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

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

NOTICE OF PROPOSED RULE MAKING

Adopted: May 31, 2000 **Released: June 9, 2000**

Comment Date: July 7, 2000
Reply Comment Date: July 28, 2000

By the Commission:

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I. INTRODUCTION

1. Section 338(a)(1) of the Communications Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA") [1], provides that after December 31, 2001:

> each satellite carrier providing [television broadcast signals under the compulsory copyright licensing system] to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located within that local market, subject to section 325(b) [retransmission consent requirement].[2]

2. In this Notice of Proposed Rulemaking ("Notice"), we seek comment on the appropriate rules to implement this requirement. The SHVIA authorizes satellite carriers to offer more local and national broadcast programming to their viewers and makes that programming available to subscribers who previously have been prohibited from receiving broadcast programming via satellite under the compulsory licensing provisions of the copyright law.[3] The SHVIA generally seeks to place satellite carriers on an equal footing with cable operators regarding the provision of local broadcast programming, and thus give consumers more competitive options in selecting a multichannel video program distributor ("MVPD"). It is the clear intent of both Congress and the Commission to provide satellite subscribers with local television service in as many markets as possible.

3. Among other things, this new legislation requires satellite carriers, by January 1, 2002, to carry upon request all local broadcast stations' signals in local markets in which the satellite carriers carry at least one broadcast station signal licensed to the subject television market pursuant to Section 122 of title 17, United States Code.[4] The SHVIA conference report added the cross-reference to Section 122 to the House provision to indicate the relationship between the benefits of the statutory license and the carriage requirements imposed by this Act.[5] Until January 1, 2002, satellite carriers are granted a royalty-free copyright license to retransmit broadcast signals on a station-by-station basis, subject to obtaining a broadcaster's retransmission consent. This transition period is intended to provide the satellite industry with time to begin providing local signals into local markets -- "local-into-local" satellite service. The applicable statutory provisions, noted in greater detail below, are found in Section 1008 of the SHVIA

[1] Pub. Law 106-113, 113 Stat. 1501, Appendix I (1999). This is one in a series of Notices of Proposed Rulemaking and Orders the Commission will issue to implement the SHVIA.

[2] 47 U.S.C. §338(a)(1).

[3] We note that DirecTV now offers local television service packages to its subscribers in 22 markets and Echostar offers local television service in 28 markets. *See* www.directv.com and www.dishnetwork.com, respectively.

[4] The compulsory license is granted to satellite carriers, and cable operators, for the retransmission of television and radio broadcast signals. The license is conditioned upon compliance with FCC regulations and the remittance of royalty payments to the U.S. Copyright Office. The royalty fee is later distributed to the copyright owners of programs carried on the signals. The compulsory license eliminates the need for satellite carriers and cable operators to obtain the retransmission rights of each and every program carried by a broadcast station.

[5] Joint Explanatory Statement of the Committee of Conference on H.R. 1554, 106th Cong. ("Conference Report"), 145 Cong. Rec. at H11795 (daily ed. Nov. 9, 1999).

and codified at Section 338 of the Communications Act of 1934, as amended (the "Communications Act" or "Act"). Appendix B contains the specific language of Section 338 that is the subject of this proceeding.

II. BACKGROUND

4. In 1988, Congress passed the Satellite Home Viewer Act ("1988 SHVA") in order to provide households in unserved areas of the country with access to broadcast programming via satellite.[6] The 1988 SHVA also reflected Congress' intent to maintain the role of local broadcasters in providing free, over-the-air television. As an amendment to the Copyright Act,[7] the 1988 SHVA accommodated the broadcasters' interests by only allowing satellite carriers to provide broadcast programming to those satellite subscribers who were unable to obtain broadcast network programming over-the-air. Since 1988, subscribership to direct-to-home satellite service has increased markedly.[8]

5. In the SHVIA, Congress amended the law so as to permit satellite carriers to provide the signals of local broadcast stations to subscribers residing in the broadcaster's market. After December 31, 2001, satellite carriers that provide local-into-local retransmission of broadcast stations pursuant to the statutory copyright license[9] must "carry upon request the signals of all television broadcast stations within that local market . . ."[10] The SHVIA requires the Commission to issue rules implementing this carriage requirement within one year of the SHVIA's enactment on November 29, 1999.[11] Congress has indicated that these requirements should be comparable to those for cable systems, specifically noting paragraphs (3) and (4) of Section 614(b) and paragraphs (1) and (2) of Section 615(g), presently found in the mandatory broadcast signal carriage provisions in Title VI of the Act.[12]

6. In *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues* ("*Broadcast Signal Carriage Order*"),[13] the Commission implemented the broadcast signal carriage provisions of the Cable Television Consumer Protection and

[6]Conference Report at H11792, H11795.

