

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

In the Matter of:)	
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)	
Implementation of the)	MB Docket No. 05-49
Satellite Home Viewer Extension)	
and Reauthorization Act of 2004)	
)	
Implementation of Section 340 of the)	
Communications Act)	
)	

COMMENTS OF DIRECTV, INC.

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SUMMARY

Section 340 of the Communications Act, enacted last year as part of the Satellite Home Viewer Extension and Reauthorization Act (“SHVERA”), authorizes DBS operators to retransmit the signals of broadcast stations from one market into areas of adjacent markets where they are “significantly viewed.” This provision was intended to put DBS on an equal footing with cable systems, which have been authorized to provide such signals to their subscribers for years. This, in turn, could benefit thousands of DBS subscribers who, until now, could not receive the same programming as their cable-subscriber neighbors. DIRECTV applauds Congress’s and the Commission’s effort to create a more level playing field among MVPD platforms.

The Commission must now superimpose Congress’s directive on a set of rules governing significantly viewed signals that were adopted with only cable retransmission in mind. In doing so, it would be a mistake to turn a blind eye to the patent differences between DBS and cable systems. Rather, the Commission must recognize that rules adopted for cable systems that retransmit no more than a handful of significantly viewed signals in each of their franchise areas may not be appropriate for a national service such as DIRECTV’s, which can potentially reach nearly all of the communities found on the Commission’s 400-plus page list.

DIRECTV seeks no advantage over its cable competitors in the provision of significantly viewed signals. But rules that ignore the differences between DBS and cable (or worse, exacerbate them) may limit or even preclude DBS provision of significantly viewed signals in many areas. Such an outcome would not only disserve the viewing public, but would also run counter to Congress’s manifest intent to level the

MVPD playing field. DIRECTV suggests that the Commission can account for these differences as follows:

- The Commission should recognize that existing “cable communities” were created with cable carriage, not DBS carriage, in mind. DIRECTV can now authorize service based on the five-digit zip code in which subscribers live, and will soon be able to do so based on the county in which subscribers live. (Most cable communities are based on counties.) But it cannot authorize service based on whether or not subscribers live in the hodgepodge of non-county cable communities. Under a conservative reading of SHVERA, DIRECTV can provide significantly viewed signals only to customers living in zip codes that lie entirely within such communities. Some eligible subscribers in these communities will therefore not receive significantly viewed signals. But SHVERA allows the Commission to define *future* communities in terms of zip codes. The Commission should do so, and thereby minimize the number of subscribers denied service.
- The Commission should implement the concepts of “equivalent bandwidth” and “entire bandwidth” on a case-by-case basis. In doing so, it should recognize that Congress’s intent in enacting these provisions was to prevent DBS operators from using significantly viewed carriage to discriminate against incumbent broadcasters. The Commission should therefore find violations of the equivalent bandwidth requirement only where a DBS operator treats an incumbent materially worse than a significantly viewed station, when measured over a substantial period of time. It should not require “equivalence” at any given moment, or require exact equality even when measured over a longer period of time.
- The Commission should not attempt to graft SHVERA’s “two-dish” restriction onto the significantly viewed regime. The two-dish restriction – with which DIRECTV has always complied – applies to local carriage only. If a two-dish restriction were extended to out-of-market significantly viewed signals, DIRECTV would be effectively precluded from providing such signals in over 60 markets because the relevant stations (either the local stations or the significantly viewed stations) are retransmitted from DIRECTV’s “wing” slot at 72.5° W.L. There is no legitimate policy justification for such an outcome. The two-dish rule was meant to prevent viewers from having to obtain additional equipment to receive some, but not all, of their local signals. There is no prospect of such an outcome if a viewer needs a second dish to receive all significantly viewed signals from a neighboring market.
- The Commission should not allow any station to “block” the importation of another station. It should, as it proposes, allow a DBS operator to import significantly viewed signals in a market so long as the operator provides local-into-local service in that market – even if the operator fails to obtain retransmission consent from a same-network station in that market. The

Commission should also clarify that stations violate their “good faith” obligations by seeking retransmission consent agreements that prohibit the importation of significantly viewed stations.

These suggestions will help ensure that Congress’s new significantly viewed regime fulfills the Congressional goal of increasing consumer choices in the MVPD market.

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In implementing these rules, the Commission should recognize that rules adopted for cable systems that retransmit no more than a handful of significantly viewed signals in each of their franchise areas may not be appropriate for a national service such as

DIRECTV's, which can potentially reach nearly all of the communities found on the Commission's 400-plus page list.¹ In these Comments, DIRECTV provides suggestions on how the Commission can account for these differences, and thereby implement Congress's manifest intent to level the MVPD playing field.

I. THE DEFINITION OF SOME "SIGNIFICANTLY VIEWED COMMUNITIES" MAY LIMIT THE SCOPE OF DBS SERVICE

SHVERA gives DBS operators – like cable operators – the right to retransmit signals into communities where such signals are deemed significantly viewed.² As mandated by Congress, the Commission has set forth a provisional list of such communities and has asked for comment on the accuracy of the list. Although (or perhaps because) it is new to this list, DIRECTV has compiled a series of questions and comments about specific communities and/or stations. These are set forth in Appendix 1 to this submission. DIRECTV would ask the Commission, in conjunction with the affected broadcasters, to clarify the information related to these particular communities.

There is, however, a more systemic issue associated with the overall list: DIRECTV's systems cannot always replicate significantly viewed communities as they are now defined. SHVERA allows DBS operators to provide signals to subscribers in "communities" if the signal (a) had been determined by the Commission to be

¹ *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act*, Notice of Proposed Rulemaking, FCC 05-81, MB Docket No. 05-49 (rel. Feb. 7, 2005) ("Notice").

