RETRANSMISSION CONSENT AND EXCLUSIVITY RULES: REPORT TO CONGRESS PURSUANT TO SECTION 208 OF THE SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT OF 2004

September 8, 2005

TABLE OF CONTENTS

Paragraph #

I. INTRODUCTION

1. The Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA")[1] directs the Commission, within nine months after enactment, to complete an inquiry and submit a report to Congress "regarding the impact on competition in the multichannel video programming distribution market of the current retransmission consent, network non-duplication, syndicated exclusivity, and sports blackout rules, including the impact of those rules on the ability of rural cable operators to compete with direct broadcast satellite ("DBS") industry in the provision of digital broadcast television signals to consumers."[2] SHVERA also directs the Commission to "include such recommendations for changes in any statutory provisions relating to such rules as the Commission deems appropriate."[3]

2. In accordance with this directive, the Media Bureau issued a Public Notice on January 25, 2005, requesting comment, information, and analysis on how the retransmission consent, network non-duplication, syndicated exclusivity, and sports blackout rules affect competition, both generally and specifically, in the multichannel video programming distribution ("MVPD") market.[4] The Notice also sought comment on the impact of these rules on rural cable operators' ability to compete with DBS operators in the provision of digital broadcast signals. In this Report, we address and analyze the comments we received and discuss potential areas for Congressional action.[5] At this time, we find that it is not necessary to recommend specific statutory amendments.

II. BACKGROUND

3. Carriage of the signals of broadcast television stations and the content contained in those signals is governed by three separate but interrelated regimes: (1) the retransmission consent and mandatory carriage provisions of the Communications Act of 1934, as amended (the "Act"), which govern carriage of television broadcast signals by cable and DBS operators;[6] (2) copyright law, which protects copyrighted material within broadcast signals;[7] and (3) the Commission's exclusivity rules, which protect exclusive rights to distribute certain content.[8] We discuss below the provisions of the Act and Commission regulations at issue in this report. In addition, to the extent relevant to our analysis, we address certain aspects of the copyright laws governing retransmission of the copyrighted material in

[1] Pub. L. No. 108-447, 118 Stat. 2809 (2004). SHVERA was enacted on December 8, 2004.

[2] *Id*. at § 208.

[3] *Id*.

[4] *Media Bureau Seeks Comment for Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace*, 20 FCC Rcd 1572 (2005) (Public Notice).

[5] The Appendix lists the commenters in this proceeding and the acronyms used to refer to them.

[6] *See* Communications Act of 1934, as amended ("Communications Act"), 47 U.S.C. §§ 325, 338-40, 534-35, 543, 548; 47 C.F.R § 76.55-62 (cable must carry); 47 C.F.R. § 76.64 (cable retransmission consent); 47 C.F.R. § 76.66 (DBS signal carriage).

[7] Copyright Act of 1976 ("Copyright Act"), 17 U.S.C. §§ 111, 119, 122.

[8] 47 C.F.R. § 76.92-76.95 (cable network non-duplication); 47 C.F.R. § 76.101-110 (cable syndicated exclusivity); 47 C.F.R. § 76.111 (cable sports blackout); 47 C.F.R. § 76.120 (satellite definitions related to exclusivity); 47 C.F.R. § 76.122 (satellite network non-duplication); 47 C.F.R. § 76.123-76.125 (satellite syndicated exclusivity); 47 C.F.R. § 76.127 (satellite sports blackout); 47 C.F.R. § 76.128 (application of cable and satellite sports blackout rules); 47 C.F.R. § 76.130 (satellite substitution for blacked out programming).

television broadcast signals.

A. Retransmission Consent and Mandatory Carriage

4. As described below, the laws and regulations governing carriage of broadcast signals were enacted or adopted over a number of years. While the rules differ somewhat for cable and satellite providers, pursuant to statutory directive, the Commission has adopted rules for satellite providers regarding mandatory carriage of broadcast signals and retransmission consent that closely parallel the requirements for cable providers.[9]

5. *Cable*. Originally, the primary function of cable television was to facilitate reception of local television stations by persons who could not receive a satisfactory over-the-air signal because of their location.[10] Cable television transmission evolved into providing signals from distant television stations to areas where the signals would not otherwise be available over the air. The majority of cable television programming initially consisted of the retransmission of signals broadcast by others rather than programs originated by cable systems or other non-broadcasters.[11] Today, most cable programming originates from sources other than over-the-air broadcast signals.

6. As the cable industry grew, disputes arose between cable operators and copyright owners of broadcast material regarding whether cable operators were entitled to retransmit the material contained in a broadcaster's signal without first obtaining a copyright license.[12] In 1976, in order to address the tensions between cable operators and copyright owners, Congress revised the Copyright Act.[13] Pursuant to the amendments, unlicensed retransmission of the copyrighted material in a broadcast signal constitutes copyright infringement.[14] Cable systems were granted a statutory or compulsory license for the retransmission of all local broadcast signals and distant signals that the Commission permitted them to

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[9] *See Implementation of the Satellite Home Viewer Improvement Act 1999: Broadcast Signal Carriage Issues, Retransmission Consent Issues*, 16 FCC Rcd 1918 (2000) ("*SHVIA Signal Carriage Order*"); *Technical Standards for Determining Eligibility For Satellite-Delivered Network Signals Pursuant To the Satellite Home Viewer Improvement Act*, 15 FCC Rcd 24321 (2000); *Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules To Satellite Retransmissions of Broadcast Signals*, 15 FCC Rcd 21688 (2000) ("*Satellite Exclusivity Order*"); *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445 (2000) ("*SHVIA Good Faith Order*"); *Implementation of the Satellite Home Viewer Improvement Act of 1999, Enforcement Procedures for Retransmission Consent Violations*, 15 FCC Rcd 2522 (2000).

[10] Melville B. Nimmer and David Nimmer, NIMMER ON COPYRIGHT § 8.18 (2005).

[11] *Id*.

[12] *Id*. *See, e.g., Teleprompter Corp. v. Columbia Broadcasting System, Inc.,* 415 U.S. 394 (1974) (development and implementation of new functions, such as program origination, sale of commercials and interconnection, does not convert an entire cable system, regardless of distance from the broadcasting station, into a "broadcast function" subjecting the cable operator to copyright infringement liability; importation of "distant" signals from one community into another does not constitute a "performance" under the Copyright Act); *Fortnightly v. United Artists*, 392 U.S. 390 (1968) (cable operator retransmitting signals of television stations—including plaintiff's copyrighted programming—did not "perform" within purview of Copyright Act and therefore did not infringe plaintiff's copyrights).

[13] *See* Pub. L. No. 94-553, 90 Stat. 2541 (1976); *see also* 17 U.S.C. § 101 *et seq*.

[14] *See* 17 U.S.C. § 111(b).

carry.[15] The compulsory licensing scheme established by the 1976 amendments took into consideration the Commission's rules that: (1) defined the term "local broadcast station;" (2) limited to some degree the number of distant signals that a cable operator could import (the distant signal rule);[16] (3) permitted a local broadcaster to require a cable operator to delete duplicative programming for which the station had obtained exclusive rights (the network non-duplication and syndicated exclusivity rules); and (4) required the carriage of certain signals.[17]

7. Historically, the Commission's rules provided mandatory carriage rights to local broadcast stations and permitted carriage of distant broadcast signals.[18] Local stations were defined in terms of mileage zones around the station's community of license, generally 35 or 55 miles, depending on the market size, or by Grade B contours, areas that approximated the area reached by the station's over-the-air signal. In addition, certain out-of-market stations were deemed "significantly viewed" based on over-the-air viewing and treated as local for carriage purposes. The Commission's mandatory carriage rules were twice struck down by the Court of Appeals as violating the First Amendment.[19]

8. The repeal of the Commission's must-carry rules led Congress to enact provisions in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"), which established mandatory carriage of television broadcast stations within their local markets.[20] In adopting the mandatory carriage provisions of the 1992 Act, Congress recognized the importance of local television broadcast stations as providers of local news and public affairs programming.[21] Congress found that cable service was rapidly penetrating television households, and increasingly was competing with free over-the-air television for advertising dollars.[22] Congress recognized that television broadcast stations rely on advertising dollars to provide free over-the-air local service and that competition from cable television posed a threat to the economic viability of television broadcast stations. It therefore mandated cable

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[15] *See* 17 U.S.C. § 111(c). Under the compulsory license, cable systems are not required to obtain the consent of the copyright owners of copyrighted material contained in the broadcast signal being retransmitted or negotiate license fees for the use of such copyrighted material, but, instead, must pay government-established fees for the right to retransmit copyrighted material contained in broadcast programming. 17 U.S.C. § 111(d). The 1976 amendments established that fees payable to copyright owners for compulsory licenses would be based on a percentage of each cable system's gross revenues and would be adjusted periodically by the newly formed Copyright Royalty Tribunal. *Id. see also* 17 U.S.C. § 801(b).

[16] 47 C.F.R. §§ 76.59(b), 76.61(b)-(c) (repealed 1980); 17 U.S.C § 111.

[17] 47 C.F.R. §§ 76.92, 76.101; 17 U.S.C. § 111(d).

[18] *See First Report and Order in Dockets 14895 and 15233,* 38 FCC 683 (1965) ("*1965 Network Exclusivity Order*"); *Second Report and Order in Dockets 14895, 15233 and 15971,* 2 FCC 2d 725 (1966) ("*1966 Network Exclusivity Order*").

[19] *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985) (striking down the Commission's 1972 must carry rules set forth in 36 FCC 2d 143 (1972)); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) (striking down the Commission's 1986 must carry rules set forth in 1 FCC Rcd 864 (1986)).

[20] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992); H. Rep. No. 628, 102d Cong., 2d Sess. 1 (1992) ("*House Report*"); S. Rep. No. 92, 102d Cong., 1st Sess. 1 (1991) ("*Senate Report*").

[21] House Committee on Energy and Commerce, H.R. Conf. Rep. No. 102-862 ("*Conference Report*"), 102d Cong., 2d Sess. (1992), reprinted at 138 Cong. Rec. H8308 (Sept. 14, 1992) at 2.

[22] *Conference Report* at 3.

carriage to ensure the continued economic viability of free local broadcast television.[23]

9. In the 1992 Act, Congress also granted broadcasters retransmission consent rights. Prior to the 1992 Act, cable operators were not required to seek the permission of a broadcaster before carrying its signal nor were they required to compensate the broadcaster for the value of its signal. Congress found that this created a "distortion in the video marketplace which threatens the future of over-the-air broadcasting."[24] Congress acted to remedy the situation by giving broadcasters control over the use of their signals and permitting broadcasters to seek compensation from cable operators and other MVPDs for carriage of their signals. Congress noted that some broadcasters might find that carriage itself was sufficient compensation for the use of their signal by an MVPD while other broadcasters might seek monetary compensation and still others might negotiate for in-kind consideration such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system. Congress emphasized that it intended "to establish a marketplace for the disposition of the rights to retransmit broadcast signals" but did not intend "to dictate the outcome of the ensuing marketplace negotiations."[25]

10. During the first round of retransmission consent negotiations, broadcasters initially sought cash compensation in return for retransmission consent.[26] However, most cable operators—particularly the largest multiple system operators ("MSOs")—were not willing to enter into agreements for cash, and instead sought to compensate broadcasters through the purchase of advertising time, cross-promotions, and carriage of affiliated channels.[27] Many broadcasters were able to reach agreements that involved in-kind compensation by affiliating with an existing non-broadcast network[28] or by securing carriage of their

[23] *Conference Report* at 3.

[24] *Senate Report* at 35.

[25] *Senate Report* at 36.

[26] *See, e.g.*, Disney Reply Comments at 7-9; NAB Comments at 19; Network Affiliates Comments at 7-8; Fox Reply Comments at ii, 4-5; NAB Reply Comments at 9-11. *See also* Ted Sherman, *Consumers Loom as Losers in Battle Between Cable, Broadcast Firms*, THE NEWARK STAR-LEDGER, Sept. 13, 1993 (noting that after 1992 Act established retransmission consent requirements, "[a]lmost every broadcaster initially demanded the cash [and] at the same time, nearly all cable operators said no, threatening to dump the on-air broadcast stations come Oct. 6, when the [retransmission consent] provision takes hold"); Mark Robichaux, *Tele-Communications Says It Will Fail to Meet Deadline on TV Stations' Fees*, THE WALL STREET JOURNAL, Aug. 18, 1993, at B8 ("Delays in meeting the October deadline have been caused in part by the face-off between TV stations demanding new cash fees and cable systems steadfastly refusing to pay.").

[27] *See* Disney Reply Comments at 7-9; NAB Comments at 19; NAB Reply Comments at 9-11; Network Affiliates Comments at 7-8; Fox Reply Comments at 5. *See also* Robichaux, n. 26, *supra* ("Nearly all of the nation's largest cable operators have vowed to forgo paying cash to local TV stations."); Michael Burgi, *TV Ratings Companies Brace For Retransmission Fallout*, MEDIA WEEK, Jun. 28, 1993 ("'. . . we can foresee no circumstances where we would pay cash,' said Richard Aurelio, president of Time Warner Cable in New York, referring to the FCC retransmission consent decree . . ."); Mark Robichaux, CABLE COWBOY: JOHN MALONE AND THE RISE OF THE MODERN CABLE BUSINESS (John Wiley & Sons, Inc. 2002) ("TCI, for one, refused to pay cash to any of the big networks but it indicated it might be willing make room on its systems for a new cable channel a broadcaster might like to start.").

[28] *See* Wayne Friedman, *Tribune Time*, INSIDE MEDIA, Oct. 6, 1993 (Tribune's partnership with the fledgling TV Food Network "was put together mainly to negotiate retransmission consent with cable systems").

own newly-formed non-broadcast networks.[29] Broadcast stations that insisted on cash compensation were forced to either lose cable carriage or grant extensions allowing cable operators to carry their signals at no charge until negotiations were complete.[30] Twelve years later, cash still has not emerged as a principal form of consideration for retransmission consent. Today, virtually all retransmission consent agreements involve a cable operator providing in-kind consideration to the broadcaster.[31]

11. Within local market areas,[32] commercial television stations may elect cable carriage under either the retransmission consent or mandatory carriage requirements created by the 1992 Act.[33] As a general rule, the 1992 Act requires cable operators to obtain authorization before they carry the signal of commercial television stations, either directly through retransmission consent, or through the invocation

[29] *See* Disney Reply Comments at 8; NAB Reply Comments at 9. The new broadcast-affiliated MVPD networks included Fox's FX, ABC's ESPN2, and NBC's America's Talking, which later became MSNBC. Disney Reply Comments at 8; *see also* Sherman, n. 26, *supra*.

[30] CBS, which maintained a cash compensation strategy longer than other broadcasters, authorized retransmission consent to cable operators without compensation for one year while negotiations continued. *See* Barry Layne, *No Fade to Black Under Retrans,* HOLLYWOOD REPORTER, Oct. 7, 1993. Major network affiliates were removed from TCI cable systems in Corpus Christi, Texas for over one month as negotiations continued. *Battle Over Carriage Ends in Corpus Christi,* CABLE WORLD, Nov. 22, 1993. Other stations were removed from cable systems in Grand Rapids, and Michigan, Portland, Maine. *At Deadline*, MEDIA WEEK, Oct. 11, 1993. *See also*, Jeannine Aversa, Rachel W. Thompson & Rod Granger, *Storm Still Brews in Conn. as FCC Readies Final Must-Carry Rules*, MULTICHANNEL NEWS, Mar. 8, 1993 (noting Cablevision's threat to drop several broadcast stations, including those in Boston and Hartford/New Haven "if they don't forgo payment for carriage").