[7]17 U.S.C. §119.

[8]*See Annual Assessment of the Status of Competition for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd 978 at ¶ 70 (2000).

[9]*See* 17 U.S.C. §122(a) (*as amended by* §1002 of the SHVIA).

[10]47 U.S.C. §338(a)(1) (*as amended by* §1008 of the SHVIA).

[11]The legislative history states that the procedural provisions applicable to Section 338 (concerning costs, avoidance of duplication, channel positioning, compensation for carriage, and complaints by broadcast stations) are generally parallel to those applicable to cable systems. Conference Report at H11795.

[12]47 U.S.C. §338(g).

[13]*Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order 8 FCC Rcd 2965 (1993). The Commission later clarified these rules. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Order, 8 FCC Rcd 4142 (1993) ("*Clarification Order*").

Competition Act of 1992 ("1992 Cable Act").[14] This statute amended the Communications Act to provide television stations with certain carriage rights on local market cable television systems. Sections 614 and 615 of the Act contain the cable television "must carry" requirements for commercial and noncommercial television stations, respectively.[15] Section 325 contains retransmission consent requirements pursuant to which cable operators may be obligated to obtain the consent of commercial broadcasters before retransmitting their signals. Within local market areas,[16] commercial television stations may elect cable carriage under either the retransmission consent or mandatory carriage requirements. Noncommercial television stations may only opt for must carry under the Act, but may nevertheless agree to be carried on a voluntary basis.

7. There are important distinctions between cable operators and satellite carriers that are implicated in attempting to harmonize Section 338 with Sections 614 and 615. The first significant difference is that satellite carriers have uplink facilities that are used to receive, package, and retransmit video programming.[17] In contrast, cable operators receive, process, and distribute video programming from a local facility called a headend. This distinction is important because many cable carriage rules, such as the carriage requirement for local noncommercial television stations,[18] rely upon the location of the cable operator's principal headend, a facility not used by satellite carriers. Second, satellite carriers have no legal obligation to have a basic service tier.[19] Thus, they are under no obligation to place broadcast signals on such a tier of service as cable operators are required to do under the Act.[20] Rather, Section 338(d) requires satellite carriers to position local broadcast station signals on contiguous channels. Third, a satellite carrier has a general obligation to carry all television stations in a market, if it carries one station in that market through reliance on the statutory license, without reference to a channel capacity cap. In contrast, a cable system with more than 12 usable activated channels is required to devote no more than one-third of the aggregate number of usable activated channels to local commercial television stations that may elect mandatory carriage rights.[21] A cable system is also obligated to carry a certain number of qualified noncommercial educational television stations above the one-third cap.[22] Fourth, satellite carriers provide a national service and need not have a franchise from local or state

[14]Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[15]47 U.S.C. §§534 and 535; 47 C.F.R. §76.56.

[16]*See* 47 C.F.R. §76.55(e).

[17]*But see*, Section C below concerning the new local receive facility requirement contained in Section 338.

[18]*See, e.g.*, 47 U.S.C. §535(l)(2) ("The term 'qualified local noncommercial educational television station' means a qualified noncommercial educational television station—(A) which is licensed to a principal community whose reference point. . . .is within 50 miles of the principal headend of the cable system; or (B) whose Grade B service contour. . . .encompasses the principal headend of the cable system.).

[19]Cable operators are required to establish a basic service tier consisting of local broadcast signals and public, educational and governmental access channels pursuant to the rate regulation provisions of the 1992 Cable Act. 47 U.S.C. §543(b)(7).

[20]*See id.*

[21]47 U.S.C. §534(b)(1)(B).

[22]47 U.S.C. §535(a).

authorities to serve subscribers with any type of television signal nor do they have local access channel requirements.[23] Cable operators, on the other hand, serve local franchise areas under franchise agreements with either local, county, or state authorities.[24] Local franchise authorities often impose technical and system build-out requirements, as well as public, educational, and government access channel requirements, on cable operators.[25] Finally, we note that 82% of all multichannel video programming distributor subscribers receive their video programming from a local franchised cable operator, while the satellite industry represents less than 15% of all MVPD subscribers.[26] We will take into account these differences between the two industries in order to sensibly implement the requirements of Section 338.