² 47 U.S.C. § 340(a).

significantly viewed in that community; or (b) is in the future determined by the Commission to be significantly viewed in that community.³ A community, in turn, is

(A) a county or a cable community, as determined under the rules, regulations, and authorizations of the Commission applicable to determining with respect to a cable system whether signals are significantly viewed; or

(B) a satellite community as determined under such rules, regulations, and authorizations (or revisions thereof) as the Commission may prescribe in implementing the requirements of this section.⁴

SHVERA thus gave DBS operators a new right to retransmit signals into certain “counties” or “cable communities” – some already determined, others to be determined.

But “counties” and (more obviously) “cable communities” are geographic constructs that were designed for the particular circumstances presented by local cable systems.⁵ DBS systems, unlike cable systems, are national systems. And satellite beams – even spot beams – do not recognize municipal borders. DBS operators can thus offer localized services (such as local-into-local service or, now, significantly viewed signals) only if they can limit the ability to receive such services to eligible subscribers within the footprint of a beam. If, for example, DIRECTV wishes to offer a Washington, D.C.

³ *Id.* DBS operators cannot, however, retransmit signals into communities where the signal had been determined significantly viewed but where the signal was subsequently determined to be subject to the Commission’s network nonduplication and syndicated exclusivity rules. *Id.*

⁴ 47 U.S.C. § 340(i)(3).

⁵ Cable systems are local systems. Cable operators thus always tailor their offerings to cable communities. As the *Notice* observed, this is what a cable community is – a community served by a cable system. And, to DIRECTV’s knowledge, signals are significantly viewed in a county only where cable and county boundaries coincided (at least when the original significantly viewed determination was made). At least as DIRECTV understands it, if signals are significantly viewed in a cable community or a county, incumbent cable operators can provide such signals to subscribers in that community or county – and only to such subscribers. *See Notice* at ¶ 29 (“In the cable context, the Commission defined a community unit in terms of a ‘distinct community or municipal entity’ where a cable system operates or will operate. Due to the localized nature of cable systems, cable communities were easily defined by the geographic boundaries of a given cable system, which are often, but not always, coincident with a municipal boundary and may vary as determined on a case-by-case basis.”).

station on a local-into-local basis, it must place that station on the spot-beam covering Washington – which also encompasses some or all of several neighboring designated market areas (“DMAs”). It then must configure its system such that, within the spot beam, those in the Washington DMA can access the signal, while those in Baltimore cannot. Likewise, if DIRECTV now seeks to offer the Washington station in areas in the Baltimore DMA where it is significantly viewed, it must ensure that only subscribers in those areas can receive it.

DIRECTV accomplishes this through a combination of its subscriber transaction system and its conditional access system. Although complicated in practice, the idea is simple. First, DIRECTV’s subscriber transaction system combines programming packages (the “Washington local signals” package, for example) with eligibility criteria (a subscriber’s zip code, for example). It then communicates this information to the conditional access system, which in turn ensures that only subscribers that meet the eligibility criteria are allowed to sign up for the package in question.⁶

DIRECTV’s billing and conditional access systems have historically been able to determine geographic eligibility for local-into-local service based on *five-digit zip codes*.⁷ In part because of changes to Nielsen’s definition of local markets, DIRECTV has

⁶ More specifically, DIRECTV’s Subscriber Transaction Management System (“STMS”) communicates with the Conditional Access Management Center (“CAMC”). The CAMC is the set of hardware and software/database that keeps track of every access card and the programming channels for which that card is authorized. The CAMC communicates with the access card both over the satellite via a system called the Conditional Access Uplink System (“CAUS”) and telephone callback.

⁷ With respect to distant signals, DIRECTV has employed non-geographic eligibility criteria. For years, DIRECTV would allow subscribers to sign up for the distant signal package only if they lived in “unserved households” as that term is defined in the Copyright Act. 17 U.S.C. § 119(d)(10). DIRECTV continues to update its systems to incorporate SHVERA’s new requirements, including the “no-distant where local” rules. *See* 47 U.S.C. § 339(a)(2)(B)-(C); 47 U.S.C. § 339(a)(2)(D)(iv). As discussed below, such a solution is not currently available with respect to significantly viewed signals.

recently (and at great expense) begun updating its system such that it will also be able to authorize service based on the county in which a subscriber lives. Fortunately, the majority of significantly viewed communities are defined in terms of counties, so DIRECTV will soon be able to accurately determine subscriber eligibility in such areas.

DIRECTV cannot, however, currently authorize service to subscribers based on residence in cable communities not identified by county or zip code (“non-county communities”). To take one example, the Commission’s significantly viewed list indicates that KCTV-5 Kansas City is “significantly viewed” in Shawnee County, but subject to exclusivity provisions in “Topeka, Auburn and unincorporated portions of Shawnee County (including the areas known as Berryton and Tecumseh), KS.”⁸ DIRECTV cannot authorize service based on whether subscribers live in Topeka or Auburn or Berrytown or Tecumseh.⁹ It can only do so based on whether a subscriber is in a *zip code* in one of these areas, or (soon) in Shawnee County as a whole.¹⁰

DIRECTV is exploring whether it is possible to more accurately place subscribers in these non-county communities. At the moment, however, no such solution is available, and DIRECTV does not know how much it would cost to create such a system, assuming one could be devised at all. Moreover, integrating this capability into DIRECTV’s system would likely involve the creation of more than a thousand separate program packages (one for each of the station/community combinations found on the

⁸ Notice at App. B (p. 169).

⁹ Indeed, it is not even clear that DBS operators can reliably obtain zip code information for all cable communities. To take three examples, Rockland, NY, Mackamating, NY, and Bowers Beach, DE do not appear on the Post Office’s website list of zip codes.