[31] *See General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control*, 19 FCC Rcd 473 at 503 ¶ 56 (2004) ("*News-Hughes Order*") (study shows most broadcasters have opted for, or settled for, in-kind compensation from cable operators in exchange for retransmission consent (citing FCC, OPP Working Paper #37, *Broadcast Television: Survivor in a Sea of Competition* at 29)); *id.* at 555 ¶ 180 (the "price" an MVPD is willing to pay for carriage of a local broadcast station is more likely to be structured in the form of an "in kind" payment whereby the MVPD provides channel capacity for a broadcast network's affiliated cable programming network and/or other carriage-related concessions (citing *SHVIA Good Faith Order*, 15 FCC Rcd at 5462 ¶ 38).

[32] The Commission is required to define local markets by using commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. § 534(h)(1)(C). The Commission first used Arbitron's areas of dominant influence (ADIs) and subsequently adopted Nielsen Media Research's designated market areas (DMAs) to define local markets. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 2965, 2975-76 ¶¶ 37-41 (1993) ("*Signal Carriage Order"*) (defining markets using ADIs); *Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules, Implementation of Section 301(d) of the Telecommunications Act of 1996, Market Determinations,* 11 FCC Rcd 6201 (1996) (defining local markets using Nielsen DMAs after Arbitron ceased publication of television data). Local markets for purposes of cable carriage tend to be larger, on average, than the areas served by a station's over-the-air signal.

[33] Cable operators that are subject to rate regulation are required to provide subscribers with a basic service tier and to carry local broadcast stations on that tier. 47 U.S.C. § 543(b)(7), 47 C.F.R. § 76.901. In order to receive mandatory carriage on a cable system, a station must provide the cable system with a good quality signal, and its programming must not be substantially duplicative of the programming of another station carried by the cable system. 47 C.F.R. § 76.55(c)(3); 47 C.F.R. § 76.56 (b)(5).

of mandatory carriage.[34]

12. *Satellite.* While the first cable carriage rules were adopted by the Commission over 40 years ago,[35] the satellite carriage rules were adopted much more recently. Satellite television began primarily as a rural service to provide non-broadcast signals to households in areas that could not otherwise receive such signals because cable service was unavailable. In 1988, Congress enacted the Satellite Home Viewer Act ("SHVA"), the first satellite compulsory copyright law.[36] It granted direct-to-home ("DTH")[37] satellite providers a compulsory copyright license to retransmit television signals of distant network stations[38] to "unserved households"[39] and superstations (non-network stations) to any

[34] 47 U.S.C. § 325. Noncommercial television stations have a right to mandatory carriage under the 1992 Act, but do not have statutory retransmission consent rights. Sections 614 and 615 of the Communications Act contain the cable television "must carry" requirements for commercial and noncommercial television stations, respectively.

[35] *See Carter Mountain Transmission Corp*., 32 FCC Rcd 459 (1962), *aff'd sub. nom., Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir. 1963), *cert. denied,* 375 U.S. 951 (1963), in which the Commission concluded that providing a cable system with a distant signal that duplicated the programming of the only local television station would have an adverse economic impact on that station. After *Carter*, the Commission initiated a rulemaking proceeding that eventually resulted in the adoption of the Commission's first cable television rules. *See 1965 Network Exclusivity Order*, 38 FCC 683. A year later, the Commission asserted jurisdiction over all cable systems and further expanded the rules. *See 1966 Network Exclusivity Order*, 2 FCC 2d 725.

[36] The Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935, Title II (1988) ("SHVA"); 17 U.S.C. § 119.

[37] The DTH industry was originally comprised mainly of Home Satellite Dish (HSD) providers, who offered consumers home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS service, which uses small dishes operating on other frequencies, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from licensed program packagers. DBS is now the most widely-used means for individuals to receive satellite programming. DirecTV and the DISH Network (owned and operated by EchoStar) are DBS carriers currently providing nationwide service.

[38] "Network stations" are generally television broadcast stations owned or operated by, or affiliated with, one or more of the television networks. *See* 47 U.S.C. § 339(d)(3) (stating that "network station" for purposes of this section is defined by the Copyright Act); 17 U.S.C. § 119(d)(2) ("The term 'network station' means – (A) a television broadcast station, including any translator station or terrestrial satellite stations that rebroadcasts all or substantially all of the programming broadcast by a network station, that is owned or operated by, or affiliated with, one or more of the television networks in the United States which offer an interconnected program service on a regular basis for 15 or more hours per week to at least 25 of its affiliated television licensees in 10 or more States; or (B) a noncommercial educational broadcast station . . .").

[39] 17 U.S.C. §119(a)(1), (2). Section 119(d)(10)(A) of the Copyright Act defines an unserved household as a "household that cannot receive, through use of a conventional stationary, outdoor rooftop receiving antenna, an over-the-air signal of a primary network television station affiliated with that network of Grade B intensity as defined by the Federal Communications Commission under section 73.683(a) of title 47 of the Code of Federal Regulations, as in effect on January 1, 1999." An unserved household can also be one that is subject to one of four statutory waivers or exemptions. *See* 17 U.S.C. § 119(d)(10)(B)-(E). *See also* 47 USC § 325(b)(2)(C) (providing an exemption from retransmission consent requirements for satellite carriage of network stations to unserved households), as amended by section 201 of the SHVERA (extending exemption from December 31, 2004 to December 31, 2009).

household.[40] The license authorized by SHVA, codified as section 119 of the Copyright Act, generally applies to the signals of superstations and network stations retransmitted by satellite carriers to the public for private home viewing, and the license to retransmit the signals of network stations is further limited to persons who are in "unserved households."[41]

13. During the mid- to late-1990s, the satellite industry evolved and found more success in marketing service to subscribers. In 1999, Congress enacted the Satellite Home Viewer Improvement Act ("SHVIA"), which extended the compulsory copyright license for distant signals granted to satellite carriers until December 31, 2004, and enacted a permanent compulsory copyright license for local signals. SHVIA also extended the retransmission consent exemption for satellite carriage of distant signals. Most significantly, SHVIA created a new statutory copyright license for satellite carriage of stations to any subscriber within a station's local market, without distinction between network and non-network signals or served or unserved households.[42] Retransmission consent is required for such "local-into-local" carriage.[43] Through SHVIA, Congress sought to enable satellite providers to become a viable alternative MVPD to cable operators. Congress intended SHVIA to place satellite carriers on an equal footing with local cable operators when it comes to the availability of local broadcast programming, and thus to give consumers more and better choices in selecting a multichannel video program distributor.[44]

14. Unlike cable providers, however, satellite carriers are not required to provide subscribers with a basic service tier that includes local broadcast stations under the Communications Act.[45] The statute does not require satellite carriers to carry television stations in markets where they do not choose to offer local-into-local service pursuant to the statutory license.[46] However, if a satellite carrier chooses to carry a local station in a particular DMA pursuant to the statutory copyright license, it generally must carry any qualified local television station in the same DMA that has made a timely election for mandatory

[40] Section 119(d)(9) of the Copyright Act defines "superstation" as "a television station, other than a network station, licensed by the Federal Communications Commission, that is secondarily transmitted by a satellite carrier."

[41] 17 U.S.C. § 119.

[42] The Satellite Home Viewer Improvement Act of 1999, Pub. L. No 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 ("SHVIA") (1999). SHVIA was enacted as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA") (relating to copyright licensing and carriage of broadcast signals by satellite carriers).

[43] 47 U.S.C. § 325.

[44] *See* Joint Explanatory Statement of the Committee of Conference on H.R. 1554, H.R. Conf. Rep. No. 106-464 ("*SHVIA Conference Report*"), 106th Cong., 1st Sess. (1999), reprinted at 145 Cong. Rec. H11792 (Nov. 9, 1999).

[45] 47 U.S.C. §§ 534-535. Cable operators that are subject to rate regulation are required to set aside a portion of their channel capacity, generally one third, for the carriage of commercial broadcast signals. 47 U.S.C. § 534(b), 47 C.F.R. § 76.56(b). They are required to provide each subscriber with a basic service tier, and all broadcast stations must be carried on that tier. 47 U.S.C. § 543(b)(7), 47 C.F.R. § 76.901.

[46] 47 U.S.C. § 338. *But see* § 210 of SHVERA, creating § 338(d)(4) (mandatory carriage in Alaska and Hawaii). *See also Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, MB Docket No. 05-181, FCC 05-159 (rel. Aug. 23, 2005).

carriage.[47] This is commonly referred to as the "carry one, carry all" requirement.

15. In 2004, SHVERA extended the retransmission consent exemption for distant signals to December 31, 2009. It also modified the compulsory copyright license for such signals and extended it to December 31, 2009.[48] The copyright provisions in SHVERA prohibit the retransmission of distant analog signals to unserved households where analog local-into-local service is offered, unless the subscriber was receiving the signal as of December 8, 2004, or prior to the commencement of local-into-local service. SHVERA also granted satellite carriers the right to offer Commission-determined "significantly viewed" signals to subscribers, creating a distinction between "local" though out-of-market signals and "distant" signals.[49] Pursuant to SHVERA, DBS operators were granted the right to retransmit out-of-market significantly viewed stations to subscribers in the community in which the station is deemed significantly viewed, provided the local station affiliated with the same network as the significantly viewed station is offered to subscribers.[50] SHVERA provided that, as in the cable context, satellite carriers would pay reduced copyright royalty fees for retransmission of significantly viewed stations.[51] Satellite carriers are not required to carry out-of-market significantly viewed stations, and, if they do carry them, retransmission consent is required.

16. SHVERA expands the copyright license to make express provision for distant digital signals. In general, if a satellite carrier offers local-into-local digital signals in a market, it is not allowed to offer distant digital signals to subscribers in that market, unless it was offering such distant digital signals prior to commencing local-into-local digital service. If a household is predicted to be unserved by the analog signals of a network station, it can qualify for the distant digital signal of the network with which the station is affiliated if it is offered by the subscriber's satellite carrier. If the satellite carrier offers local-into-local analog service, a subscriber must receive that service in order to qualify for distant digital signals. A household that qualifies for distant signal service can receive only signals from stations located in the same time zone or in a later time zone, not in an earlier time zone. SHVERA also provides

[47] 47 U.S.C. § 338. Satellite carriers are not required to carry a station if its programming is duplicative of the programming of another station carried by the DBS provider in the DMA or if the station fails to provide a good quality signal to the DBS provider's local receive facility. *Id.*

[48] SHVERA, §§ 101(a), 201.

[49] Regarding the term "significantly viewed," section 102 of SHVERA extends the statutory copyright license contained in 17 U.S.C. § 119(a) to "apply to the secondary transmission of the primary transmission of a network station or a superstation to a subscriber who resides outside the station's local market … but within a community in which the signal has been determined by the Federal Communications Commission, to be significantly viewed in such community, pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, applicable to determining with respect to a cable system whether signals are significantly viewed in a community." 17 U.S.C. § 119(a)(3)(A). *See also Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act*, 20 FCC Rcd 2983 (2005) (*"SHVERA Significantly Viewed NPRM"*).

[50] SHVERA permits a satellite carrier to privately negotiate with a local network station to obtain a waiver of the requirement that the local station be offered. 47 U.S.C. § 340(b)(4). In addition, the statutory copyright provisions contained in 17 U.S.C. § 119, as amended by SHVERA, permit subscribers to seek a waiver from the relevant local station through their satellite carrier. The statutory copyright waiver provision sunsets on December 31, 2008, on which date no further waivers will be granted and those then in effect will terminate. 17 U.S.C. § 119(a)(3)(C)(ii).

[51] SHVERA, § 102; 17 U.S.C. § 119(a). Significantly viewed stations are treated as local stations for purposes of copyright royalty fee payments.

for signal testing at a household to determine if it is "served" by a digital signal over-the-air. In some cases, if a household is shown to be unserved, it would be eligible for distant digital signals, provided the household subscribes to local-into-local analog service, if it is offered. However, this digital testing option is not available until April 30, 2006, in the top 100 television markets, and July 15, 2007, in all other television markets. Such digital tests also are subject to waivers that the Commission may issue for stations that meet specified statutory criteria.

B. Exclusivity Rules

17. A broadcaster can carry network and syndicated programming on its local television station(s) only with the permission of the networks or syndicators that own or hold the rights to that programming. In addition, the ability of broadcasters to grant retransmission consent for MVPD carriage may be governed by the network/affiliate agreement or by the syndication agreement.[52] The Commission has concluded that the network non-duplication and syndicated exclusivity rules should serve primarily as a means of enforcing contractual exclusivity agreements entered into between broadcasters, which purchase the distribution rights to programming, and networks and syndicators, which supply the programming.[53] Thus, the network non-duplication and syndicated exclusivity rules require that the broadcaster possess a legitimate exclusivity contract prior to requesting a blackout.[54] The rules may be invoked by stations that elect must carry as well as by those that elect retransmission consent in their local markets, even if they are not actually carried by the cable operator.[55] By requiring MVPDs to black out duplicative programming carried on any distant signals they may import into a local market, the Commission's network non-duplication and syndicated exclusivity rules provide a regulatory means for broadcasters to prevent MVPDs from undermining their contractually negotiated exclusivity rights. The Commission's sports blackout rule protects a sports team's or sports league's distribution rights to a live sporting event taking place in a local market. As with the network non-duplication and syndicated exclusivity rules, the sports blackout rule applies only to the extent the rights holder has contractual rights to limit viewing of sports events.

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[52] NBC states that contracts between broadcasters and networks/syndicators often contain provisions limiting the station's out-of-market redistribution of the network and syndicated programming. NBC Comments at 6-8.

[53] *Amendment of Parts 73 and 76 of the Commission's Rules Related to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 5299, 5316, 5319 ¶¶ 104, 118 (1988) ("*1988 Program Exclusivity Order*"), *recon. denied in pertinent part*, *Memorandum Opinion and Order,* 4 FCC Rcd 2711 (1989) ("*1989 Program Exclusivity Order*").

[54] 47 C.F.R. §§ 76.93, 76.103, 76.122(b), 76.123(b)-(c), 76.124. Sections 73.658(b) and (m) of the Commission's rules, 47 C.F.R. §§ 73.658(b), (m), limit the geographic area of the exclusive territory that licensed commercial television stations can obtain from a network or non-network program supplier.

[55] The extent to which must carry stations rely on the network non-duplication and syndicated exclusivity rules may be limited because of rules permitting cable and satellite carriers to decline to carry duplicating stations. Under the must carry rules, if a cable operator elects to carry just one of two local affiliates of a network, it must carry the affiliate whose community of license is closest to the cable system's headend. Also, a cable operator is not required to carry the signal of any local station that substantially duplicates the signal of another local station or to carry the signals of more than one local commercial station affiliated with a particular broadcast network. *See* 47 C.F.R. § 76.56. A satellite carrier is not required to carry any local station that substantially duplicates another local station, or more than one local commercial station affiliated with a network unless such stations are licensed to communities in different states. A satellite carrier is permitted to select which duplicating signal in a market to carry, and which network affiliate in a market to carry. *See* 47 C.F.R. § 76.66(h) (2)-(3).