8. Direct broadcast satellite ("DBS") operators use satellites to transmit video programming to subscribers, who must buy or rent a small parabolic "dish" antenna and pay a subscription fee to receive the programming service.[27] To obtain local television signals for local distribution, DBS companies may receive the signals over-the-air or have voluntary arrangements with local stations to deliver their signals via fiber-optic cables to a local telecommunications carrier's facilities. At a certain point designated by the satellite carrier, all of the broadcast signals are digitally encoded and multiplexed together. The packet of digitized television signals are then sent, using a high capacity (DS3) line, to the satellite carriers' programming facility, or group of facilities, where they are uplinked to the appropriate satellite[28] and then retransmitted back to subscribers' dishes in the relevant stations' market of origin.

9. The home satellite dish industry, also known as HSD or C-Band, is another type of satellite carrier subject to the SHVIA and its related provisions. C-Band subscribers use a much larger dish, some seven to ten feet in diameter, to receive video programming than that equipment used for reception by DBS subscribers. C-Band subscribers are often located in rural areas that are unserved by cable operators.[29]

[23]We note, however, that DBS companies must devote 4% of their channel capacity to the carriage of noncommercial programming of an educational or informational nature. *See Implementation of Section 25 of the Cable Television and Consumer Protection and Competition Act of 1992—Direct Broadcast Satellite Public Interest Obligations*, MM Dkt. No. 93-25, 13 FCC Rcd 23254 (1998); 47 U.S.C. §335.

[24]*See* 47 U.S.C. §541.

[25]*See generally*, 47 U.S.C. §§531, 541, and 544.

[26]*See Annual Assessment of the Status of Competition for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd at 981, 984 (2000).

[27]DBS operators use the 12 GHz frequency band (12.2-12.7 GHz).

[28]A transponder is that portion of a satellite used for reception and retransmission of a signal or signals in a certain bandwidth. DBS satellites typically use transponders with a 24 MHz bandwidth. Satellite digital compression allows 6 to 24 video signals to be carried on a single transponder.

[29]See Reply Comments of the Satellite Broadcasting and Communications Association in CS Docket No. 00-2, *Application of Network Nonduplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions*, February 28, 2000 at 2.

III. SATELLITE BROADCAST SIGNAL CARRIAGE

A. Carriage Obligations and Definitions

10. The SHVIA has accorded satellite carriers the right to retransmit local television stations without first obtaining retransmission consent, and without a mandatory carriage obligation, for a six month period from November 29, 1999 to May 28, 2000. Beginning on May 29, 2000 and continuing until December 31, 2001, carriage of broadcast television stations by satellite carriers is on a station-by-station basis pursuant to retransmission consent agreements between the station and the satellite carrier.[30] On January 1, 2002, pursuant to Section 338(a)(1) of the Act:

> subject to the limitations of paragraph (2)[remedies for failure to carry], each satellite carrier providing, under section 122 of title 17, United States Code, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located within that local market, subject to section 325(b).[31]

This provision gives satellite carriers a choice. If satellite carriers provide their subscribers with the signals of local television stations through reliance on the statutory copyright license, they will have the obligation to carry all of the television signals in that particular market that request carriage. If satellite carriers provide local television signals pursuant to private copyright arrangements, the Section 338 carriage obligations do not apply.[32]

11. In order to effectuate Section 338, it is necessary to determine what constitutes a request for carriage, adopt procedural guidelines regarding the manner in which a broadcaster communicates its request for carriage, and set out guidelines for the satellite carrier to commence carriage. In this context,

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[30]The Commission has implemented the statutory provisions relating to retransmission consent in a separate proceeding. *See Implementation of the Satellite Home Viewer Improvement Act of 1999—Retransmission Consent Issues*, Notice of Proposed Rulemaking, 14 FCC Rcd 21736 (1999); *Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 (2000).

[31]47 U.S.C. §338(a)(1).