¹⁰ DIRECTV cannot depend on such subscribers to identify themselves as residing in particular cable communities. SHVERA subjects DBS operators to significant penalties for delivering “significantly viewed” signals to areas where the signal is not really significantly viewed. See 47 U.S.C. § 340(f). Subscriber inaccuracy in identifying eligibility for significantly viewed signals would thus place DIRECTV in legal jeopardy.

Commission's list). Thus, even if the underlying data were available at the requisite level of detail, the modification of DIRECTV's billing and conditional access systems needed to implement a system capable of processing that data would be (at best) a dauntingly complex and expensive prospect.¹¹

In the absence of such a technical solution, DIRECTV will have to proceed based on its existing capability. This being the case, if DIRECTV can determine that a zip code is *entirely* within a particular non-county community, DIRECTV can obviously provide significantly viewed signals to everybody in that zip code. But absent improbably good fortune, it is likely that many such communities will include zip codes that fall only partially within the boundaries of non-county communities. This presents DIRECTV with something of a Hobson's choice. If it were to provide service to everybody in such "split" zip codes, some ineligible subscribers would receive out-of-market signals. Alternatively, DIRECTV could decline to provide significantly viewed signals at all in split zip codes, but then some eligible subscribers would not receive the service.

DIRECTV does not know that it has the authority to superimpose a more "DBS-friendly" set of eligibility criteria (based on zip codes) over the Commission's list of cable communities, because SHVERA does not appear to anticipate automatic extension of those boundaries to encompass all split zip codes. In non-county cable communities, therefore, DIRECTV will likely take the conservative approach of offering each significantly viewed signal only to subscribers in zip codes that DIRECTV can determine

¹¹ That said, should a workable third-party geocoding or other solution become available (against DIRECTV's expectations), DIRECTV should be entitled to rely on the services of such third parties in determining eligibility to receive significantly viewed signals. Stations should not be able to seek damages for unauthorized retransmission when such retransmission is based on the good faith use of third-party eligibility determinations.

to be located entirely within the relevant communities.¹² In other words, unless SHVERA can be interpreted otherwise, DIRECTV will have to deny service to eligible subscribers in order to avoid providing service to ineligible subscribers.

The Commission can, however, minimize this problem for future significantly viewed determinations. It should, wherever possible, define future “cable communities” and “satellite communities” in terms of zip codes, or at least in terms of counties.¹³ DIRECTV understands the Commission’s concern with ignoring “an existing town, village, municipality or other geopolitical entity that constitutes a ‘community’ in the more traditional sense” or with creating “an artificial ‘community’ with no minimum or maximum size, except as bounded by a postal zip code map.”¹⁴ (That said, DIRECTV does not find it obvious that, say, “unincorporated portions of Shawnee County” necessarily constitutes any more of a “community in the traditional sense” than a particular zip code located in Shawnee County, or, for that matter, that an area defined by a cable system necessarily bounds a cohesive “community in the traditional sense.”) In the end, abstract concerns with traditionalism should defer to the near certainty that eligible households in each area where significantly viewed signals are provided by a DBS operator will be unable to get service under a more traditional definition. In defining future significantly viewed communities, the Commission should err, if at all, on the side of consumers.

¹² The Commission could greatly facilitate this process by issuing a proposed list of such zip codes that all parties (DBS operators and broadcast stations alike) could review and refine in order to create a definitive reference source.

¹³ *Notice* at ¶ 32.

¹⁴ *Id.*

II. THE COMMISSION SHOULD IMPLEMENT “EQUIVALENT BANDWIDTH” AND “ENTIRE BANDWIDTH” ON A CASE-BY-CASE BASIS, WITH REFERENCE TO NON-DISCRIMINATION

As the *Notice* points out, “a satellite carrier’s retransmission of a local network station’s digital signal must either (1) occupy ‘at least the equivalent bandwidth as the digital signal retransmitted’ or (2) comprise ‘the entire bandwidth of the digital signal broadcast by such local network station.’”¹⁵ The Commission seeks comment on whether and how to define these concepts.¹⁶ DIRECTV believes that the Commission is on the right track in proposing *not* to define them.¹⁷ These two terms were meant to provide non-discrimination protections for incumbent broadcasters. They will be most useful to broadcasters and DBS operators alike if implemented on a case-by-case basis.

To understand why the Commission is right in not attempting to define these terms in a more formal sense (*e.g.*, “equivalent bandwidth means no greater than an average X mbps difference when measured over Y period”), one must recognize the context in which they were developed during the enactment of SHVERA. When it became clear that Congress might allow DBS operators to retransmit digital broadcast signals in significantly viewed areas, broadcasters expressed concerns that a DBS operator could harm “incumbent” stations by discriminating in such retransmissions. The concern, as originally expressed, was that a DBS operator might, for example, import a significantly-viewed NBC high definition (“HD”) signal but insist on retransmitting the local NBC affiliate’s digital signal in standard definition (“SD”) format. Frankly, it had never occurred to DIRECTV to discriminate in such a manner, so it did not object to the

¹⁵ *Notice* at ¶ 42; 47 U.S.C. § 340(b)(2)(B).

¹⁶ *Notice* at ¶ 42.

¹⁷ *Notice* at ¶ 45.

initial Congressional efforts to provide broadcasters with reasonable protections in this regard.