1. Network Non-Duplication

18. The network non-duplication rules protect a local commercial or non-commercial broadcast television station's right to be the exclusive distributor of network programming within a specified zone, and require programming subject to the rules to be blacked out when carried on another station's signal imported by an MVPD into the local station's zone of protection.[56] A television station's rights under the network non-duplication rules are limited by the terms of the contractual agreement between the station and the holder of the rights to the program. The Commission's rules allow commercial and non-commercial television stations to protect the exclusive distribution rights they have negotiated with broadcast networks, not to exceed a specified geographic zone of 35 miles (55 miles for network programming in smaller markets).[57] For purposes of these rules, it is these specified zones that distinguish between "local" and "distant."

19. *Cable*. Network non-duplication rules for cable were first promulgated by the Commission in 1965.[58] Throughout the 1960s and 1970s the Commission continually refined the rules, but the policy behind them remained the same.[59] The purpose of the rules was to protect the exclusive contractual rights of local broadcasters in network programming from the importation of non-local network stations by cable systems and thus to provide appropriate protections and incentives to program producers and distributors to provide the programming desired by viewers.[60] Prior to 1988, network non-duplication protection applied only to programming being broadcast simultaneously in the local market by a distant signal.[61] In 1988, the Commission modified the rule to remove this limitation and extend exclusivity protection to any time period specified in the contractual agreement between the network and the

[56] *See* 47 C.F.R. §§ 76.92 and 76.122. In addition to full power television stations, 100-watt translator stations are allowed to demand network non-duplication protection under certain circumstances. *See* 47 C.F.R. § 76.92(d).

[57] *See* 47 C.F.R. §§ 76.92 and 76.120. Section 76.51 of the rules lists the top 100 markets applicable to this rule. A station licensed to a hyphenated television market, as defined in section 76.51, is entitled to assert exclusivity, under the network non-duplication rule, within 35 miles surrounding each named city. The 35 mile specified zone, as well as all other mileage zones, used in applying the exclusivity rules, is measured from the relevant station's "reference point" in its community of license. The rules provide a list of the reference points to identify television market boundaries used for this purpose. *See* 47 C.F.R. § 76.53. For a full explanation of the relevant zone of protection for the application of the sports blackout rule, *see* 47 C.F.R. § 76.5(e). The same reference point applies to all stations licensed to the same community regardless of where their transmitters or studios are located.

[58] *See 1965 Network Exclusivity Order*, 38 FCC 683 (implementing the first non-duplication rules for cable television).

[59] *See id*. *See also 1966 Network Exclusivity Order*, 2 FCC 2d 725 (modifying the non-duplication rule, shortening the time period of non-duplication to one day); *First Report and Order in Docket 19995,* 52 FCC 2d 519 (1975) (exempting cable providers with less than 1,000 subscribers from network non-duplication requirements); *Memorandum Opinion and Order in Docket No. 19995,* 67 FCC 2d 1303 (1978) ("*1978 Network Exclusivity Order*") (exempting significantly viewed channels from being blacked out under network non-duplication rules); *1989 Program Exclusivity Order,* 4 FCC Rcd 2711 (1989) (modifying the notice requirement for network non-duplication and reinstating the syndicated exclusivity rules.)

[60] *See 1988 Program Exclusivity Order*, 3 FCC Rcd at 5308 ¶ 49, *recon. denied in pertinent part*, *1989 Program Exclusivity Order,* 4 FCC Rcd 2711 (1989). For a complete history of the Commission's network non-duplication and syndicated program exclusivity rules, *see 1989 Program Exclusivity Order*, 4 FCC Rcd at 2711-2716 ¶¶ 5-29.

[61] *Amendment of Parts 73 and 76 of the Commission's Rules Related to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 6171 (1988) ("*Program Exclusivity FNPRM*").

affiliate.[62]

20. Because a station's zone of protection[63] under the network non-duplication rules may not exceed the area agreed upon by the station and its network or the area within which the station has acquired broadcast territorial exclusivity rights,[64] the concept of a DMA and its boundaries is entirely irrelevant for purposes of the network non-duplication rules. Thus, a station subject to program deletions could be another network affiliate in the same DMA.

21. There are several exceptions to application of the network non-duplication rules. First, because of the cost of the equipment necessary to carry out deletions, the Commission exempts cable systems having fewer than 1,000 subscribers.[65] The rule also does not apply if the out-of-market station's signal is deemed "significantly viewed" in a relevant community.[66] This exception was first adopted to ensure that cable subscribers receive the same programming that would be available to over-the-air viewers in their communities.[67]

22. *Satellite*. SHVIA required the Commission to extend the network non-duplication rule to

[62] *1988 Program Exclusivity Order*, 3 FCC Rcd at 5314 ¶ 92; 47 C.F.R. §§ 76.92 and 76.93.

[63] The cable rules governing exclusivity are applied on a community unit basis within a station's zone of protection. *See* 47 C.F.R. § 76.5(dd). Community units are political jurisdictions (*i.e*., a city, town, or county) or portions of political jurisdictions for which a local government body has granted a franchise to operate a cable system. Since satellite carriers, unlike cable systems, do not have identifiers assigned to the communities they serve, the rules incorporate a comparable method for determining the areas to which the zone of protection applies, based on zip codes. 47 C.F.R. §§ 76.122(c)(7), 76.123(d)(4).

[64] 47 C.F.R. §§ 76.92 note (the area within which a station may enforce network non-duplication may not exceed the area within which the station may acquire territorial exclusivity rights under section 73.658(m). *See also* 47 C.F.R. § 76.93 (stations shall be entitled to exercise non-duplication rights in accordance with contractual provisions of the network-affiliate agreement.) The territorial exclusivity rules limit the area in which a broadcast station may obtain the rights to be the exclusive distributor of specific programming. Under network territorial exclusivity (47 C.F.R. § 73.658(b)), no broadcast station licensee may have an agreement that prevents another station located in a different community from broadcasting any network program. Under non-network territorial exclusivity (47 C.F.R. § 73.658(m)), a station may not have an arrangement with a non-network program supplier which prevents another station located in a community more than 35 miles away from broadcasting the same programming. Network affiliation agreements often have provisions restricting affiliates from granting retransmission consent beyond a specified area.

[65] *See* 47 C.F.R. §§ 76.95(a); *see also 1988 Program Exclusivity Order*, 3 FCC Rcd at 5314 ¶ 94.

[66] *See* 47 C.F.R. § 76.92(f).

[67] *See, e.g., 1965 Network Exclusivity Order,* 38 FCC at 720 ¶ 97; *1978 Network Exclusivity Order,* 67 FCC 2d 1303, 1304 ¶ 6 (1978).

DBS in 2000, but only with respect to the retransmission of nationally distributed superstations.[68] These nationally distributed superstations may be offered to any satellite subscriber, without the "unserved" restriction that applies to distant network stations. SHVIA directed the Commission to implement new exclusivity rules for satellite that would be "as similar as possible" to the rules applicable to cable operators.[69] In general, the network non-duplication rules apply when a satellite carrier retransmits a nationally distributed superstation to a household within a local broadcaster's zone of protection[70] and the nationally distributed superstation carries a program to which the local station has exclusive rights.[71] In contrast to the mileage-based specified zones used in the cable context, zip codes are used to determine the areas to which the zone of protection applies for satellite carriers.[72] As in the cable context, the broadcast station licensees may exercise their network non-duplication rights in accordance with the terms specified in a contractual agreement between the network and its affiliate.[73] The rules for satellite carriers also have exceptions for significantly viewed stations and for areas in which the satellite carrier has fewer than 1,000 subscribers in a protected zone.[74]

2. Syndicated Exclusivity

23. The syndicated exclusivity rules are similar in operation to the network non-duplication rules, but they apply to exclusive contracts for syndicated programming, rather than for network programming.[75] In addition, the syndicated exclusivity rules apply only to commercial stations. The syndicated exclusivity rules allow a local commercial broadcast television station or a distributor of syndicated programming to protect its exclusive distribution rights within a 35-mile geographic zone surrounding a television station's city of license, although the zone may not be greater than that provided

[68] 47 U.S.C. § 339(b). A "nationally distributed superstation" is defined as a television broadcast station, licensed by the Commission, that: (1) is not owned or operated by or affiliated with a television network that, as of January 1, 1995, offered interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states; (2) on May 1, 1991, was retransmitted by a satellite carrier and was not a network station at that time; and (3) was, as of July 1, 1998, retransmitted by a satellite carrier under the statutory license of section 119 of title 17, United States Code. 47 U.S.C. § 339(d)(2). The television broadcast stations that meet the foregoing three criteria are limited to KTLA-TV (Los Angeles), WPIX-TV (New York), KWGN-TV (Denver), WSBK-TV (Boston), WWOR-TV (New York) and WGN-TV (Chicago). *See Satellite Exclusivity Order,* 15 FCC Rcd at 21692-93 ¶¶ 9-10. "Nationally distributed superstations" are a subset of "superstations." *See* 47 C.F.R. §§ 76.122 and 76.123.

[69] 47 C.F.R. § 76.122 sets out the network non-duplication rules as they apply to DBS providers.

[70] For a definition of "zone of protection," see 47 C.F.R. § 76.120(e).

[71] 47 C.F.R. § 76.122(a).

[72] *Id*.; *see also Satellite Exclusivity Order*, 15 FCC Rcd at 21703 ¶ 28. While there is no readily applicable measure that will precisely match specified zones in either the cable or satellite context, it would be more difficult to determine which satellite subscribers are located within a cable community unit, which is tied to the cable franchise process, than to use zip codes. *Id*.

[73] 47 C.F.R. § 76.122(b). *See also* 47 C.F.R. § 76.124, which details the requirements for invoking network non-duplication rights.

[74] 47 C.F.R. § 76.122(k)(l).

[75] 47 C.F.R. §§ 76.101-110, 76.120 and 76.123-125. Translator stations are not entitled to syndicated exclusivity protection.

for in the exclusivity contract between the station and syndicator.[76] Unlike the network non-duplication rule, however, the zone of protection is the same for smaller markets as it is for the top-100 markets.[77] With only a few exceptions, a station that has obtained syndicated exclusivity rights in a program may request a cable operator to black out that program as broadcast by any other television station, and may request a satellite operator to provide such protection against any nationally distributed superstation. The cable or satellite system must comply if properly notified in accordance with the rules.[78]

24. *Cable*. The first syndicated exclusivity rule was promulgated by the Commission in 1972, adopted as a result of a "Consensus Agreement" that was negotiated among the cable, broadcast, and program production industries in order to facilitate the passage of copyright legislation.[79] Shortly after Congress established a compulsory license system in 1976, the Commission began an inquiry to review the "purpose, effect, and desirability of" the syndicated exclusivity rules.[80] In 1979, the Commission adopted the Report on Cable Television Syndicated Exclusivity Rules, which performed a cost-benefit analysis to determine whether retaining the syndicated exclusivity rules would be in the public interest.[81] The Commission found that eliminating the rules would have negligible effects on the size of local station audiences and consequently would not significantly harm any broadcaster.[82] The Commission concluded that, when weighed against the minimal negative impact on broadcasters and program supply, the increase in diversity and number of new cable systems that the rules' elimination would allow supported their repeal. Therefore, in 1980, the Commission repealed the syndicated exclusivity rules.[83]

25. In 1988, however, the Commission reversed its decision, finding that the reasoning that shaped the 1980 decision to repeal the syndicated exclusivity rules was flawed in two significant respects.[84] First, the Commission found that its prior inquiry had incorrectly examined the effects of repeal or retention on individual competitors rather than how the competitive process operates.[85] Second, the Commission found that it had failed to analyze the effects on the local television market of denying broadcasters the ability to enter into contracts with enforceable exclusive exhibition rights when they had

[76] *See* 47 C.F.R. §§ 76.101, 76.103, 76.123(b). The Commission's rules provide such protection within a station's 35-mile geographic zone, which extends from the reference point of the community of license of the television station. *See* 47 C.F.R. §§ 73.658(m), 76.53, and 76.101 Note.

[77] *See* 47 C.F.R. § 76.101 Note.

[78] *See* 47 C.F.R. §§ 76.101 and 76.123. For the notification requirements see 47 C.F.R. §§ 76.105 and 76.123(d). For cable, the syndicated exclusivity rules provide exceptions for any station whose signal is in the Grade B contour of the station asserting exclusivity, when the signal is significantly viewed, or if the cable system has fewer than 1,000 subscribers. 47 C.F.R. § 76.106. For satellite, the rules also provide exceptions regarding the carriage of programming of any nationally distributed superstation. 47 C.F.R. § 76.123 (k)-(m).

[79] *See Cable Television Report and Order,* 36 FCC 2d 143 ¶ 65 (1972).

[80] *Cable Television Syndicated Program Exclusivity Rules*, 61 FCC 2d 746 (1976).

[81] *Cable Television Syndicated Program Exclusivity Rules*, 71 FCC 2d 951 (1979).

[82] *Id*. at 966 ¶ 44.

[83] *See Cable Television Syndicated Program Exclusivity Rules, Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television*, 79 FCC 2d 663 (1980) ("*1980 Program Exclusivity Order*"); *see also id*.

[84] *1988 Program Exclusivity Order*, 3 FCC Rcd 5299, 5308-09 ¶¶ 49-55, *recon. denied in pertinent part*, *1989 Program Exclusivity Order,* 4 FCC Rcd 2711 (1989).

[85] *Id*. at ¶¶ 23, 49-51.

to compete with cable operators, who could enter into such contracts.[86] The Commission therefore reinstated its syndicated exclusivity rules.

26. The Commission's current cable syndicated program exclusivity rule allows local commercial stations to protect their exclusive distribution rights for syndicated programming on local cable systems in a local market.[87] Distributors of syndicated programming are allowed to seek protection for one year from the initial licensing of such programming anywhere in the United States, except where the relevant programming has already been licensed.[88] The exceptions to application of the syndicated program exclusivity rule are similar to those that apply to the network non-duplication rule. Cable systems with fewer than 1,000 subscribers are exempt because of the cost of the equipment necessary to carry out deletions.[89] The rule also does not apply if the distant station's signal is "significantly viewed" in a relevant cable community.[90] In addition, the syndicated programming of a distant station need not be blacked out if that station's Grade B signal encompasses the relevant cable community.[91]

27. *Satellite*. SHVIA required the Commission to extend its cable exclusivity rules, including syndicated exclusivity, to DBS providers only with respect to retransmission of nationally distributed superstations.[92] The Commission implemented this using zip codes rather than community units to determine zones of protection.[93] The rules for satellite carriers also provide exceptions for significantly viewed stations and for areas in which the satellite carrier has fewer than 1,000 subscribers in a protected zone.[94]

3. Sports Blackout

28. The Commission's sports blackout rule protects a sports team's or sports league's distribution rights to a live sporting event taking place in a local market.[95] As with the network non-duplication and syndicated exclusivity rules, the rule applies only to the extent the rights holder has contractual rights to limit viewing of sports events. The sports blackout rules are applied only if a local station is not broadcasting the local sporting event. If a local station does not have permission to broadcast the local game, then no other broadcaster's signal displaying the game can be carried by a cable or satellite operator to subscribers in the protected local blackout zone.[96] The purpose of the sports blackout rule is

[86] *Id*. ¶¶ 23, 52-55. This analysis in 1988 pre-dates the requirements for retransmission consent.

[87] 47 C.F.R. § 76.101. A syndicated program is defined as "any program sold, licensed, distributed or offered to television station licensees in more than one market within the United States other than as network programming . . ." 47 C.F.R. § 76.5(ii).

[88] *See* 47 C.F.R. § 76.103.

