down conversion equipment which the DBS operator may already own.

Moreover, it is unclear how much of any alleged burden can be alleviated by deploying new set-top boxes. Because the new set-top boxes support both MPEG-4 and MPEG-2 and because these set-top boxes have the built-in capability to down convert HD signals,<sup>14</sup> one option and an alternative to carrying

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<sup>13</sup> See Summary of Assets and Challenges for HD Local-into-Local; Attachment to ex parte letter from William M. Wiltshire and Michael D. Nilsson to Marlene H. Dortch filed March 10, 2008 in CS Docket Nos. 98-120 and 00-96, MB Docket No. 07-91.

<sup>14</sup> See *DIRECTV HD Receiver* web page, available at <http://www.directv.com/DTVAPP/global/content/PageNR.jsp?assetId=P4380066>, (visited June 3, 2008). Showing that it is "standard definition (mpeg-2) enabled" and provides "4801i . . . picture output"; *Dish HD Receiver* web page, available at [http://www.dishnetwork.com/content/our\\_products/dish\\_hd/receivers/vip211/index.shtml](http://www.dishnetwork.com/content/our_products/dish_hd/receivers/vip211/index.shtml) (visited June 4, 2008). Showing that it is possible to "View

SD and HD signal, is to carry only MPEG-4 encoded signals and provide all subscribers with new MPEG-4 set-top boxes. While these boxes are technically “HD-capable” they can be used to provide SD reception to subscribers who do not have HDTV sets.

DIRECTV’s assertion that the antidiscrimination provision of § 338 applies narrowly to those practices listed and cannot be applied to other related discriminatory practices<sup>15</sup> is contravened by the legislative history of this provision. As Congress explained, the particular forms of discrimination mentioned in the Act are merely “illustrative of the general requirement to ensure that satellite carriers position local stations in a way that is *convenient and practically accessible for consumers*.”<sup>16</sup>

A failure to require carriage of SD and HD signals of mandatory carried stations in a market would also violate the spirit, if not the language of the prohibition against material degradation of the signals of such stations by satellite carriers. See 76.66(k) of the Commission’s rules. That rule requires satellite carriers to provide stations whose signals are carried under mandatory carriage to be provided with the same “quality of signal processing provided to stations electing retransmission consent.”<sup>17</sup> It would be perverse and illogical to protect a mandatory carried station from having its signal degraded below the quality of

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high-definition (HD) or standard-definition (SD) . . . “ and “Supports four TV display resolutions: 480i1 . . . .”

<sup>15</sup> DIRECTV March 18, 2008, *ex parte* at 1.

<sup>16</sup> SHVIA Conference Report, 145 Conf. Rec. H11795 (July ed. Nov. 9, 1999)(emphasis supplied).

<sup>17</sup> The requirement is subject to technical feasibility and good engineering practice limitations.

retransmission consent carried stations in the market, and then to have another rule permitting the carrier to eliminate access to that station's signal altogether with respect to a class of subscribers by refusing to carry a SD signal.

Finally, it must again be recalled in response to any alleged burden satellite carriers might claim in complying with an HD/SD signal carriage requirement that, in fact, it would not truly be a "requirement" at all. DBS operators are always free not to avail themselves of the generous compulsory license provisions of 17 U.S.C. § 122, in which case they would not be subject to any such requirement.

### **III. The Commission Should Impose Satellite Carriage "Viewability Rules" Ensuring Reception of All Carry-One, Carry-All Signals by All Satellite Subscribers**

In its Petition for Rulemaking RPV asks the Commission to amend Section 76.66 of its rules to ensure that, after the February 17, 2009 end of the transition to digital television ("DTV Transition"), the digital signals of local-into-local must-carry broadcast television stations will be viewable by satellite subscribers possessing analog television sets. Specifically, PRV requests that the Commission promulgate satellite carriage rules 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").

In its Cable Carriage Order, the Commission announced it was adopting rules: "To ensure that cable subscribers will continue to be able to view

broadcast stations after the transition, and that they will be able to view those broadcast signals at the same level of quality in which they are delivered to the cable system.”<sup>18</sup>

With respect to the role of mandatory carriage rules in the digital transition, the Commission stated:

We are mindful that the mandatory carriage rules serve their purpose only when such stations are viewable by all cable subscribers, including those who will only have analog sets after the transition. Furthermore, we act with the knowledge that Congress intended that the benefits of the digital transition should accrue to all consumers.<sup>19</sup>

Surely satellite subscribers are no less entitled to fulfillment of these Congressionally mandated public interest goals than are cable’s subscribers.<sup>20</sup> This is what RPV’s petition seeks. It should be granted.