As discussions progressed, however, it became apparent that the complexities of digital transmission would not be amenable to a rigid standard requiring some measure of exact equality – so Congress took account of these complexities by adopting a supple benchmark. First, broadcasters may in the future configure the broadcast services provided over digital spectrum in any number of different ways, not just in HD and SD “programming streams.” Thus, Congress expressed its non-discrimination requirement in terms of “bandwidth” rather than, for example, “services” or “programming streams.” Second, the bandwidth used by a given broadcast transmission changes from moment to moment, making instantaneous comparisons of any two signals essentially meaningless. Thus, Congress used the concept of “equivalency” rather than exact equality.¹⁸ Third, DBS operators (and, increasingly, broadcasters themselves) use a variety of multiplexing, compression, and modulation techniques that greatly complicate any comparison of the retransmitted signal with the broadcaster’s original transmission of that signal. Thus, Congress did not require such a comparison.¹⁹ And fourth, some stations may choose not

¹⁸ 47 U.S.C. § 340(i)(4) (“[T]his paragraph shall not be construed . . . to require a satellite carrier to use the identical bandwidth or bit rate for a local network station as it does for a distant network station.”). *See also* “Satellite Home Viewer Extension and Reauthorization Act of 2004,” H.R. Rep. No. 108-634, 108th Cong., 2d. Sess. at 13 (July 22, 2004) (“*House Commerce Committee Report*”) (“The Committee does not intend section 340(b)(2)(B) to . . . require a satellite operator to use the exact bandwidth or bitrate for a local broadcaster as it does for a distant broadcaster.”).

¹⁹ 47 U.S.C. § 340(i)(4) (“[T]his paragraph shall not be construed . . . to prevent a satellite carrier from using compression technology [or] to require a satellite carrier to use the identical bandwidth or bit rate as the local or distant broadcaster whose signal it is retransmitting. . . .”). *See also House Commerce Committee Report* at 13 (“The Committee does not intend section 340(b)(2)(B) to prevent a satellite operator from using compression technology [or] to require a satellite operator to use the exact bandwidth or bit rate as the local or distant broadcaster whose signal it is retransmitting”). It is also worth noting that newer technologies (such as MPEG-4) will be able to retransmit broadcast signals more efficiently, so that a signal of similar quality to the older standard (MPEG-2) would require less bandwidth.

to use all of their spectrum for broadcast services. Accordingly, Congress included the alternative concept of “entire” bandwidth to clarify that a DBS operator cannot be blocked from carrying a significantly viewed station that uses the full bandwidth for its broadcast signal if it also carries the entirety of the incumbent’s signal, even though the significantly viewed signal may therefore use more bandwidth.²⁰

The equivalent bandwidth and entire bandwidth concepts were thus created to prevent material discrimination from the carriage of significantly viewed digital signals in this fluid environment. As the Commission recognizes, this can only be done on a case-by-case basis.²¹

In making such case-by-case decisions, however, the Commission must be careful not to uncouple the two definitions from Congress’s underlying statutory goals. The *Notice*, unfortunately, provides one example of what can go wrong with such uncoupling:

We also seek comment on whether satellite carriers must use the same compression techniques for both the local network station and the significantly viewed network affiliate. We note that doing so may result in differences in real bandwidth and bit rate, depending on the programming content carried by the signal. For example, a significantly viewed network affiliate broadcasting a sporting event would use more bandwidth than a local network station broadcasting an interview (*i.e.*, talking head). In this example, should we apply the same compression standard to both stations, thereby precluding the significantly viewed sporting event? Instead, should only comparable content that uses a comparable bit rate be afforded equivalent bandwidth? Should we require only that the same amount of bandwidth be made available to the local network station, allowing the local station to choose the amount of bandwidth it needs?”²²

²⁰ 47 U.S.C. § 340 (b)(2)(B)(ii) (“the retransmission of the local network station is comprised of the entire bandwidth of the digital signal broadcast by such local network station”).

²¹ *Notice* at ¶ 45 (“While we believe the final order adopted pursuant to this Notice will define these concepts as required by the statute, we do not believe it is necessary at this time to include definitions of these terms in our rules because they will, to some extent, depend upon specific circumstances in each case. The rules we propose provide that satellite carriers must abide by the ‘equivalent bandwidth’ and ‘entire bandwidth’ requirements.”).

²² *Notice* at ¶ 46.

The regime hypothesized in this paragraph has nothing to do with the “discrimination” issue that Congress was trying to address. None of the parties involved in formulating the equivalent bandwidth restriction intended for the concept to “preclud[e a] significantly viewed sporting event,” because nobody could reasonably have thought that the DBS operator discriminates against the incumbent in such a scenario. Nor did the parties contemplate that the restriction would require comparison of megabits per second from moment-to-moment. Again, non-discrimination does not require such a comparison, and DBS operators could never comply with such a requirement.

The Commission would do far better – and would effectuate the intent of Congress – by interpreting the equivalent bandwidth and entire bandwidth requirements *to prohibit material discrimination as measured on an overall carriage (not program-by-program or minute-by-minute) basis.*

In implementing this standard, the Commission should keep in mind that thousands of broadcasters may shift between HD and multicast carriage throughout the broadcast day. DIRECTV cannot possibly keep track of this level of activity on a moment-by-moment basis, nor can it reasonably be expected to account for modest (and changing) differences in the choices between any two broadcasters. If the equivalent bandwidth restriction is to work, DBS operators must be able to make discrete decisions on what they can and cannot carry, on which they can reasonably rely in creating program packages for subscribers.