[89] *See* 47 C.F.R. § 76.106(b). *See also 1988 Program Exclusivity Order*, 3 FCC Rcd at 5314 ¶ 15.

[90] 47 C.F.R. § 76.106(a).

[91] *Id.*

[92] *See* SHVIA § 1008, creating 17 U.S.C. § 339(b).

[93] *See Satellite Exclusivity Order,* 15 FCC Rcd at 21703 ¶ 28. *See also* explanation of community units at n. 63, *supra*.

[94] *See* 47 U.S.C. § 340(e); 47 C.F.R. § 76.123(m).

[95] 47 C.F.R. § 76.111.

[96] 47 C.F.R. § 76.128.

to ensure the continued general availability of sports programming to the public. The Commission adopted this rule, which pre-dates retransmission consent, based on a concern that sports teams would refuse to sell the rights to their local games to television stations serving distant markets due to their fear of losing gate receipts if the local cable system imported the local sporting event carried on a distant station.[97]

29. *Cable*. The Commission originally adopted the sports blackout rules in 1975.[98] The rules apply to any television broadcast station, not just network stations. The rules are triggered when a subject sporting event will not be aired live by any local television station carried on a cable system.[99] Under the cable sports blackout rule, the holder of the rights to the event (*e.g.*, a sports team or league, rather than a broadcaster) has the right to prohibit cable carriage inside the zone of protection of a live sporting event broadcast by a station outside the specified zone of protection when that event is played locally, but the team or league does not permit the local broadcast stations to televise the event. The zone of protection for the sports blackout rule is generally 35 miles surrounding the broadcast station's community of license in which the live sporting event is taking place.[100] The sports blackout rules do not apply to any community unit with fewer than 1,000 subscribers.[101]

30. *Satellite*. SHVIA directed the Commission to extend the sports blackout rules to satellite carriers.[102] The satellite sports blackout rule applies to retransmission of both nationally distributed superstations and network stations.[103] As in the cable context, the satellite sports blackout rule applies when a subject sporting event will not be aired live by any local television station, and a satellite carrier retransmits a nationally distributed superstation or a network station carrying that sporting event to a household within the zone of protection of the holder of exclusive distribution rights to the event.[104] In these cases, the television broadcast station or other rights holder may require the satellite carrier to black out these particular programs for the satellite subscriber households within the protected zone.[105]

31. As with the network non-duplication and syndicated exclusivity rules, the sports blackout

[97] The Commission was concerned that sporting events would be available to fewer viewers as a result. *See Amendment of Part 76 of the Commission's Rules and Regulations Relative to Cable Television Systems and the Carriage of Sports Programs*, 54 FCC 2d 265, 281 ¶ 57 (1975).

[98] *Id.*

[99] 47 C.F.R. § 76.111.

[100] When sports facilities are located in suburban areas, the downtown reference points specified in section 76.53 may be inappropriate for purposes of calculating the protected zone (*e.g.*, the New England Patriots play midway between Boston and Providence). Therefore, the Commission has expressed its willingness to consider waivers "to substitute a zone of protection extending out 35 miles from the site of a sports event for the television station specified zone designated by the rule." *Amendment of Part 76 of the Commission's Rules and Regulations Relative to Cable Television Systems and the Carriage of Sports Programs on Cable Television Systems, Reconsideration of Report and Order in Docket. No. 19417* ("*1975 Sports Blackout Reconsideration Order*"), 56 FCC 2d 561, 567 ¶ 19 (1975).

[101] 47 C.F.R. § 76.111(f).

[102] *See* 47 U.S.C. § 339(b); *Satellite Exclusivity Order*, 15 FCC Rcd at 21719-23 ¶¶ 60-69.

[103] 47 U.S.C. § 339(b)(1).

[104] 47 C.F.R. § 76.128.

[105] 47 C.F.R. § 76.128(a)-(b).

rules are applied to satellite carriers by reference to zip codes rather than community units.[106] A satellite carrier is not required to black out a sports event to a subscriber who lives outside the specified zone but within an area defined in terms of an excluded zip code.[107] Also, a satellite carrier is not required to black out a sports event if the carrier has fewer than 1,000 subscribers within the specified zone.[108]

III. DISCUSSION

32. The rules examined in this report were adopted to ensure that broadcasters are compensated fairly for MVPDs' retransmission of their signals, that MVPD retransmission of distant signals does not undermine exclusivity protections negotiated by broadcasters and their programming suppliers, and that sports leagues' contractual arrangements for the exhibition of sporting events are preserved. All of these rules have been adapted over time in response to new technologies and changing market conditions, as well as to balance various public policy goals. Since 1992, technological advances, increased channel capacity, and the introduction of DBS as a competitor to cable have been accompanied by revisions in the rules to: (1) enhance the viability of over-the-air broadcasting; (2) promote localism; and (3) advance regulatory parity between cable and DBS, while taking account of their different operational structures.

33. It is essential to bear in mind that the four rules considered in this Report do not operate in a vacuum. They are part of a mosaic of other regulatory and statutory provisions (*e.g.*, territorial exclusivity, copyright compulsory licensing, and mandatory carriage) to implement key policy goals. For example, territorial exclusivity protects localism by preventing local broadcasters from contracting for exclusivity outside their local markets, while network non-duplication and syndicated exclusivity protect localism by facilitating enforcement of contractual arrangements that limit importation of duplicative distant broadcast signals into local markets.[109] Thus, these rules complement one another. Similarly, copyright law and retransmission consent rules operate in a complementary fashion. The statutory compulsory license compensates rights holders for use of their property, while permitting MVPDs to retransmit their programming without costly and time-consuming negotiations with individual copyright holders. Further, the government-established copyright fee for distant signals, which is higher than that for local stations, operates together with the network non-duplication and syndicated exclusivity rules to encourage MVPD carriage of local broadcast signals.[110] Finally, broadcast mandatory carriage rights, which promote localism and ensure the viability of free, over-the-air television, complement the retransmission consent regime. Together, must-carry and retransmission consent provide that all local stations are assured of carriage even if their audience is small, while also allowing more popular stations to seek compensation (cash or in-kind) for the audience their programming will attract for the cable or satellite operator. Must-carry alone would fail to provide stations with the opportunity to be compensated for their popular programming. Retransmission consent alone would not preserve local stations that have a smaller audience yet still offer free over-the-air programming and serve the public in their local areas.[111] Because of the interplay among these various laws and rules, when any piece of the legal landscape governing carriage of television broadcast signals is changed, other aspects of that landscape also require careful examination.

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[106] 47 C.F.R. § 76.127(b)(4).

[107] 47 C.F.R. § 76.127(d).

[108] 47 C.F.R. § 76.127(e). *See Satellite Exclusivity Order*, 15 FCC Rcd at 21724-25 ¶¶ 70-72.

[109] 47 C.F.R. §§ 73.658 (b) and (m), 76.92, and 76.101.

[110] Satellite carriers are not required to pay any royalty fees for local-into-local carriage. 17 U.S.C. § 122.

[111] *See Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180 (1997) (*Turner II*).

34. Cable commenters in particular advocate substantial modification of the regulations governing retransmission consent, as well as significant reduction or even elimination of network non-duplication, syndicated exclusivity, and sports blackout rules. For the most part, these commenters' objections to the current rules focus on how they impact the relative market power of broadcasters and cable operators – *i.e.*, which party has the upper hand when negotiating retransmission consent, the prices (monetary and in-kind) MVPDs pay for retransmission consent, the use of retransmission consent to facilitate carriage of affiliated non-broadcast networks, and the prices consumers pay for popular tiers of MVPD programming. Although we have examined the arguments and proposals advanced in the record, we do not believe comments directed at the foregoing concerns can be properly considered within the scope of our examination. Underlying these comments, however, is an implication that the current rules impede cable operators' ability to compete with DBS, which cable commenters appear to view as subject to more lenient requirements. Consistent with the scope of our mandate, we focus on these concerns in detail. For the reasons set forth herein, we do not recommend specific statutory revisions or propose to revise related Commission regulations at this time.

A. Retransmission Consent

35. Of the four rules examined in this report, retransmission consent is the most recent right granted. Prior to 1992, when the policy goal was to ensure the continued viability of local broadcasters and thereby to enable more households to receive local broadcast programming through cable carriage, broadcasters did not have the right to negotiate retransmission consent. In 1992, however, Congress enacted a statutory provision to address broadcasters' longstanding claim for fair compensation for retransmission of their signals by MVPDs.[112] Retransmission consent replaced the pre-1992 free use of the broadcaster's signal with the post-1992 scheme in which signals may be retransmitted pursuant to the broadcaster's consent in exchange for negotiated compensation. Although retransmission consent does not guarantee that a broadcaster will receive fair compensation from an MVPD for retransmission of its broadcast signal, it does provide a broadcaster with the opportunity to negotiate for compensation. Notably, Congress chose not to "dictate the outcome of the ensuing marketplace negotiations."[113] Many expected that cable operators would compensate broadcasters with cash in return for retransmission consent. In reality, much of the compensation for retransmission consent has been in-kind, including carriage of an affiliated non-broadcast channel, or other consideration such as the purchase of advertising time, cross-promotions, and carriage of local news channels. While many of the comments in this proceeding focus on retransmission consent agreements that involve carriage of affiliated non-broadcast networks as a form of compensation for carriage of network owned and operated stations, little or no information has been provided regarding other types of retransmission consent agreements. As we discuss below, our review of the record does not lead us to recommend any changes to the retransmission consent regime at this time.

1. Comments

36. Several commenters complain that broadcasters link retransmission consent for carriage of

[112] 47 U.S.C. § 325 (b). Lorna Veraldi, *Newscasts as Property: Will Retransmission Consent Stimulate Production of More Local Television News?,* 49 Fed. Comm. L. J. 469, 484-85 (1994). Prior to the 1992 enactment of retransmission consent, broadcasters were not entitled to direct compensation for MVPD carriage of their signals, although under the 1976 copyright statute, cable operators were required to pay copyright fees for carriage of broadcast stations.

[113] NAB Comments at 18 (citing the *Senate Report* at 36).

their broadcast stations to carriage of affiliated non-broadcast networks or other content.[114] MVPDs claim that this results in a variety of harms and consequences unintended by Congress.[115] MVPDs claim that conditioning retransmission consent on the carriage of non-broadcast networks increases the size and the price of the extended basic tier and occupies capacity that could be used to carry DTV signals and independent networks.[116] Joint Cable Commenters argue that retransmission consent has become the principal driver of cable rate increases, an unanticipated consequence.[117] Joint Cable Commenters further argue that another unintended result of the retransmission consent regime is that broadcast networks have become the dominant providers of video programming.[118]

37. Several commenters express concerns about broadcasters' ability to exercise market power to fill up MVPD channel capacity with their affiliated programming.[119] Commenters state that the Commission itself has recognized that the signals of local broadcast television stations are without close substitutes and has previously held that News Corp.'s Fox network stations possess market power in the broadcast station segment of the video programming market.[120] Joint Cable Commenters contend that a broadcaster's threat to withhold its signal during retransmission negotiations represents an exercise of market power, even if the broadcaster itself is not affiliated with any non-broadcast networks, because an MVPD cannot afford to risk subscriber defections to alternative MVPDs.[121] Broadcasters are further strengthened in retransmission consent negotiations, according to Joint Cable Commenters, by the network non-duplication rule and the syndicated exclusivity rule, which prevent MVPDs from obtaining a

[114] *See, e.g.,* Joint Cable Commenters Comments at 6; ACA Comments at 7; EchoStar Comments at 3-6; Time Warner Reply Comments at 4. According to EchoStar, broadcasters condition retransmission consent on carriage of affiliated non-broadcast networks, carriage of affiliated broadcast stations in the same market, and carriage of affiliated broadcast stations in other markets. EchoStar Comments at 3-8.

[115] Time Warner asserts that Congress expected that most broadcast stations would elect must carry, rather than retransmission consent, whereas the opposite has happened. According to Time Warner, in the latest round of retransmission consent negotiations, virtually all broadcast stations owned by or affiliated with the top six broadcast networks elected retransmission consent, rather than must-carry. *See* Time Warner Reply Comments at 3. The six networks are ABC, CBS, FOX, NBC, UPN and WB.

[116] Joint Cable Commenters Comments at 3-4; ACA Comments at 7; Discovery Reply Comments at 2-3.

[117] Joint Cable Commenters Comments at 40-41; 46-50; *see also* William P. Rogerson, *The Social Cost of Retransmission Consent Regulations* (Feb. 28, 2005) at 17-19 (the Rogerson study is attached to Joint Cable Commenters Comments).

[118] Joint Cable Commenters Comments at 18-26. Joint Cable Commenters note that the parent companies of the Big Four broadcast networks now own ten of the fifteen top-rated non-broadcast networks. *Id.* at 19. They further state that before broadcasters gained retransmission consent rights, only Fox was vertically integrated with a studio. Today, all of the Big Four broadcast networks are vertically integrated with studios. *Id.* at 24.

[119] Joint Cable Commenters at 11-13 (because they control "must have" programming, the Big Four broadcast networks (*i.e.*, ABC, CBS, Fox, and NBC) are able to obtain carriage of affiliated networks at higher rates and on more favorable terms than would be the case if those affiliated networks had to compete solely on their own merits); Discovery Reply Comments at 2-3 (broadcasters use of market power to fill up MVPD channel capacity with broadcast-affiliated programming makes it more difficult for programmers unaffiliated with broadcasters to obtain carriage of their programming in some markets (*e.g.*, Manhattan, where 60% of expanded basic tier is filled with broadcast affiliated programming)).

[120] Joint Cable Commenters Comments at 13; EchoStar Comments at 3 (citing *News-Hughes Order*, 19 FCC Rcd at 564 ¶ 202).

[121] Joint Cable Commenters Comments at 18-19.

substitute for the local broadcast station.[122]

38. EchoStar states that the exchange of retransmission consent for carriage of affiliated non-broadcast networks constitutes a *per se* illegal tie under the antitrust laws because local broadcast stations carrying network programming are critical to MVPD offerings and stations are using their bargaining power to insist on conditions that are anti-competitive.[123] Time Warner states that any compensation paid to broadcasters for retransmission consent, whether cash or carriage of affiliated programming, is greater than can be justified by the policies underlying retransmission consent.[124] As a practical matter, cable systems that have not increased their capacity to keep pace with competitors may have the most difficulty accommodating requests for the carriage of additional networks in exchange for consent to retransmit broadcast signals. In particular, small cable operators with limited channel capacity contend that such conditioning harms their ability to compete against DBS operators with much larger channel capacity.[125] Joint Cable Commenters and Time Warner state that retransmission consent was not expected to have these various negative effects, but instead was intended to strengthen the ability of local broadcasters to compete against MVPDs.[126]

39. MVPDs propose several potential remedies to the problems they discuss in their comments. EchoStar requests that the Commission abolish any presumption that retransmission consent arrangements that link carriage of broadcast station signals to carriage of affiliated content are consistent with competitive marketplace considerations.[127] EchoStar also asks that third parties be prohibited from negotiating retransmission consent agreements.[128] The Joint Cable Commenters propose that before a broadcaster can initiate a service disruption by withholding retransmission consent, it must make an offer that is not linked to the carriage of national or regional networks.[129] Several commenters recommend that the Commission require television stations and MVPDs to undertake mandatory arbitration, similar to that imposed in the *News-Hughes Order*, before a station is permitted to withdraw or withhold retransmission consent for its local signal, and to meet other conditions imposed in the *News-Hughes Order*.[130]

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[122] *Id*. at 14.