While DBS service has always been transmitted as a digital service,<sup>21</sup> it is NAB’s understanding that customers with analog sets have received down-converted standard definition, but not high definition, signals with a MPEG-2 box. In order to receive high definition signals, a customer would need additional equipment such as an MPEG-4 set-top box. Moreover, at least with respect to DIRECTV, it appears that if mandatory carried station signals are carried on a Ka-band satellite spot beam, they will be viewable only by subscribers with

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<sup>18</sup> *Cable Carriage Order* at ¶ 2.

<sup>19</sup> *Id.*

<sup>20</sup> Paragraph 3 of the *Cable Carriage Order* states that about 35% of all television homes or about 40 million households are analog only cable subscribers. While NAB has no comparable statistics for analog only satellite subscribers, all of these 40 million households are potential analog only satellite subscribers.

<sup>21</sup> *Second Report and Order* at ¶ 9.

MPEG-4 equipment.<sup>22</sup> Accordingly, there are and will be a universe of satellite subscribers with analog sets that will not be able to view some local station signals for want of the appropriate set-top box.

The Commission asks with respect to this universe of subscribers, “whether satellite carriers nonetheless have a [statutory] obligation . . . to provide *all* subscribers in a local-into-local market with the ability to view *all* stations pursuant to carry-one, carry-all requirements” or whether “as a policy matter” it should “impose such a requirement in the interest of regulatory parity and for the benefit of consumers.”<sup>23</sup>

As the discussion above makes clear, NAB believes the Commission should impose such a requirement, both as a matter of statutory imperative and as a policy matter.

First, for all of the reasons set forth above, and from the Court’s holdings in SBCA, it is clear that the carry-one, carry-all provisions of Section 338 justify a viewability requirement. Absent such a requirement, independent stations can be discriminated against and will suffer harm. Moreover, at first, the universe of analog television set owners not able to receive some station signals, but ultimately all viewers in a market, will be deprived of the “widespread dissemination of information from a multiplicity of sources.”<sup>24</sup>

Second, the answer to the Commission’s concern , expressed in the *Second Further Notice*, about the lack of a satellite equivalent to the cable

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<sup>22</sup> Opposition of DIRECTV, Inc., File No. CSC-397 (filed May 2, 2008) at p. 1.

<sup>23</sup> *Second Further Notice* at p. 24516 (emphasis supplied).

<sup>24</sup> SHVIA Conf. Rep. at 101.

statutory basis for its viewability rules, is that a statutory basis for satellite viewability rules lies in 47 U.S.C. § 338(j). As the Commission observed, that provision requires it to: “adopt rules for DBS ‘comparable’ to those governing cable in the areas of material degradation, signal processing, carriage, and technical capacity.”<sup>25</sup> Because the cable viewability rules implicate at least two of these factors, carriage and material degradation,<sup>26</sup> §338(j) provides a statutory basis for action here.

Third, as the Commission observes in the *Second Further Notice*:

“Requiring similar treatment among broadcast stations could help ensure that consumers in local-into-local markets continue to receive all of their local broadcast signals, regardless of their subscription package.”<sup>27</sup>

There could not be a clearer articulation of the public interest rationale than this to justify a satellite viewability requirement “as a policy matter.”

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<sup>25</sup> *Second Report and Order, Memorandum, Opinion and Order, and Second Further Notice of Proposed Rule Making*, CS Docket No. 00-96 (released 3/27/08) at 4-5.

<sup>26</sup> The Commission’s cable viewability rules gave cable operators an option where they “must carry the signals of . . . must carry stations in analog format to those subscribers after downconverting the signals from their original digital format at the headend.” These rules also required operators providing analog service to carry signals in their original digital format “[i]n accordance with the material degradation rules . . . .” See *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission’s Rules*, *Third Report and Order and Third Further Notice of Proposed Rule Making*, 22 FCC Rcd 21064 at ¶ 18 and Footnote 44.

<sup>27</sup> *Second Further Notice* at ¶ 5.

#### **IV. Conclusion**

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 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.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Benjamin F.P. Ivins". The signature is written in a cursive, flowing style.

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