With this in mind, DIRECTV below sets forth its views on how the requirements should apply in various scenarios. These examples, of course, concern only whether or not DIRECTV’s importation of significantly viewed signals would comply with

SHVERA's equivalent bandwidth and entire bandwidth restrictions. They should not be read as implying that any particular carriage arrangement would otherwise be required, or, indeed, even authorized. In many cases, carriage arrangements would depend on privately negotiated retransmission consent agreements between DIRECTV and the stations in question.²³

- If a significantly viewed station transmits full time in HD, and the incumbent station transmits six full time SD channels, DIRECTV could comply with the “equivalent bandwidth” restriction by either (1) carrying all six SD incumbent channels in order to transmit the significantly viewed HD channel, or (2) carrying a single programming stream of both the incumbent and significantly viewed station in SD format. (This, of course, assumes a “rule of thumb” that the transmission of one HD channel generally requires the same bandwidth as six standard definition SD channels.)
- If, however, the incumbent station in the above example transmits only two SD channels on a full time basis, DIRECTV could retransmit the significantly viewed HD signal in compliance with the “entire bandwidth” restriction if it retransmits both of the incumbent SD channels.
- If both stations transmit HD programming during some parts of the day, and transmit multiple SD channels during other parts of the day, DIRECTV could retransmit a single programming stream for each station (the “primary signal” consisting of the HD stream when transmitted, and one of the multiple SD streams when transmitted) in compliance with the equivalent bandwidth rule.
 - DIRECTV would comply with the rule even if the two stations do not transmit HD programming at the same time. (In other words, bandwidth need not be equivalent between the two stations at any given moment.)
 - DIRECTV would comply with the rule even if the two stations do not transmit exactly the same number of hours of HD programming. (In other words, the allocation of HD vs. SD programming would be left to the broadcaster, and DIRECTV need not account for the number of hours each station transmits in each format to ensure absolute equality.)

²³

In this regard, DIRECTV notes that SHVERA states that the equivalent bandwidth and entire bandwidth concepts “shall not be construed . . . to affect the definitions of ‘program related’ and ‘primary video’” in connection with the Commission’s digital carriage rules. *See Carriage of Digital Television Broadcast Signals*, Second Report and Order and First Order on Reconsideration, FCC 05-27, CS Docket No. 98-120 (rel. Feb. 23, 2005) (determining that the Commission’s mandatory carriage rules require carriage of only a single programming stream and related material.).

- DIRECTV would *not* comply with the rule, however, if it retransmitted the primary signal (in HD and SD) and additional SD channels for the significantly viewed station while retransmitting only the primary signal for the incumbent station (unless that were the incumbent station’s “entire bandwidth”).
- DIRECTV could continue to use advanced compression and modulation technology consistent with the equivalent bandwidth rule, so long as it does not discriminate.
 - DIRECTV would not comply with the rule if it intentionally compressed the incumbent’s signal to the point where it was materially degraded in comparison to the significantly viewed signal.
 - But DIRECTV could comply with the rule even if it used different compression technology (*e.g.*, MPEG-4 vs. MPEG-2) or modulation technology (*e.g.*, 8PSK vs. QPSK) for the two sets of signals – again, assuming no materially greater degradation of the incumbent’s signal.
 - DIRECTV could comply with the rule even if compression or modulation results in the two signals using different levels of bandwidth at any given time (*i.e.*, DIRECTV’s multiplexers can allocate bandwidth rationally as between sports and “talking head” programming).

III. THE COMMISSION SHOULD NOT CREATE A “SIGNIFICANTLY VIEWED TWO-DISH” RESTRICTION

DIRECTV has always complied with what has now become known as the “two-dish” restriction for local stations.²⁴ But the Commission now proposes to apply this restriction to out-of-market significantly viewed signals.²⁵ The Commission lacks statutory authority to impose such a requirement, because Congress quite plainly limited the two-dish restriction to local (not significantly viewed) signals. Moreover, grafting the two-dish restriction onto the significantly viewed rules would make it impossible for DIRECTV to provide signals in dozens of significantly viewed communities. No policy

²⁴ 47 U.S.C. § 338(g).

²⁵ *Notice* at ¶ 34 (asking whether “the statute necessarily require[s] that out of market significantly viewed signals be carried such that the subscriber would receive them on the same antenna and equipment as the local signals”).

justification exists for such an outcome. The two-dish rule was meant to prevent viewers from having to obtain additional equipment to receive some, but not all, of their local signals. There is no prospect of such an outcome if a viewer needs a second dish to receive all significantly viewed signals from a neighboring market.

SHVERA limits the two-dish restriction to *local-into-local* service. This is clear, first of all, by SHVERA's structure. Section 338 of the Communications Act governs the retransmission of local signals. Section 339 of the Act governs the retransmission of distant signals. And new Section 340 governs the retransmission of out-of-market significantly viewed signals.²⁶ The most natural way to read these SHVERA provisions – indeed, the only way they have ever been read – is that each of these sections contains authorizations and limitations specific to the type of retransmission in question. Thus, the rules for local service are found in Section 338 of the Communications Act, which includes the new two-dish restriction. The rules for providing service in significantly viewed areas can be found in new Section 340, where there is no two-dish restriction.

SHVERA's language reflects this distinction. The two-dish provision governs “satellite carrier[s] providing, under section 122 of Title 17, United States Code, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station”²⁷ The restriction itself provides:

Each satellite carrier that retransmits the analog signals of local television broadcast stations in a local market shall retransmit such analog signals in

²⁶ 47 U.S.C. § 340(a) (stating that, “[i]n addition to the broadcast signals that subscribers may receive under section 338 and 339,” satellite carriers are “also” authorized to retransmit significantly viewed stations).

²⁷ 47 U.S.C. § 338(a)(1). Significantly viewed signals are governed under Section 119 of the Copyright Act, not Section 122, which covers local-into-local retransmissions. *See* 17 U.S.C. § 119(a)(3).

such market by means of a single reception antenna and associated equipment.²⁸

This language can only apply to local-into-local service. This is what retransmitting the signals of a “*local* television broadcast station in a local market” means – a station is only “local” in its own market.²⁹

Expanding the two-dish restriction also makes no sense as a policy matter. It would effectively preclude the offering of significantly viewed signals where DBS operators employ different technologies in neighboring markets. To take the most obvious example, DIRECTV now offers local channels from three separate orbital locations – 101° W.L., 119° W.L., and 72.5° W.L. DIRECTV’s newer receive antennas can “see” 101° W.L. and 119° W.L. simultaneously,³⁰ but no such antenna can see those locations and 72.5° W.L. as well.