[123] EchoStar Comments at 3-6.

[124] Time Warner Reply Comments at 7.

[125] ACA Comments at 7.

[126] Joint Cable Commenters Comments at 28-33; Time Warner Reply Comments at 4.

[127] EchoStar Comments at 6-7. The purpose of its proposal is to prevent broadcast networks from negotiating on behalf of their affiliates. *Id*.

[128] ACA proposes a similar prohibition in a separately-filed Petition for Rulemaking. *See* ACA, *Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103, Retransmission Consent, Cable Network Non-Duplication, and Syndicated Exclusivity* (Mar. 2, 2005) ("*ACA Petition for Rulemaking*").

[129] This would permit the linkage of carriage of a broadcast station's analog signal to carriage of the broadcaster's digital or multicast signals, thereby making the considerations locally-based and broadcast-related, consistent with the goals of the 1992 Act to foster localism and local broadcasting. Joint Cable Commenters meeting with Media Bureau staff (Jul. 25, 2005).

[130] *See, e.g.,* BellSouth Comments at 8; EchoStar Comments at 10-11; ACA Comments at 11. *See also News-Hughes Order*, 19 FCC Rcd at 572-76 ¶¶ 218-26. Under the current rules, when a retransmission consent agreement expires, a broadcaster may withhold its signal from an MVPD while negotiating a new retransmission consent agreement (except during ratings "sweeps" periods). 47 C.F.R. § 76.1601, Note 1. Although this does not occur often, broadcasters have withheld their signals during retransmission consent disputes in a few instances (e.g., Nexstar withheld signals from several cable systems in Missouri and Texas in 2005).

BellSouth urges the Commission to prohibit a television broadcast station from requiring the carriage of its digital signal as a condition for retransmission consent for the carriage of its analog signal.[131] BellSouth also requests that the Commission include program access non-discrimination principles in the retransmission consent rules in order to help MVPDs with small subscriber bases obtain broadcast signals at lower prices.[132] EchoStar urges that the statutory ban on exclusive retransmission consent agreements (which expires on January 1, 2010) be made permanent in order to ensure that all MVPDs have access to all local broadcast signals.[133]

40. Broadcasters, on the other hand, argue that Congress believed that the pre-1992 regulatory scheme was unfair to broadcasters and enacted retransmission consent to provide broadcasters with the right to control the retransmission of their signals. Broadcasters believe Congress intended to establish a marketplace for the exchange (*i.e.*, retransmission) of broadcast signals, without dictating the outcome of the retransmission consent negotiations.[134] They point out that Congress understood and approved of monetary compensation, carriage of affiliated non-broadcast networks, and other in-kind compensation as possible terms of retransmission consent.[135] Broadcasters say the practice of conditioning broadcast station carriage on the carriage of non-broadcast networks developed after cable operators declined to pay cash for retransmission consent.[136] Network Affiliates state that conditional carriage proposals are legal and are expected to become a common tool used by broadcasters for obtaining MVPD carriage of their digital signals.[137] According to Network Affiliates, nothing would be more detrimental to the digital transition than for broadcasters to be denied dual must carry and then prohibited from negotiating for carriage of both signals under retransmission consent.[138]

41. Broadcasters deny that retransmission consent is responsible for the increasing cable rates

[131] BellSouth suggests that the Commission prohibit a television broadcast station from imposing any non-optional linkage of its digital signal to carriage of its analog signal in exchange for retransmission consent. It argues that the Commission has determined that television stations are not entitled to mandatory carriage of their digital signals or their digital multicast channels during the DTV transition, and that broadcasters should not be able to circumvent that decision by forcing an MVPD into digital carriage as a *quid pro quo* for analog carriage. BellSouth Comments at 8. For the same reasons discussed herein regarding the linkage of broadcast and non-broadcast signals, we will not recommend any restrictions on the terms of retransmission consent agreements at this time.

[132] BellSouth Comments at 8. BellSouth also proposes that Congress amend the program access statutory provision (47 U.S.C. § 548) so that its prohibition on exclusive contracts remains in effect at least until the current sunset date for the statutory ban on exclusive retransmission consent agreements. BellSouth Comments at 8. An examination of the program access provisions is beyond the scope of this proceeding, and we decline to consider this proposal.

[133] EchoStar Comments at 12-13.

[134] NAB Comments at 14; Network Affiliates Comments at 4.

[135] NAB Comments at 18-20; Network Affiliates Comments at 4-5 (citing *Senate Report* at 35-36). Other examples of in-kind compensation include: an agreement by a cable operator to: (1) purchase advertising on the broadcast station; (2) promote the broadcast station on cable program service channels; and (3) allow the broadcast station to sell local advertising time on cable program service channels. Network Affiliates Comments at 8.

[136] NAB Comments at 18-19; Network Affiliates Comments at 7-8; Disney Reply Comments at 7-8; Fox Reply Comments at 5.

[137] Network Affiliates Reply Comments at 30.

[138] *Id*.

paid by subscribers,[139] maintaining that non-programming costs, such as the investments associated with offering broadband services and digital television, are responsible for increasing cable rates.[140] Broadcasters cite a recent GAO report as evidence that broadcast-affiliated networks receive license fees similar to the fees received by non-broadcast networks that are not affiliated with broadcasters.[141] Broadcasters fear that prohibiting in-kind compensation arrangements would eliminate needed flexibility and may give rise to more frequent disputes leading to the withdrawal of broadcasters' signals during retransmission consent negotiations.[142]

42. Finally, broadcasters deny that they have market power, asserting that so-called "must-have" programming is nothing more than programming that is currently popular, and that such temporary popularity among certain viewers is similar to the preference of a subset of consumers for a specific favorite restaurant, neither of which constitutes market power.[143] Network Affiliates contend that the ability of local television stations to negotiate compensation from MVPDs does not imply market power in an economic sense.[144] Rather, according to Network Affiliates, many non-broadcast networks are good substitutes for network broadcast signals, and nothing prevents cable operators from developing additional popular programming.[145] Viacom asserts that the parent companies of the four major broadcast networks (Viacom, Disney, News Corp., and NBC-Universal) collectively own only 23 percent of the existing non-broadcast networks, making it unlikely that any one of these companies could exercise market power capable of producing anticompetitive effects.[146] NAB says that prior to the launch of DBS, broadcasters were at the mercy of cable operators, which had monopoly power as the only broadcast retransmission system available.[147] With the advent of competition in the MVPD market, NAB states that broadcasters are now beginning to obtain compensation that more accurately reflects the value of

[139] Disney Reply Comments at 9-11; NBC Reply Comments at 6-7; Network Affiliates Reply Comments at 23; Viacom Reply Comments at 9-11; Fox Reply Comments at 12-13; and NSBA Reply Comments at 5-8.

[140] Disney Reply Comments at 10; Viacom Reply Comments at 11.

[141] Network Affiliates Reply Comments at 23; Viacom Reply Comments at 10-11 (citing General Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, Highlights of GAO-04-8, Telecommunications (Oct. 2003)); *see also* Government Accountability Office, *Subscriber Rates and Competition in the Cable Television Industry*, Highlights of GAO-04-262T, Telecommunications (Mar. 25, 2004).

[142] NAB Comments at 16-17 and Reply Comments at 12; Disney Reply Comments at 6; Viacom Reply Comments at 4.

[143] NBC Reply Comments at 5. *See also* Network Affiliates Reply Comments at 12 (neither communications law nor economic theory recognize any such thing as must-have broadcast signals).

[144] Network Affiliates Reply Comments at 13. In support of its position, Network Affiliates cites statements made by the Media Bureau in a past report: "All differentiated products, such as video programming, possess some degree of market power in the sense that there are no perfect substitutes. The critical question in any analysis involving differentiated products is whether the existing degree of market power is sufficient to allow the firm to profitably engage in the hypothesized anticompetitive activity." *Id*. (citing *Report on the Packaging and Sale of Video Programming Services to the Public* (*A La Carte Report*) (MB Nov. 18, 2004).

[145] Network Affiliates Reply Comments at 13-14.

[146] Viacom Reply Comments at 13. *See also* Disney Reply Comments at 14-15; Jeffrey A. Eisenach and Douglas A. Trueheart, CapAnalysis, *Retransmission Consent and Cable Television Prices* (Mar. 31, 2005) at 15-27 (Exhibit A of the Disney Reply Comments); and Fox Reply Comments at 6.

[147] NAB Reply Comments at 31.

broadcast signals to MVPDs.[148]

43. Broadcasters oppose the various MVPD proposals to modify the existing retransmission consent regime. They unanimously oppose the imposition of mandatory arbitration requirements, asserting that the circumstances presented by the News Corp./DirecTV transaction were unique, and that imposition of such conditions on all broadcasters would be unjustified.[149] Broadcasters state that the Commission's program access rules are designed to address potential competitive harms arising from vertical integration of programmers and cable operators, and that BellSouth has not explained why the rules should apply to broadcasters that are not vertically integrated with cable operators.[150] Broadcasters further assert that the good faith negotiation requirement in the retransmission consent rules permits BellSouth to seek relief where it can show that broadcasters seek to impose discriminatory retransmission consent terms and conditions,[151] and that BellSouth fails to cite a single example of such discrimination.[152] Viacom states that broadcasters have strong incentives to have their signals carried to as many households as possible and do not have incentives to offer anticompetitive carriage terms to small or alternative MVPDs.[153] Broadcasters also oppose extension of the ban on retransmission consent agreements.[154]

2. Discussion

44. We believe that, overall, the regulatory policies established by Congress when it enacted retransmission consent have resulted in broadcasters in fact being compensated for the retransmission of their stations by MVPDs, and MVPDs obtaining the right to carry broadcast signals. As we previously have stated, the retransmission consent process provides "incentives for both parties to come to mutually beneficial arrangements."[155] The Commission has observed that both the broadcaster and MVPD benefit when carriage is arranged – the station benefits from carriage because its programming and advertising will be carried as part of the MVPD's service, and the MVPD benefits because the station's programming

[148] *Id*. at 31.

[149] Disney Reply Comments at 13-16; NBC Reply Comments at 5-6; NAB Reply Comments at 20-22; Viacom Reply Comments at 14-15; Network Affiliates Reply Comments at 4-9. Broadcasters argue that there have been thousands of retransmission consent negotiations since 1992, but fewer than 10 complaints have been filed against broadcasters alleging a failure to negotiate in good faith. NAB Comments at 20-21; Network Affiliates Reply Comments at 32. According to broadcasters, there has only been one case where the Commission reached the merits of the complaint, and in that case the Commission determined that the broadcaster had fulfilled its obligation. *Id*.

[150] NAB Reply Comments at 22-23.

[151] NAB Reply Comments at 23.

[152] Network Affiliates Reply Comments at 29.

[153] Viacom Reply Comments at 15.

[154] NAB argues that the ban was intended to be a transitional measure to help foster the growth of DBS as a competitor to incumbent cable operators. NAB Reply Comments at 26-27. NAB states that in the early years of DBS, Congress was concerned that cable operators would coerce broadcasters into entering exclusive contracts, and it placed a ban on such contracts as a temporary solution to facilitate the growth of DBS and competition between cable and DBS. *Id*. at 27.

[155] *News-Hughes Order*, 19 FCC Rcd at 556-57 ¶ 180, ns. 502-06 (citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723, 6747 ¶ 115 (1994); *SHVIA Good Faith Order*, 15 FCC Rcd at 5448 ¶ 8; and Applicants' Reply at 44-45).

makes the MVPD's offerings more appealing to consumers. Most importantly, consumers benefit by having access to such programming via an MVPD. Thus, as a general rule, the local television broadcaster and the MVPD negotiate in the context of a level playing field in which the failure to resolve local broadcast carriage disputes through the retransmission consent process potentially is detrimental to each side.[156]

45. Nevertheless, we note cable operators' widespread concern that retransmission consent negotiations frequently involve broadcasters tying carriage of their broadcast signals to carriage of numerous affiliated non-broadcast programming networks. This process may produce results that go beyond what Congress envisioned. We note, though, that if Congress views the carriage of several of a broadcaster's non-broadcast programming networks as an unintended consequence of retransmission consent and seeks to address this practice, it is important that Congress also consider changes to other aspects of the broadcast signal carriage framework, specifically the mandatory carriage provisions. As we noted above, the retransmission consent rules are part of a carefully balanced combination of laws and regulations governing carriage of television broadcast signals, with the must-carry and retransmission consent regimes complementing one another. For example, since the Commission's decision to deny broadcasters the ability to assert dual and multicast must-carry, broadcasters have begun using their retransmission consent negotiations to negotiate carriage of their digital signals, thus furthering the digital transition by increasing the number of households with access to digital signals. If broadcasters are limited in their ability to accept in-kind compensation, they should be granted full carriage rights for their digital broadcast signals, including all free over-the-air digital multicast streams. Should Congress consider proposals circumscribing retransmission consent compensation, we encourage review of such related rules and policies, as well, in order to maintain a proper balance.

B. Exclusivity Rules

1. Network Non-Duplication and Syndicated Exclusivity Rules

a. Comments

46. Cable operators propose that the network non-duplication and syndicated exclusivity rules be made unenforceable with respect to stations that elect retransmission consent. Specifically, NCTA asks the Commission to initiate a rulemaking to exempt cable operators from compliance with these rules with respect to local broadcast stations that elect retransmission consent when the cable operator and broadcaster are unable to reach agreement and the cable operator seeks to carry a duplicating distant signal in lieu of the local broadcast signal.[157] NCTA and ACA argue that local stations can use their exclusivity rights to prevent cable operators from providing their subscribers with network programming

[156] *Id*.

[157] NCTA Comments at 12. In its separately-filed petition for rulemaking, ACA asks the Commission to revise the retransmission consent, network non-duplication, and syndicated exclusivity rules so that when a broadcaster seeks compensation for retransmission consent, a "small cable company" would be able to shop for lower cost network programming without being subject to network non-duplication and syndicated exclusivity. *ACA Petition for Rulemaking*. ACA proposes that broadcast stations and programming suppliers be prohibited from entering into contractual arrangements that would prevent the importation of duplicating distant signals into a local market in cases where the local station elects retransmission consent and seeks any terms "beyond carriage and channel placement." *Id*. at vii, 37. The term "small cable company" is defined in the Commission's rules governing rate regulation as "a cable television operator that serves a total of 400,000 or fewer subscribers over one or more cable systems." 47 C.F.R. § 76.901(e).

from distant affiliates.[158] ACA claims that broadcasters use the exclusivity rules to raise the price of retransmission consent because, without the ability to carry distant signals, cable operators do not have an alternative source of network programming.[159] ACA argues that this problem is exacerbated in smaller and rural markets that are underserved by over-the-air broadcasters.[160]

47. Broadcasters maintain that the network non-duplication and syndicated exclusivity rules are needed to protect programming for which broadcasters have exclusive rights. They state that elimination of the rules would harm localism, jeopardize broadcast networks, and undermine retransmission consent.[161] According to broadcasters, the rules promote the long-standing goal of localism by: (1) providing MVPD subscribers with access to local content produced by broadcasters; and (2) maximizing local viewership and advertising revenues to support the development and airing of local content.[162] They claim that the rules are necessary to permit broadcasters that have negotiated exclusivity rights with their programming suppliers to protect those rights against MVPD importation of duplicating distant signals and assert that the rules are intended to provide broadcasters with an incentive to invest in programming that serves their communities.[163] To support their arguments, broadcasters note that in 1988, the Commission concluded that the exclusivity rules are necessary to preserve broadcasters' ability to compete against cable operators. They further point out that the Commission later rejected proposals to eliminate these rules when retransmission consent was implemented in 1993.[164] NAB argues that the consequences of eliminating exclusivity protection would be especially dire in small and medium sized markets because the rules are needed to protect the audience base of stations in such markets.[165]

48. Broadcasters fear that elimination of the rules with respect to stations that elect retransmission consent would endanger localism by subjecting local broadcasters to competition with out-of-market broadcasters. NAB indicates that many network affiliation agreements refer to the Commission's rules to define the parties' obligations with respect to exclusivity and to define the geographic scope of exclusivity.[166] Thus, NAB argues that exempting some cable operators from application of the rules with respect to stations that elect retransmission consent could cause significant

[158] NCTA Comments at 12; ACA Comments at 4.

[159] ACA Comments at 4. In its Petition for Rulemaking, ACA specifically proposes that the Commission adopt a new subsection (n) to 47 C.F.R. § 76.64, allowing a "small cable company" to override a local station's exclusivity rights when retransmission consent negotiations fail and the cable operator is able to obtain retransmission consent rights for carriage of an out-of-market station. ACA Petition for Rulemaking at 37.

[160] ACA Comments at 5. In more populous regions, by contrast, viewers may be served by out-of-market significantly viewed signals, which are treated as local for copyright purposes and which cable operators may retransmit without having to black out duplicative programming.

[161] Disney Reply Comments at 17-21; Duhamel Reply Comments at 2; NAB Reply Comments at 35-37; Network Affiliates Reply Comments at 40-45; NSBA Reply Comments at 9-10.

[162] Disney Reply Comments at 18-19. See also NBC Reply Comments at 10 (NCTA's proposal treats distant broadcast network signals as equivalent to local broadcast network signals, but the Commission has always recognized the difference); NAB Comments at 10-11 (unlike local stations, distant stations do not provide viewers with local news, weather, emergency, and public service programming).

[163] NSBA Reply Comments at 9; Viacom Reply Comments at 16-17.

[164] NAB Reply Comments at 35-36; Disney Reply Comments at 17-18.

[165] NAB Reply Comments at 35-36.

[166] NAB meeting with Media Bureau staff (Aug. 10, 2005). *See also* NBC Comments at 6-7.

disruption of existing contractual relationships by forcing broadcasters and their programming suppliers to renegotiate existing contracts.[167] NAB further contends that adoption of the proposed regulatory modifications may well lead to unintended consequences that cannot be anticipated on the basis of the existing record.[168]

b. Discussion

49. Whether or not these rules remain in place, cable operators' ability to retransmit duplicative distant broadcast signals is governed in the first instance by the contract rights negotiated between broadcasters and their programming suppliers. If networks and syndicators have entered into contracts with broadcasters that limit broadcasters' exclusivity such that a duplicative distant signal could be imported by an MVPD without blacking out the duplicative programming, the Commission's rules would not prevent that result. Conversely, where exclusivity contracts exist, repeal of the Commission's rules would not necessarily be sufficient to enable the retransmission of duplicative programming. Moreover, to some extent, rural cable operators are already able to import distant signals without blacking out duplicative programming. The exclusivity rules already contain certain exceptions that should ameliorate rural cable operators' need for relief. Significantly viewed signals, for example, are not subject to these rules.[169] The rules also do not apply to small cable systems serving fewer than 1,000 subscribers. According to ACA, approximately half of its members qualify for this exemption.[170]

50. To the extent that cable operators are asking the Commission to modify the network non-duplication and syndicated exclusivity rules such that they would supersede contract arrangements between broadcasters and their programming suppliers that are permitted by the rules, we cannot endorse or recommend such modifications. The legislative history of the 1992 Act indicates that the network non-duplication and syndicated exclusivity rules were viewed as integral to achieving congressional objectives.[171] Based on this legislative history, the Commission previously has refused to find that the network non-duplication rules do not apply to stations that elect to exercise retransmission consent rights with respect to a cable system.[172] Moreover, the Commission has a longstanding policy favoring the

[167] *Id*.

[168] *Id*.

[169] *See* 47 C.F.R. §§ 76.92(f) and 76.106.

[170] ACA Comments at 4.

[171] The *Senate Report* states that "the Committee has relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules. Amendments or deletions of these rules in a manner which would allow distant stations to be submitted on cable systems for carriage or local stations carrying the same programming would, in the Committee's view, be inconsistent with the regulatory structure created in S. 12." *Senate Report* at 38.

[172] *Signal Carriage Order*, 8 FCC Rcd at 3006 ¶ 180 ("It seems clear that Congress intended that local stations electing retransmission consent should be able to invoke network non-duplication protection and syndicated exclusivity rights, whether or not these stations are actually carried by a cable system."); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992,* 8 FCC Rcd 2965 (1993), *on recon.,* 9 FCC Rcd 6723 at 6747 ¶ 114 ("*Reconsideration Decision*") ("Network non-duplication and syndicated exclusivity rights protect the exclusivity that broadcasters have acquired from their program suppliers, including their network partners, while retransmission consent allows broadcasters to control the redistribution of their signals. Both policies promote the continued availability of the over-the-air television system, a substantial government interest in Congress' view.")

provision of local broadcast service to communities, and the Commission expects and indeed requires broadcasters to serve the needs and interests of their local communities. Except in cases where a contract violates the Commission's rules, we do not deem it in the public interest to interfere with contractual arrangements that broadcasters have entered into for the very purpose of securing programming content that meets the needs and interests of their communities. Such interference would contradict our own requirements of broadcast licensees and would hinder our policy goals.

51. Accordingly, we decline to recommend at this time that the network non-duplication and syndicated exclusivity rules be modified as proposed by NCTA. Rather than risking the major disruption and possible unintended consequences of rendering these rules unenforceable with respect to broadcasters that elect retransmission consent, it may be appropriate to consider whether 1,000 subscribers remains the correct benchmark for defining a small system, but there is no record in this proceeding to make that determination. Any such consideration should be undertaken cautiously in view of the important role these rules play in enabling local broadcasters to provide robust local service**.**

52. *Geographic Zone of Exclusivity Protection*. We do not recommend that the applicable zones of protection for the network non-duplication and syndicated exclusivity rules be modified and made consistent with the DMAs used to determine local television markets for must carry and retransmission consent election rights for both cable and DBS.[173] The geographic zones over which a broadcaster can request network non-duplication or syndicated exclusivity protection were originally adopted when determination of which broadcast stations were entitled to mandatory carriage rights on particular cable systems was based primarily on mileage zones. In applying network non-duplication and syndicated exclusivity protection to DBS, the Commission adopted the same exclusivity zones that were applicable to cable service consistent with Congress' directive in SHVIA.[174] In 1992, when Congress enacted must-carry/retransmission consent for cable operators, it established the ADI, which was replaced by the DMA, as the local market for carriage rights.[175] Similarly, when SHVIA was enacted, the local market for broadcast signal carriage was defined as the DMA.[176]

53. Some broadcast stations provide a good quality signal to all households and cable operators throughout the entire DMA. However, some broadcasters may not provide a strong signal to all households and cable systems throughout the DMA. DMAs can extend for hundreds of miles, especially in the western states, and there may be multiple affiliates of an individual network in a DMA.[177] In fact, Pioneer states that some broadcasters do not provide a strong signal to all households and cable systems where they currently assert network non-duplication and syndicated exclusivity protection under the current specified zone (*i.e.*, generally the 35/55 limits).[178] For these stations, extending exclusivity

[173] Duhamel at 1. Duhamel supports maintaining the existing exclusivity provisions as well as an increase in the zone.

[174] 47 U.S.C. § 339(b)(1)(A).

[175] *See* n. 32, *supra.*

[176]17 U.S.C. § 122(j)(2).

[177] Nielsen delineates television markets by assigning each U.S. county (except for certain counties in Alaska) to one market based on measured viewing patterns both off-air and by MVPD distribution. Each U.S. county generally is assigned to only one market based on the market whose stations receive the preponderance of audience in that county. However, in a few cases where a county is large and viewing patterns differ significantly between parts of the county, a portion of the county is assigned to one television market and another portion of the county is assigned to another market. Several counties in Alaska are not assigned to any DMA.

[178] Pioneer Comments at 5.

protection to an even larger geographic area, such as the entire DMA, would further the disparity between the actual footprint where the station provides a strong signal and the exclusivity protection. Such an approach would permit a broadcaster to assert exclusivity and block retransmission of duplicative programming on distant broadcast signals in areas where the broadcaster does not provide service. Moreover, in terms of actual location, a distant station may be closer to a viewer than the "local" station based on DMA definitions. Thus, the closer station would be disadvantaged, and this modification could impede that station's ability to provide local service.

2. Sports Blackout Rule

a. Comments

54. The Professional Sports Leagues favor retention of the current sports blackout rule.[179] The Professional Sports Leagues state that the sports blackout rule does not impose any significant burden on cable or satellite operators and does not affect the ability of rural cable operators to compete with DBS in the provision of digital broadcast television signals to consumers.[180]

55. The Professional Sports Leagues state that they routinely incorporate blackout provisions into their negotiated out-of-market rights agreements.[181] However, they are unable to do so for broadcast stations carried pursuant to the statutory licenses granted by sections 111 and 119 of the Copyright Act.[182] They explain that the statutory licenses enable cable operators and satellite carriers to retransmit sports from distant broadcast stations without obtaining the consent of the affected sports clubs.[183] Those provisions, however, require MVPDs to comply with the sports blackout rule.[184] Absent the sports blackout rule, the Professional Sports Leagues state that MVPDs would be able to exploit compulsory licensing to override a decision by the sports club not to televise a particular home game in the local market in which it is being played.[185] In addition, the Professional Sports Leagues contend that absent the sports blackout rule, MVPDs could override a decision to provide exclusive rights to a non-broadcast regional sports network to televise that game within the club's home market.[186]

56. The Professional Sports Leagues state that the sports blackout rule provides sports clubs narrow protection that requires MVPDs to black out only a handful of telecasts in approximately three dozen geographically-confined areas.[187] They say the protection afforded by the sports blackout rule is more limited than the protection the Professional Sports Leagues routinely negotiate regarding games not covered by the sports blackout rule.[188] For example, MVPDs may offer their subscribers a package,

[179] Professional Sports Leagues Comments at 8.

[180] *Id*. at 2-3.

[181] *Id*. at 8.

[182] *Id*.

[183] *Id*. at 4.

[184] *Id*.

[185] *Id*.

[186] Professional Sports Leagues Comments at 8.

[187] *Id*. at 5.

[188] *Id*.

called MLB Extra Innings, of up to 60 out-of-market telecasts of Major League Baseball ("MLB") games each week.[189] MVPDs, however, are contractually required to black out specific games on MLB Extra Innings throughout the home television territories of the teams participating in those games.[190] In contrast to the sports blackout rule, which permits blackouts only in a limited 35-mile zone around a Commission-determined "reference point" for the home club, the contractually negotiated blackout throughout the home territories of Professional Sports teams generally extends well beyond 35 miles.[191] In addition, the sports blackout rule affords blackout protection only to the home teams, while the Professional Sports Leagues often negotiate blackout protection for both the home and visiting teams.[192] Furthermore, the sports blackout rule permits clubs to provide exclusivity for specific games only to non-broadcast distributors – such as regional sports networks – and not to local broadcast stations.[193] Thus, when a local broadcast station shows a club's home game, the sports blackout rule does not apply and, therefore, does not permit the club to require MVPDs to black out the retransmission of a distant broadcast signal carrying the same game. In contrast, the Professional Sports Leagues typically negotiate blackout provisions that provide exclusive licensing arrangements with both broadcasters and MVPDs.[194] For example, MVPDs may not offer in either of the participating clubs' home territories any MLB Extra Innings game telecast involving those clubs, thus protecting those clubs' property rights (to broadcast or non-broadcast distribution) as the exclusive provider of their club's games.[195]

57. NCTA states that the Commission "should exempt a cable operator from facing blackouts under the network non-duplication, syndicated exclusivity, and sports blackout rules so that it can fully serve consumers with distant stations that it brings to its community," but NCTA does not address the sports blackout rule in any further detail.[196] NCTA also claims that DBS operators may import "multiple sporting events" in areas where DBS retransmission of distant signals is exempt from blackout.[197] The Professional Sports Leagues refute NCTA's claim that DBS may offer multiple sporting events to unserved households in areas that cable operators must black out pursuant to the sports blackout rule.[198]

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[189] *Id*. at 6.

[190] *Id*.

[191] *Id*.

[192] *Id*.

[193] *Id*.

[194] *Id*. at 6.

[195] *Id*. at 6-7.

[196] NCTA Comments at 12.

[197] NCTA Comments at 5-6.

[198] Professional Sports Leagues Reply Comments at 2 (citing NCTA Comments at 5-6). We note that NCTA did not refer specifically to the blackout requirement of the sports blackout rule, and we interpret NCTA's statement as a reference to the disparities in the network non-duplication and syndicated exclusivity rules as they apply to cable and DBS. *See* NCTA Comments at 5-6. In a late-filed comment, Microcom claims that the sports blackout rule has been used by sports leagues to prevent DBS operators from importing to Alaska and Hawaii sports events being played hundreds of miles away and requests that the Commission restrict the application of the sports blackout rules to only those geographic areas with a reasonable opportunity to attend the sports event. Microcom Comments at 1-2. We note the sports blackout rule already applies only in a limited area (*i.e.*, 35-mile zone), and Microcom's complaint therefore would seem to relate to contractual restrictions, not to the Commission's sports blackout rule.

As the Professional Sports Leagues note, the sports blackout rule imposes the same blackout obligations on all MVPDs.[199] Thus, whenever a cable operator is required to black out a distant broadcast signal carrying a specific game under the sports blackout rule, the DBS operator serving subscribers in the same community must also black out that game.[200]

b. Discussion

58. Having examined the sports blackout rule and comments in the record, we conclude that the rule does not affect competition among MVPDs and we do not recommend any changes to the relevant statutes or regulations. Like the network non-duplication and syndicated exclusivity rules, the sports blackout rule is intended to ensure that MVPDs do not undermine contractual arrangements between broadcasters and sports programming rights holders by importing sports programming that is subject to blackout in the local market. Although NCTA broadly advocates elimination of all of the Commission's exclusivity rules, including the sports blackout rule, commenters have not advanced any link between the rule and competition among MVPDs, and no commenter presses the case for repeal or modification of the sports blackout rules.[201]

59. Sports leagues control both broadcast carriage and MVPD retransmission of their programming. A broadcaster cannot carry a sporting event on its local television stations without the permission of the sports leagues or clubs that own or hold the rights to the sports event. Under the current retransmission consent rules, MVPDs, with limited exceptions, cannot carry a broadcaster's signal without the permission of the broadcaster. Since the terms of carriage may include deletion of specific sports events, a sports league could prevent unwanted MVPD retransmission through contractual arrangements with broadcast stations. While the Professional Sports Leagues claim that the sports blackout rule gives them the additional ability to black out games being carried by MVPDs pursuant to the statutory licenses granted by sections 111 and 119 of the Copyright Act,[202] it appears that the same blackout protection can be obtained through their contracts with broadcast stations. Therefore, the sports blackout rule may serve primarily as an enforcement mechanism for existing contracts between broadcasters that purchase the distribution rights to the sports event and sports leagues or clubs that own the rights to the sports event.