DIRECTV complies with the two-dish restriction because it offers all local stations in a given market from the same orbital location.³¹ But it could not reasonably comply with a requirement that it offer stations *from different markets* via a single dish in all cases. By DIRECTV’s count, there are 61 markets in which either DIRECTV

²⁸ 47 U.S.C. § 338(g) (also providing that, “[i]f the carrier retransmits signals in the digital television service, the carrier shall retransmit such digital signals in such market by means of a single reception antenna and associated equipment, but such antenna and associated equipment may be separate from the single reception antenna and associated equipment used for analog television service signals.”).

²⁹ The term “local market” is defined in 17 U.S.C. § 122(j)(2). “The term ‘local market’, in the case of both commercial and noncommercial television broadcast stations, means the designated market area in which a station is located, and . . . in the case of a commercial television broadcast station, all commercial television broadcast stations licensed to a community within the same designated market area are within the same local market; and . . . the county in which the station’s community of license is located.”

³⁰ DIRECTV’s older receive antennas can only view one of these central orbital locations. Were DIRECTV to offer local signals from one of the central orbital locations and significantly viewed signals from the other, consumers would require a new dish to receive the significantly viewed signals. But they would receive both sets of signals with the single new dish.

³¹ In the case of stations carried from the 72.5° W.L. slot, the dish receiving local channels is different from the dish receiving other DIRECTV programming.

provides local-into-local service from a central orbital location but would provide significantly viewed signals that are currently retransmitted from 72.5° W.L., or vice versa. Either scenario would require the use of two dishes to receive both local and significantly viewed signals. DIRECTV cannot rearrange the station allocation across its satellite constellation to comply with a multi-market two-dish rule. A two-dish restriction for significantly viewed signals is thus, in reality, a prohibition on such retransmissions in many areas.

There is simply no justification for such a result. The two-dish rule was meant to prevent viewers from having to obtain additional equipment to receive some, but not all, of their local signals.³² Here, by contrast, some viewers may have to obtain a second dish only if they wish to a second complement of out-of-market signals. The equities are not remotely the same. Moreover, where a second dish is required, it is required for *all* significantly viewed stations “imported” from the same DMA. Indeed, the Commission’s proposal would hurt all such stations, because DIRECTV could not comply with the requirement and would simply not be able to offer the signals in significantly viewed areas.

³² See e.g., Statement of Congressman Gonzalez, Cong. Rec. H8220 (Oct 6, 2004) (“For several years, I have heard complaints from local Spanish language broadcasters that one particular satellite company has refused to carry Spanish language broadcast on the same dish on which it carries the signals of the major television network. In fact, in my own home State of Texas nine of the eleven stations bumped by that satellite company to a second dish are Spanish language stations. In these two-dish markets, customers do not receive all of the channels for which they have paid if they do not ask that particular company for the second dish. This is unfair to consumers, and it harms the viability of local broadcasters because fewer people are watching their channels.”).

IV. THE COMMISSION SHOULD CONFIRM THAT STATIONS CANNOT SEEK TO PROHIBIT THE IMPORTATION OF SIGNIFICANTLY VIEWED SIGNALS INTO THEIR LOCAL MARKETS

The Commission notes that SHVERA’s significantly viewed provisions do not “change the retransmission consent requirements.”³³ It thus concludes that “retransmission consent [for significantly viewed stations] is not necessary if the satellite carrier is exempt from having to obtain retransmission consent for other reasons” (such as provision to unserved households).³⁴ DIRECTV agrees with this conclusion.

There are, however, two respects where SHVERA’s significantly viewed provisions do impact retransmission consent. One concerns the potential ability of an incumbent station to “block” importation of a same-network significantly viewed station by, for example, withholding retransmission consent. The Commission tentatively concluded that the law does not allow such an outcome,³⁵ and this is exactly the right decision – no station should be able to block carriage of another station.³⁶

The Commission should also be aware of a possibility similar to that described in the *Notice*. At least one broadcaster has already demanded, as a condition of carriage, that DIRECTV agree *not* to import significantly viewed signals into its DMA.

DIRECTV fully expects more such requests – even in areas where the local cable

³³ *Notice* at ¶ 33.

³⁴ *Id.*

³⁵ *Notice* at ¶ 39 (“We tentatively conclude that a subscriber receiving local-into-local service in a market is eligible for out-of-market significantly viewed stations even if the local stations retransmitted by the satellite carrier exclude an affiliate of the network with which a significantly viewed station is affiliated. We do not think that a subscriber should be deprived of access to a significantly viewed station because the local station refused to grant retransmission consent or is otherwise ineligible for local carriage, but we seek comment on this tentative conclusion.”).

³⁶ SHVERA clearly provides that, where a DBS operator seeks to import a significantly viewed station into a market where there is no same-network affiliate, it can do so without providing local-into-local service in that market. 47 U.S.C. § 340(b)(3). DIRECTV, however, intends to offer significantly viewed signals as part of its local package, and thus does not anticipate providing such signals prior to the launch of a local market.

operator retransmits significantly viewed stations. DIRECTV understands that the Commission is not generally comfortable delving into the specific terms of retransmission consent agreements. But the Commission should clarify that broadcast stations violate their duty to negotiate in good faith when they make demands to limit the carriage of other stations.³⁷

V. ADMINISTRATIVE AND OTHER MATTERS

A. Notice Issues and “Good Faith”

SHVERA includes a number of provisions requiring notice to local broadcast stations, including those related to significantly viewed signals. The Commission “tentatively conclude[s] that . . . written notices [related to significantly viewed signals] must be sent to the station’s principal place of business, as listed in the Commission’s database, by certified mail, return receipt requested.”³⁸ This raises several related issues.