60. Indeed, the sports leagues claim that they already negotiate contractual blackout protections that exceed the protections afforded by the Commission's rules, for example by extending the blackout zone to a team's entire home territory, as defined by the team or relevant sports league. Significantly, however, the Leagues do not request stronger rules. Moreover, any regulatory or statutory expansion of the blackout zone would require a careful consideration of the impact of such action on consumers. In the absence of any request that we consider such measures, or any evidence in the record concerning the relationship of the rule to competition among MVPDs, we are not recommending regulatory or statutory revisions to modify the protections afforded to the holders of sports programming rights.

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[199] *Id*.

[200] Professional Sports Leagues Reply Comments at 2. *See also* 47 C.F.R. § 76.127.

[201] *See* n. 198, *supra* (NCTA and Microcom complaints related to other rules or contractual obligations, not the sports blackout rule).

[202] 17 U.S.C. §§ 111, 119.

C. Parity Between the Cable and DBS Regulatory Structures

61. Some commenters have objected to certain disparities between the retransmission consent and program exclusivity rules as they apply to cable and DBS. Having recommended that major changes to the existing rules not be pursued for the reasons discussed above, we now turn to the question of whether disparities between the existing rules for cable and DBS should be eliminated. For reasons discussed further below, we conclude that although establishing parity in the laws and regulations governing DBS and cable carriage of television broadcast signals is a worthy goal, a comprehensive analysis of regulatory disparities and possible measures to achieve greater parity should await the results of the companion Copyright Office review of related copyright law which is being undertaken pursuant to SHVERA.

1. Comments

62. Cable commenters state that rural cable operators face increasing competitive pressure from satellite providers and ask the Commission to adopt or recommend various measures to remedy the perceived competitive imbalance. Specifically, NCTA explains that for unserved households DBS operators may import two distant broadcast signals affiliated with each broadcast network without retransmission consent, and without being subject to the network non-duplication and syndicated exclusivity rules.[203] In contrast, NCTA explains, for the same unserved households, cable operators must obtain retransmission consent to import distant broadcast signals, and these signals are subject to the network non-duplication and syndicated exclusivity rules.[204] NCTA proposes that cable operators, like DBS operators, should be exempt from obtaining retransmission consent when they provide distant broadcast signals to a household that would be allowed to receive the signal if it were a DBS subscriber.[205]

63. Broadcasters object to NCTA's proposal, saying it would harm local broadcasters' competitive position and ability to provide local programming.[206] Broadcasters argue that in enacting SHVIA, Congress stimulated competition between cable and DBS by providing DBS with a temporary reprieve from retransmission consent, network non-duplication, and syndicated exclusivity for households that do not receive broadcast service so that DBS could offer distant broadcast programming to subscribers.[207] Broadcasters assert, however, that Congress did not make the exemptions permanent; in SHVIA, Congress established a sunset date of December 31, 2004, for the exemptions, which was extended to December 31, 2009, in SHVERA.[208] NAB suggests that if cable and DBS have reached sufficient competitive equality in the MVPD marketplace to justify regulatory parity, the exemptions for DBS for unserved households should be eliminated.[209] The exemptions, NAB says, should not be

[203] NCTA Comments at 5. Additionally, NCTA argues that SHVERA gives DBS a new right to provide distant digital network signals to households that are served by analog networks signals but fail to receive an over-the air digital signal. NCTA Comments at 8-9.

[204] *Id*. at 4.

[205] *Id*. at 12.

[206] NAB Reply Comments at 25-26; Network Affiliates Reply Comments at 37-38.

[207] NAB Reply Comments at 25; Network Affiliates Reply Comments at 38.

[208] NAB Reply Comments at 25-26, Network Affiliates Reply Comments at 38.

[209] NAB Reply Comments at 26.

extended to cable.[210]

64. DBS operators also oppose NCTA's proposal. They state that NCTA's complaints and proposed regulatory changes fail to acknowledge the "no-distant-if-local" rule, which applies only to DBS providers.[211] SHVERA provides that a DBS operator cannot offer the analog signal of a distant network station to a new subscriber when the DBS operator carries the analog signal of a local broadcast station affiliated with the same network.[212] A similar prohibition applies to the importation of a distant digital network station when a digital local broadcast station affiliated with the same network is being carried.[213] EchoStar states this "super network non-duplication rule" applies only to DBS providers, for both served and unserved households, in every DMA where the DBS operator provides local-into-local service.[214] In contrast, EchoStar argues, a cable operator may carry distant analog and digital broadcast signals to all of its subscribers, whether or not they can receive an analog or digital over-the-air signal, subject to retransmission consent, network non-duplication, and syndicated exclusivity.[215] EchoStar contends that, although it is difficult to compare the competitive impact of the rules on cable and DBS operators, SHVERA's introduction of both the analog and digital "no-distant-if-local" rules place greater restrictions on DBS's carriage of distant network stations, relative to the restrictions placed on cable operators.[216]

2. Discussion

65. At the outset, parity – application of the same laws and regulations to cable and DBS – is a worthy goal. Several of Congress' revisions to the laws governing carriage of television broadcast signals by DBS operators have been aimed at establishing greater parity between the legal frameworks for cable and DBS operators.[217] Establishing statutory and regulatory parity between cable and DBS could mean applying the DBS provisions to cable, the cable provisions to DBS, or some combination of the two. The principal recommendation in the record is to extend to cable operators the exemptions from retransmission consent, network non-duplication, and syndicated exclusivity that apply to DBS operators for retransmission of distant broadcast network signals to "unserved households."[218]

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[210] *Id*.

[211] EchoStar Reply Comments at 4; DirecTV Reply Comments at 5.

[212] 47 U.S.C. § 339(a)(2)(C).

[213] 47 U.S.C. § 339(a)(2)(D)(iv).

[214] EchoStar Reply Comments at 4.

[215] *Id*. at 5.

[216] *Id*. at 6.

[217] House Commerce Committee Report at 1 (purpose of the SHVERA includes "increasing regulatory parity by extending to satellite carriers the same type of authority cable operators already have to carry 'significantly viewed' signals into a market"); *SHVIA Conference Report* at H11795 (SHVIA intended to place satellite carriers on more equal footing with local cable operators by allowing local-into-local carriage).

[218] NCTA Comments at 11-12. In addition to recommending that the retransmission consent and exclusivity rules be made parallel, NCTA also argues that satellite carriers receive a copyright advantage over cable operators in determining which stations are considered "network" stations subject to lower royalties. NCTA Comments at 10-11. Section 109 of SHVERA requires the Copyright Office to report to Congress on the operation of section 111, 119, and 122 copyright licenses. As the differing definitions of a "network" signal are an integral part of copyright law, we defer to the Copyright Office with respect to this issue.

66. We have examined the disparities in our rules as well as proposals advanced by cable operators to remedy the alleged ill effects of these disparities. We conclude that the proposed remedies would not necessarily have the desired effect and, in fact, may be unworkable. In addition, the role of copyright compulsory license authority cannot be ignored in this analysis, and disparities in the application of the copyright scheme to cable and DBS operators must be taken into account in any evaluation of proposed modifications to the Commission's retransmission and exclusivity rules or the underlying statutes. Those disparities are complex and cannot readily be categorized as favoring either one industry or the other.

67. Under current rules, there are significant differences between cable and satellite regarding the need to obtain retransmission consent for the carriage of broadcast stations outside the local DMA. The cable rules are straightforward with respect to carriage of distant signals. A cable operator generally may offer any distant broadcast signal to any household by paying the required copyright royalties, obtaining retransmission consent, and complying with the network non-duplication and syndicated exclusivity rules.

68. DBS operators, on the other hand, face greater restrictions in the retransmission of distant signals, especially for subscribers that are considered to be served by broadcast stations over-the-air. Specifically, a DBS operator may not offer distant network signals except to households shown to be "unserved" by network stations. On a going forward basis, a DBS operator will not be permitted to offer distant network signals to any subscriber where local-into-local service is available.

69. In some respects, however, the rules applicable to DBS are seemingly less restrictive than the rules applicable to cable. For example, a DBS operator may offer the signals of distant superstations (*i.e.*, non-network stations) to any household without obtaining retransmission consent. Cable operators, on the other hand, must obtain retransmission consent for all distant signals except a very limited group of superstations. DBS operators must comply with the network non-duplication and syndicated exclusivity rules only for nationally distributed superstations, a limited subset of all superstations. Cable operators must comply with these rules with respect to all distant signals. However, in practice, this supposed DBS advantage is not meaningful because the households treated as "unserved" are most likely outside of the 35/55 mile zone within which local stations may assert exclusivity protection against cable operators. In the cable context, where the concept of "unserved household" does not exist, cable operators are required to provide local stations as part of basic service to all subscribers and, while they are permitted to provide distant signals to anyone, they must obtain retransmission consent to do so and provide exclusivity protection where applicable.

70. One approach to remedying disparities would be to apply the DBS rules to cable households that would be considered "unserved." This would allow cable operators in outlying areas, which are often rural, to carry distant signals without retransmission consent and without having to blackout programming under the exclusivity rules. Since the concept of "unserved household" does not currently exist under the cable rules, as envisioned, the modification advocated by NCTA would provide that whenever a DBS operator may retransmit a distant broadcast signal to an unserved household without being subject to the retransmission consent, network non-duplication and syndicated exclusivity rules, a cable operator should be entitled to retransmit distant broadcast signals to the same household, if it were a cable household, without being subject to the retransmission consent, network non-duplication and syndicated exclusivity rules. NCTA claims this option would make it easier for cable operators to import distant broadcast signals to unserved households and into areas where it is difficult for viewers to get a good quality local broadcast signal.

71. It is unclear from the comments how cable systems would be able to determine whether

households are "unserved" and how they would differentiate in their delivery of programming between a household that is served and a household that is unserved. Given that all broadcast stations are supposed to be on a cable system's "basic" tier (in a rate-regulated system), it is unknown how the cable system would turn a distant station on or off from the basic tier based on whether a household is or is not "served." Satellite operators, on the other hand, are not required to offer local broadcast service in all DMAs, and there is no basic tier equivalent for DBS. Satellite providers also are subject to elaborate reporting requirements for notifying the networks as to which subscribers are getting particular distant network stations. Networks may (and do) challenge satellite carriers' designation of "unserved" status.

72. Moreover, it is unlikely that the network non-duplication and syndicated exclusivity rules now apply to cable service to a household that would be deemed "unserved," since such households tend to be distant from any broadcast station's community of license and therefore outside the applicable specified zones. Consequently, while cable operators generally are subject to the Commission's network non-duplication and syndicated exclusivity rules, it is unlikely that a broadcast signal delivered to an "unserved" home would be in an area where blacking out must occur, and parity with DBS in this case would not have a significant impact. Furthermore, out-of-market significantly viewed stations are not subject to the network non-duplication and syndicated exclusivity rules, and the rules do not apply to cable systems that serve fewer than 1,000 subscribers.

73. With respect to retransmission consent, if Congress amended the statute to exempt cable carriage of distant signals from retransmission consent to match the DBS model, cable operators would be relieved of retransmission consent obligations only with respect to individual subscribers, which is likely to be unworkable. In addition, pursuant to SHVERA, if local-into-local service is available in a market, a DBS operator may not offer distant signals to subscribers, even if they are "unserved," unless they were getting distant signals as of December 8, 2004. The analogous situation for cable would mean that distant signals would never be permitted because cable always carries local stations and is required to carry such signals on the basic tier, which is provided to all subscribers. As DBS operators expand local-into-local service, any perceived advantage that DBS has is likely to disappear over time as DBS carriage of distant signals shrinks to fewer and fewer markets and sunsets in 2009 (unless extended again).[219]

74. An alternative approach would be to apply the cable provisions to DBS. Under this alternative, as raised in the record, DBS operators would be required to obtain retransmission consent and would be subject to the network non-duplication and syndicated exclusivity rules in situations where DBS operators currently are not subject to those rules.[220] This option could be limited to the provision of distant signals to unserved households or it could be extended to the provision of distant signals to all DBS subscribers, if the compulsory copyright license were revised. With respect to the offering of distant broadcast signals to unserved households, this option, which is raised by NAB, would make it more

[219] NCTA suggests that DBS operators may have an additional advantage with respect to the delivery of distant digital networks to unserved households because some households that are served by analog signals may be unserved by digital signals. *See* para. 77, *infra*. While there may be some cases where a household that is not entitled to receive analog distant network signals may receive digital distant network signals, we expect that number will diminish over time as DBS operators increasingly provide local digital broadcast stations to their subscribers. *See* DirecTV, *DIRECTV Spaceway F2 Satellite Will Expand Local Digital/HD Services for DIRECTV Customer; Satellite Shipped to French Guiana* (press release) May 25, 2005, and *DIRECTV Spaceway F1 Satellite Launches New Era in High-Definition Programming; Next Generation Satellite Will Initiate Historic Expansion of DIRECTV Programming* (press release) Apr. 26, 2005, available at http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-news (visited Aug. 16, 2005).

[220] NAB Reply Comments at 26.

difficult and less desirable for DBS operators to retransmit distant broadcast signals to unserved households and would further limit the availability of programming to consumers who do not get local programming service. As currently written, the statute and rules allow these households to receive programming from a distant signal when local stations, the preferable choice for receiving programming, are not available. If the cable provisions were applied to DBS, DBS operators would be allowed to retransmit any distant broadcast signals to any subscriber, whether or not the subscriber is considered an unserved household, and whether or not local-into-local service is provided, subject to retransmission consent and network non-duplication and syndicated exclusivity protection, as is currently permitted under the cable rules. Although no one requested this option, it would permit DBS operators additional choice for the services they provide their subscribers, while still protecting the exclusivity rights of local stations. This alternative would require a statutory amendment to the copyright law.

75. Regulatory parity is generally a worthy goal where disparities are not warranted by special circumstances. Consistent with the different technologies involved, every effort should be made to apply the same rules to cable operators, DBS operators, and other MVPDs. Thus, to the extent the Commission's exclusivity and retransmission consent rules are different with respect to cable and DBS and create distortions in the competitive landscape, we generally recommend that Congress continue its efforts to harmonize applicable laws to the extent feasible in light of differences in technology. However, consistency of policies and rules is a matter not just of communications policy but copyright policy as well: a large part of this effort will necessarily involve the consideration of copyright issues, which the Copyright Office is currently examining in compliance with SHVERA.[221] We believe a comprehensive analysis of regulatory disparities and possible measures to achieve greater parity should await the outcome of those efforts so that policy objectives relating to communications law and copyright law can be coordinated. Accordingly, we conclude that specific suggestions for change should await the results of the companion Copyright Office inquiry. Finally, in considering whether to apply the DBS rules to cable or the cable rules to DBS or developing some other alternatives, Congress should seek solutions that rely, to the extent feasible, on market mechanisms rather than detailed administrative rules.

D. Rural Cable and Digital Broadcast Signals

76. Section 208 requires that we examine the effects of the retransmission consent, network non-duplication, syndicated exclusivity, and sports blackout rules on the ability of rural cable operators to compete with DBS in offering digital broadcast signals. Below we describe commenter positions and proposals on this subject. Having reviewed the record in this proceeding, we find that commenters have not demonstrated that the rules are affecting the ability of rural cable operators to compete with DBS in the provision of digital broadcast signals. Accordingly, we do not recommend any changes to relevant statutory or rule provisions at this time. We note, however, that our most recent *Notice of Inquiry* on the state of video competition seeks additional information on competition in rural markets.[222] To the extent that relevant evidence is forthcoming in that proceeding, we will report our findings to Congress in our next annual video competition report.

1. Comments

77. DBS operators assert that cable operators have market power, while rural cable operators assert that DBS operators have market power. DirecTV contends that cable operators are often the

[221] SHVERA, §§ 109-110.

[222] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Notice of Inquiry, MB Docket No. 05-255, FCC 05-155, ¶ 23 (rel. Aug. 15, 2005).

dominant MVPDs in their franchise areas and may be described as local monopolies in many of the largest DMAs.[223] DirecTV claims that a cable operator's share of the local MVPD market often gives it sufficient market power to refuse to pay cash for retransmission consent, while DirecTV's small share of the local MVPD market requires it to pay cash.[224] Cable commenters allege that regulatory disparities not only hinder competition generally, but will increasingly hinder rural cable operators' ability to carry digital broadcast signals. NCTA argues that DBS has a number of advantages in households that do not receive analog broadcast service and will soon have additional advantages in households that do not receive digital broadcast service.[225] ACA states that there is a growing disparity in market power between DBS and rural cable operators stemming from the inability of some rural cable operators to receive and retransmit good quality local broadcast signals to their subscribers.[226] According to ACA, DBS's local-into-local service is increasingly able to provide good quality local broadcast signals to DBS subscribers.[227] NCTA further points out that many broadcasters are not reaching their entire analog population with a digital signal.[228] NCTA states that this is usually not a problem with respect to the delivery of analog signals because cable operators can receive signals from translators, but that translators do not currently have second channels for the purpose of digital signal transmission and will likely not be available as a source of digital signal delivery until the end of the digital transition.[229]

78. ACA claims that these problems can be solved by granting rural cable operators access to satellite-delivered local broadcast signals on nondiscriminatory prices and terms.[230] DBS operators disagree, stating there is no reason to force DBS operators to provide broadcast signals to competitors.[231] EchoStar states that DBS operators do not control a bottleneck or essential facility to which competitors need nondiscriminatory access.[232] EchoStar and DirecTV argue that they have established facilities for receiving local broadcast signals in markets where they offer local-into-local service, and there are no barriers preventing rural cable operators from making arrangements for the delivery of good quality local broadcast signals to their cable headends.[233]

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[223] DirecTV Reply Comments at 3.

[224] *Id*.

[225] NCTA Comments at 5-10.

[226] ACA Comments at 1-2.

[227] *Id*. at 5.

[228] NCTA Comments at 7. NCTA states that approximately 40 percent of stations operating pursuant to special temporary authority ("STA") are reaching less than 70 percent of their analog population with a digital signal. They also state that the FCC recognizes that households unable to receive these digital signals "are more likely to be in outlying or rural areas . . ." *Id.* (quoting *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 18279, 18315 ¶ 79 (2004).

[229] NCTA Comments at 6-7.

[230] ACA Comments at 6. ACA proposes the following statutory change: "In markets where a satellite carrier delivers local-into-local signals, that satellite carrier shall make those signals available to MVPDs on nondiscriminatory prices, terms and conditions, when: (i) the MVPD cannot receive a good quality signal off-air; and (ii) the MVPD has the consent of the broadcasters to retransmit the signal." *Id*. at 6-7.

[231] EchoStar Reply Comments at 1-3; DirecTV Reply Comments at 7-9.

[232] EchoStar Reply Comments at 1.

[233] EchoStar Reply Comments at 1-2; DirecTV Reply Comments at 7-8.

79. NCTA and ACA also make other comments and proposals concerning the effects of our retransmission consent, non-duplication and syndicated exclusivity rules on competition in rural areas, which we discuss above in Sections III.A. and III.B.[234] Although the comments and proposals would apply to a broader group of NCTA and ACA members than just rural cable operators, NCTA and ACA assert that their comments are particularly important to rural cable operators' ability to provide digital signals to subscribers.[235] For example, ACA contends that the practice of linking carriage of broadcast signals to carriage of other affiliated programming diverts resources from rural cable operators that could be used to deliver digital signals.[236] NCTA contends that its proposals will allow rural cable operators to compete more effectively with DBS, although they do not assert that their proposals will spur competition with respect to provision of digital signals in particular.

80. Network Affiliates state that the retransmission consent, network non-duplication, syndicated exclusivity, and sports blackout rules do not treat digital signals differently than analog signals, so the current regulations do not disadvantage rural cable operators relative to satellite carriers.[237] With respect to the sports blackout rule, the Professional Sports Leagues explain that most sports events are held in large, urban areas, so the sports blackout rule is rarely applicable to rural cable operators.[238] Thus, they argue, the sports blackout rule does not hinder the ability of rural cable operators to compete with DBS.[239]

81. Pioneer maintains that some broadcast satellite stations in rural areas fail to provide a strong signal to the entire geographic area where they assert network non-duplication and syndicated exclusivity protection.[240] Pioneer states that the poor quality broadcast signal is attributable to the broadcaster's failure to invest in adequate transmission facilities.[241] Pioneer asks the Commission to modify the network non-duplication rule so that where a local affiliate station's signal is weak or absent, the cable operator would be permitted to carry the signal of a neighboring or distant station affiliated with the same broadcast network, either exclusively, or in addition to the local affiliate.[242] Pioneer requests that it be permitted to import distant broadcast network signals without being subject to the network non-

[234] ACA complains that some broadcast networks use network non-duplication and syndicated exclusivity solely to raise the price (monetary or in-kind) of retransmission consent. ACA Comments at 4. According to ACA, broadcasters are targeting rural cable operators in the hopes of obtaining at least $860 million from rural MVPD subscribers in the next round of retransmission consent negotiations. *Id*. ACA advances proposed remedies to this alleged problem in its separately-filed Petition for Rulemaking. *Id*. *See also* n. 128, *supra,* Section III.B.1., *supra.* NCTA proposes that broadcast stations not be permitted to exercise network non-duplication or syndicated exclusivity rights if they choose retransmission consent. NCTA Comments at 12. *See also* Section III.B.1., *supra*. ACA proposes mandatory arbitration for retransmission consent disputes. ACA Comments at 3. *See also* Section III.A., *supra*.

[235] ACA Comments at 1, 4. NCTA Comments at 8.

[236] ACA Comments at 7.

[237] Network Affiliates Comments at 17-18.

[238] Professional Sports Leagues Comments at 7.

[239] *Id*.

[240] Pioneer Comments at 5. Pioneer's Comments were initially misfiled in another docket. They were submitted to the record in this proceeding on June 14, 2005.

[241] *Id*. at 2.

[242] *Id*. at 7.

duplication rule.[243]

2. Discussion

82. As we discuss in greater detail in Sections III.A. (retransmission consent) and III.B. (network non-duplication and syndicated exclusivity rules), these rules are integral to achieving core policy objectives, including the promotion of localism. These policy objectives are no less important in rural areas than in other geographic areas. Moreover, the record does not show that the rules are harming competition between DBS and rural cable. We also find that there is not sufficient evidence in the record to show that broadcasters are using the network non-duplication and syndicated exclusivity rules to raise prices for rural MVPDs. Accordingly, we will not modify the rules on such grounds.[244]

83. We also decline to adopt or recommend to Congress the proposals by ACA and Pioneer relating to signal access. Under the Commission's signal carriage rules, there are no restrictions on the manner in which the broadcaster's signal is delivered to the cable operator's headend.[245] We recognize that sharing facilities with DBS operators is one option that could be employed to deliver broadcast signals to rural cable operators' headends, but other alternatives, including fiber, microwave or fixed satellite service, could be used. We do not believe that there is a need to require that DBS operators share their facilities with their competitors – incumbent cable operators – although we would support any mutually agreed upon arrangements among the parties. Thus, we do not find it appropriate to recommend this option to Congress. Similarly, we decline to modify the network non-duplication rule in the manner proposed by Pioneer.[246] Stations that elect must-carry are required by the Commission's rules to deliver a good-quality signal to the headend. With respect to stations that elect retransmission consent, we would expect that the delivery of a good-quality signal to the cable headend would be one of the terms discussed and resolved by the parties in their negotiation for a carriage agreement. Broadcasters and cable operators are free to negotiate compensation terms that include the cost of delivering a good-quality signal to the cable headend. However, stations that elect retransmission consent may invoke the network non-duplication rules even if they are not carried. For the reasons set forth above, we are reluctant to dilute those rights.

E. Other Issues

84. In addition to the proposals discussed above, commenters provide other suggestions on narrower issues for the Commission to recommend to Congress. EchoStar provides several recommendations related to the must-carry/retransmission consent process. It requests that the Commission streamline the must-carry/retransmission consent election rules by setting up a clearinghouse, as part of an electronic system, by which television stations can make carriage requests

[243] *Id*. Pioneer states that it wants to deliver distant signals under the same provisions and conditions that are afforded to DBS operators. Unlike DBS, however, Pioneer suggests that it would be required to obtain retransmission consent. Pioneer does not mention the syndicated exclusivity rule in its comments.

[244] The findings and conclusions in our report are not intended to address the merits of ACA's separately-filed petition for rulemaking.

[245] In the case of a broadcast station electing must carry, the broadcaster is required to deliver a good quality signal to the cable system or DBS local receive facility, including covering any costs involved. *See* 47 C.F.R. §§ 76.55 and 76.66.

[246] Pioneer Comments at 7.

and by which satellite carriers can send responses.[247] We do not have any evidence in the record showing that the must-carry/retransmission consent election rules are in any way burdensome or inefficient and in need of streamlining. SHVERA directed the Commission to revise its rule governing notification of commencement of new local-into-local service by requiring satellite carriers to notify broadcasters via certified mail at the address provided in the Commission's consolidated database system.[248] Also, Commission rules require that must-carry/retransmission consent elections be made by certified mail, a process that ensures that there is no dispute over a station's election choice.[249] These procedures are clear and are intended to eliminate errors and make sure that notices are made in compliance with the rules. Accordingly, we decline to implement EchoStar's request at this time.

85. Finally, EchoStar and NCTA recommend certain changes to the copyright law. EchoStar requests that satellite carriers' legal ability to carry distant signals (analog or digital) be made permanent, rather than expire on December 31, 2009.[250] EchoStar also points out that there is now a sunset date of December 31, 2008, on the significantly viewed station waiver provision that local broadcasters may grant, allowing certain otherwise ineligible subscribers to receive such signals, and recommends that the waiver process be made permanent or be made to coincide with the distant signal provision sunset date of December 31, 2009.[251] Other commenters oppose EchoStar's requested changes to copyright law,[252] and contend that issues concerning the sunset date are beyond the scope of this proceeding.[253] NCTA argues that DBS pays lower copyright royalty fees than all but the smallest cable operators.[254] NCTA recommends that both cable and DBS pay the lower royalty fee for the same distant broadcast network signals.[255] MPAA contends that NCTA's proposals are outside the scope of this proceeding and should be disregarded.[256] We agree. As Congress has asked that we evaluate communications policy, and not copyright law, in this proceeding, we decline to consider the recommendations of EchoStar and NCTA and defer to the Copyright Office's expertise in these areas. We expect that these issues will be considered when the Copyright Office evaluates the operation of copyright licenses under sections 109

[247] EchoStar Comments at 15. EchoStar suggests that this process would significantly reduce the burdens on broadcasters and satellite carriers and cut down on mailing errors and disputes over the timeliness of requests and responses. *Id.* at 15-16. As part of its streamlining proposal, EchoStar further suggests that the Commission establish a default response for a satellite carrier's acceptance of a television station's carriage request, in the absence of an affirmative denial by the carrier, when the television station: (1) previously requested must-carry for the current election cycle; (2) is currently being carried by the carrier; and (3) makes the same carriage request for the next election cycle. *Id*. at 16. For the reasons discussed in para. 84, *supra*, we find that this default response suggestion is unnecessary.

[248] 47 U.S.C. § 338(h)(2)(A) added by Section 205 of SHVERA. *See Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Procedural Rules,* 20 FCC Rcd 7780 (2005). *See also* 47 C.F.R. § 76.66(d)(2)(ii).

[249] *See* 47 C.F.R. § 76.66(d)(1)(ii).

[250] EchoStar Comments at 13-14.

[251] *Id.* at 14-15.

[252] Network Affiliates Reply Comments at 33-34.

[253] MPAA Reply Comments at 7.

[254] NCTA Comments at 10.

[255] *Id*. at 12.

[256] MPAA Reply Comments at 4-6.

and 110 of SHVERA.

IV. CONCLUSION

86. In fulfillment of the requirements of section 208 of SHVERA, we have considered the effect of the retransmission consent, network non-duplication, syndicated exclusivity, and sports blackout rules on competition among MVPDs and on rural MVPDs' ability to compete with DBS operators in the delivery of digital broadcast signals. We have evaluated commenters' positions and proposals with respect to these rules. For the reasons set forth above, we do not recommend any changes at this time to the statutory provisions relating to Commission rules under consideration in this Report.

APPENDIX

LIST OF COMMENTERS

Initial Comments

1. ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the FBC Television Affiliates Association, and the NBC Television Affiliates Association (Network Affiliates)
2. American Cable Association (ACA)
3. BellSouth Corporation and BellSouth Entertainment, L.L.C. (BellSouth)
4. Duhamel Broadcasting Enterprises (Duhamel)
5. EchoStar Satellite L.L.C. (EchoStar)
6. Joint Cable Commenters (Advance Newhouse Communications, Cox Communications, Inc., and Insight Communications) (Joint Cable Commenters)
7. National Association of Broadcasters (NAB)
8. National Cable Television Association (NCTA)
9. NBC Universal, Inc. (NBC)
10. The Professional Sports Leagues (Office of the Commissioner of Baseball, the National Football League, the National Basketball Association, the National Hockey League, and the Women's National Basketball Association) (Professional Sports Leagues)
11. Satellite Broadcasting and Communications Association (SBCA)
12. The Walt Disney Company (Disney)

Reply Comments

1. ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the FBC Television Affiliates Association, and the NBC Television Affiliates Association (Network Affiliates)
2. DIRECTV, Inc. (DirecTV)
3. Discovery Communications, Inc. (Discovery)
4. Duhamel Broadcasting Enterprises (Duhamel)
5. EchoStar Satellite L.L.C. (EchoStar)
6. Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. (Fox)
7. Microcom (late-filed) (Microcom)*
8. Motion Picture Association of America, Inc. (MPAA)
9. Named State Broadcasters Associations (NSBA)
10. National Association of Broadcasters (NAB)
11. NBC Universal, Inc. and NBC Telemundo License Co. (NBC)
12. Pioneer Telephone Association, Inc. d/b/a/ Pioneer Communications (late-filed) (Pioneer)
13. The Professional Sports Leagues (Office of the Commissioner of Baseball, the National Football League, the National Basketball Association, the National Hockey League, and the Women's National Basketball Association) (Professional Sports Leagues)
14. Time Warner Cable Inc. (Time Warner)
15. Viacom (Viacom)
16. The Walt Disney Company (Disney)

* - Originally, Microcom misfiled in MB Docket No. 05-25.

Other Filings

1. Joint Cable Commenters (Advance Newhouse Communications, Cox Communications, Inc., and Insight Communications) (May 23, 2005)
2. NBC Telemundo License Co. (June 10, 2005)
3. National Association of Broadcasters (June 10, 2005)
4. Discovery Communications, Inc. (August 10, 2005)
5. The Walt Disney Company (August 10, 2005)
6. National Association of Broadcasters (August 11, 2005)
7. The Walt Disney Company (August 25, 2005)