Certified mail. Unlike cable operators, DIRECTV must provide a variety of notices to local television stations throughout the country.³⁹ It has found that, in managing such a large number of notices, the national overnight delivery companies are superior to certified mail. Among other advantages, these companies allow DIRECTV to more easily track correspondence. And like certified mail, these services also provide confirmation of receipt. Rather than specifying that DBS operators “must” use certified

³⁷ See 47 U.S.C. § 325(b)(3)(C)(ii) (setting forth requirement that broadcasters negotiate in good faith).

³⁸ Notice at ¶ 60.

³⁹ See 47 U.S.C. § 340(g) (providing that satellite carriers must notify all television broadcast stations in a market before it commences the retransmission of significantly viewed signals); 47 U.S.C. § 340(h)(3)(A) (providing that satellite carriers must notify stations that they reserve the right to retransmit same-network significantly viewed stations).

mail, the Commission should provide that DBS operators must use a reliable source of delivery that provides proof of receipt.

Database. DIRECTV does not object to using the addresses listed in the Commission's database. It would note, however, that such addresses are often the address of the licensee, not the physical address of the station itself. In addition, many of the addresses in the Commission's database contain only P.O. boxes, which may complicate the delivery of notices using certified mail or overnight delivery. The Commission should ask each broadcast station to update the Consolidated Database System for significantly viewed purposes to the extent they would prefer to receive notices at the station's actual physical addresses rather than the licensee's address, and to replace P.O. boxes with street addresses.

Good faith. The Commission asks about good faith generally, and about good faith and notices specifically.⁴⁰ As a general matter, DIRECTV agrees with the Commission – questions of good faith (and frivolous complaints) are best addressed on a case-by-case basis.⁴¹ The Commission's examples, however, cause DIRECTV some concern. As an entity charged with potentially sending thousands of notices related to the provision of significantly viewed service, DIRECTV cannot possibly see how one might think it bad faith "if the only violation of Section 340 were the failure to notify all broadcast stations in a market 60 days prior to commencing carriage of the significantly viewed stations"⁴² – at least absent some demonstration of actual bad faith (*i.e.*, a deliberate intent to deprive stations of their rights by withholding information). By the

⁴⁰ Notice at ¶ 56.

⁴¹ *Id.*

⁴² *Id.*

same token, it seems beyond question (again, absent additional facts) that “seeking damages for failure to notify one station [would] constitute a frivolous complaint by a broadcaster.”⁴³ DIRECTV will do its utmost to ensure that each of the myriad notices required by SHVERA is sent accurately. But the Commission should not presume bad faith in the event of error.

In this regard, there is one sense in which the Commission might be able to help minimize mistakes. The Commission’s list of significantly viewed communities is now available only as part of the *Notice*, and thus only in Microsoft Word, Adobe Acrobat, and “plain text” format. Were the Commission to make this list available in a downloadable format (Access or Excel, for example), it would reduce the possibility of “data entry” errors as satellite operators enter the 400-odd pages of information into their own databases, and would make it easier for satellite and cable operators to update their systems based on changes to the list.

B. Definition of Satellite Subscriber

The Commission notes that new Section 340 contains a relatively broad definition of the term “subscriber,” which refers to that same definition in the Copyright Act’s local-into-local statutory license.⁴⁴ The Commission states, however, that this definition “differs slightly from the definition of subscriber currently contained in 17 U.S.C. § 119, which establishes the significantly viewed compulsory copyright license for satellite carriers . . . [and] limits ‘subscribers’ to individuals in private homes.”⁴⁵ The

⁴³ *Id.*

⁴⁴ *Notice* at ¶ 37. As the Commission notes, the definition references 47 U.S.C. § 338(k), which in turn references 17 U.S.C. § 122(j)(4). This section provides that a subscriber is “a person who receives a secondary transmission service from a satellite carrier and pays a fee for the service, directly or indirectly, to the satellite carrier or to a distributor.”

⁴⁵ *Notice* at ¶ 37.

Commission proposes to employ the broader definition of “subscriber” in Section 338(k) because, it reasons, Congress intended for significantly viewed signals to be treated more like local signals than like distant signals.

This is the right result, but DIRECTV would note that the definition of “subscriber” in 17 U.S.C. § 119 no longer includes a limiting reference to “private home viewing.”⁴⁶ The two Copyright Act definitions (in Sections 119 and 122) are for present purposes largely the same, and DIRECTV sees no need to distinguish between them here.

CONCLUSION

Congress has given DBS operators a great opportunity to match cable’s offerings. This all redounds to the benefit of consumers, many of whom stand to enjoy increased choice in the MVPD marketplace. DIRECTV urges the Commission to implement Congress’s new rules to make the most of this opportunity.

Respectfully submitted,

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⁴⁶ See 17 U.S.C. § 119(d)(8) (“The term ‘subscriber’ means an individual or entity that receives a secondary transmission service by means of a secondary transmission from a satellite carrier and pays a fee for the service, directly or indirectly, to the satellite carrier or to a distributor in accordance with the provisions of this section.”).

APPENDIX 1

QUESTIONS REGARDING INDIVIDUAL STATIONS AND COMMUNITIES

STATION NAME, CHANNEL NUMBER, AND CITY OF ORIGIN AS LISTED IN FCC NPRM	SIGNIFICANTLY VIEWED COUNTY OR COMMUNITY IN QUESTION	DIRECTV QUESTION OR COMMENT
+KKVI, 35, Twin Falls, ID	ID, Gooding – Jerome – Twin Falls	Station not located.
WJJY, 14, Jacksonville, IL	MO, Marion - Ralls	Station not located.
WTCT, 27, Marion, IL	IL; Marshall	Should station be listed as significantly viewed in Marshall, Kentucky (in the Paducah DMA), not Marshall, Illinois (two DMAs away)?
+WFI, 14, Evansville, IN	KY, Hopkins	Should station be WFIE?
KVFD, 21, Fort Dodge, IA	IA, Calhoun + six additional counties	Station not located.
KKBSH, 7, Hutchinson, KS (formerly KAYS)	KS, Ness	Should station be KBSH?
KSAS, 24 Wichita, KS	KS, Butler; KY, Butler	Is this station significantly viewed in Butler, Kentucky as well as Butler, Kansas?
+WDK, 56, Danville, KY	KY, Boyle	Should station be WDKY?
KAL, 5, Alexandria, LA	LA, Grant	Should station be KALB?
KLF, 10, Lafayette, LA	LA, Allen	Should station be KLFY?
KNO, 8, Monroe, LA	LA, East Carroll	Should station be KNOE?
+WZBU, 58, Vineyard, MA (formerly WCVX)	MA, Barnstable	Station not located. Could it be WDPX?
WHLL, 27, Worcester, MA (formerly WSMW)	MA, Worcester	Station not located. Could it be WUNI?
+WXON, 20, Detroit MI	MI, Oakland	Station not located.
WFVX, 45, Vanderbilt, MI	MI, Otsego – Emmet – Charlevoix – Crawford - Cheboygan	Per DIRECTV's information, there is no WFVX in Michigan. WFVX is a Low Power station in Bangor, ME and thus cannot be significantly viewed in Michigan. Did WFVX Michigan go out of business?
WFXV, 45, Vanderbilt, MI	MI, Antrim	Per DIRECTV's information, there is no WFXV in Michigan. WFXV is in Utica, NY. The FCC may have meant WFVX Michigan. But WFVX is no longer in Michigan (see above). In any event, neither WFXV (Utica) nor WFVX (Bangor) can be significantly viewed in Michigan.

STATION NAME, CHANNEL NUMBER, AND CITY OF ORIGIN AS LISTED IN FCC NPRM	SIGNIFICANTLY VIEWED COUNTY OR COMMUNITY IN QUESTION	DIRECTV QUESTION OR COMMENT
KCIT, 50, Kansas City, MO	MO, Clinton – Ray – Platte – Lackson – Clay – Cass KS, Johnson – Leavenworth – Wyandotte	Per DIRECTV's information, KCIT Kansas City is apparently no longer in service, but there is a KCIT in Amarillo, TX
WOW, 6, Omaha, NE (formerly WOW)	NE, Cass	Station not located. Could it be WOWT?
+WNBU, 21, Concord, NH (formerly WNHT)	NH, Belknap and various other counties	Station not located. Could it be WPXG?
+KGSW, 14, Albuquerque, NM	NM, Cibola – Rio Arriba – Santa Fe – Socorro – Los Alamos	Station not located.
WSNC, 36, Charlotte, NC (formerly WRET)	NC, Union	Should station be WCNC?
KSMA, 2, Dickinson, ND (formerly KDIX)	ND, Bowman	Should station be KXMA?
KCND, 12, Pembina – ND	ND, Cavalier – Pembina – Walsh	Station not located.
WAKC, 23, Akron, OH (formerly WAKR)	OH, Summit	Could station have changed its name to WVPX?
WKBF, 61, Cleveland, OH	OH, Portage and various other counties	Station not located.
WIMA, 35, Lima, OH (formerly WIMA)	OH, Mercer	Station not located. Could it be WLIO?
+WWLF, 56, Hazelton, PA, +WOLF, 38, Scranton, PA +WWLF, 56, Scranton, PA	PA, Lycoming (WWLF Hazelton only) PA, Snyder (WWLF Scranton only)	According to the FCC's Station Search Details and Call Sign History, there appears to have been a number of transactions involving the call signs of these stations. Specifically (1) WWLF-TV Hazleton changed its call sign to WOLF-TV Hazleton in 1998; and (2) WOLF-TV in Scranton changed its call sign to WSWB Scranton on the same date. Accordingly, <ul style="list-style-type: none"> • Should WOLF-TV, Scranton instead be WSWB Scranton? • Should WWLF Hazleton instead be WOLF Hazleton? • Should WWLF Scranton instead be WOLF Hazleton?
KFSY, 13, Sioux Falls, SD (formerly KSOO)	SD, Aurora	Should station be KSFY?

STATION NAME, CHANNEL NUMBER, AND CITY OF ORIGIN AS LISTED IN FCC NPRM	SIGNIFICANTLY VIEWED COUNTY OR COMMUNITY IN QUESTION	DIRECTV QUESTION OR COMMENT
+WXMT, 30, Nashville, TN (formerly WCAY)	KY, Warren	Station not located. Could it be WUXP?
KBDC, 4, El Paso, TX (formerly KROD)	NM, Luna	Should station be KBDC?
KELP, 13, El Paso, TX (formerly KELP)	NM, Luna	Should station be KVIA?
KHTV, 39, Houston, TX	TX, Waller and various other counties	Per DIRECTV's information, KHTV is a Low Power Los Angeles station, and thus cannot be significantly viewed in Texas.
KJAC, 4, Port Arthur, TX	LA, Calcasieu – Cameron – Beauregard	Should station be KBTB?
KCTV, 8 San Angelo, TX	TX, Tom Green	Per DIRECTV's information, KCTV is a Kansas City Station, and thus cannot be significantly viewed in Texas. Could this be KLST, which is the Ch 8 station in San Angelo, TX?
KSPQ, 13, Tacoma, WA (formerly KTVW)	WA, Thurston	Should station be KCPQ?
WCH, 8, Charleston, WV	KY, Martin	Should station be WCHS?
WTR, 7, Wheeling, WV	OH, Harrison	Should station be WTRF?
KFIZ, 34, Fond du Lac, WI	WI, Fond du Lac – Winnebago	Station not located.