[32]In the legislative history accompanying Section 338, Congress noted its belief that the provision is constitutional under the First Amendment: "The conferees believe that the must carry provisions of this Act neither implicate nor violate the First Amendment. Rather than requiring carriage of stations in the manner of cable's mandated duty, this Act allows a satellite carrier to choose whether to incur the must carry obligation in a particular market in exchange for the benefits of the local statutory license. It does not deprive any programmers of potential access to carriage by satellite carriers. Satellite carriers remain free to carry any programming for which they are able to acquire the property rights. The provisions of this Act allow carriers an easier and more inexpensive way to obtain the right to use the property of copyright holders when they retransmit signals from all of a market's broadcast stations to subscribers in that market. The choice whether to retransmit those signals is made by carriers, not by the Congress. The proposed licenses are a matter of legislative grace, in the nature of subsidies to satellite carriers, and reviewable under the rational basis standard." *See* Conference Report at H11795. The Conferees also noted that they were "confident that the proposed license provisions would pass constitutional muster even if subjected to the O'Brien standard [intermediate First Amendment scrutiny] applied to the cable must carry requirement." *Id.*

we seek comment on the meaning of the phrase "carry upon request." In the cable context, the Commission initially required the cable operator to contact all local broadcast television stations, in writing, on matters relating to their carriage rights.[33] We ask whether we should establish a similar requirement, so that satellite carriers must notify all local broadcast television stations, in writing, of their carriage rights once any local station in a particular market is being carried. We note that broadcast television stations requesting carriage must do so in writing[34]-- cable carriage of local broadcast television stations requesting mandatory carriage then commences on a specified date when the request is part of the periodic election process.[35] We ask whether we should adopt similar procedural rules in the satellite carriage context. We also ask whether we should adopt separate procedural rules for the carriage of noncommercial educational television stations to mirror the cable carriage requirements.[36] In addition, we ask whether the Commission should establish separate procedures to cover new broadcast stations that may commence operation in a market or for new satellite carriers similar to those established for cable carriage.[37] Finally, we seek comment on how the Section 338 mandate will work with the revised Section 325 provisions regarding satellite carriers and retransmission consent.[38]

12. Section 338 contains several definitions that provide the framework for the satellite broadcast signal carriage paradigm. While these definitions are generally self effectuating, such as the meaning of "satellite carrier,"[39] "secondary transmission,"[40] and "subscriber,"[41] two provisions require

[33]47 C.F.R. §76.58.

[34]*See, e.g., Broadcast Signal Carriage Order*, 8 FCC at 2974; 47 C.F.R. §76.64(h).

[35]47 C.F.R. §76.64(f)(2).

[36]*See* 47 C.F.R. §76.61(a) (regarding the carriage of commercial television stations) and (b) (regarding the carriage of noncommercial television stations).

[37]47 C.F.R. §76.64(f)(4) and (l).

[38]47 U.S.C. §325(b)(3)(C).

[39]Section 338(h)(4) of the Communications Act defines the term, satellite carrier, as having the meaning given such term in Section 119(d) of title 17, United States Code. Section 119(d) defines satellite carrier to mean an entity that uses the facilities of a satellite or satellite service licensed by the Federal Communications Commission, to establish and operate a channel of communications for point-to-multipoint distribution of television station signals, and that owns or leases capacity or a service on a satellite in order to provide such point-to-multipoint distribution, except to the extent that such entity provides such distribution pursuant to tariff under the Communications Act of 1934, other than for private home viewing. 17 U.S.C. §119(d).

[40]Section 338(h)(5) defines the term, secondary transmission, as having the meaning given such term in section 119(d) of title 17, United States Code. Section 119(d), in turn, defines secondary transmission as having the meaning given such term in Section 111(f) of the Copyright Act. Section 111(f) defines secondary transmission as the "further transmitting of a primary transmission simultaneously with the primary transmission, or non-simultaneously with the primary transmission if by a "cable system" not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico: *Provided, however*, That a non-simultaneous further transmission shall be deemed to be a secondary transmission if the carriage of the television broadcast signal comprising such further transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission." 17 U.S.C. §111(f).

[41]Section 338(h)(6) defines the term, subscriber, as having the meaning given that term under section 122(j) of title 17, United States Code. Section 122(j) defines the term, subscriber, as a person who receives a secondary (continued…)

further explication to understand the scope of the satellite carriage obligation. These two provisions are as follows:

Television Broadcast Station. Section 338(h)(7) defines the term, television broadcast station, as having the meaning given such term in Section 325(b)(7).[42] Section 325(b)(7) defines television broadcast station, as an over-the-air commercial or noncommercial television broadcast station licensed by the Commission under subpart E of part 73 of title 47, Code of Federal Regulations, except that such term does not include a low-power or translator station.[43] We seek comment on the scope of the definition. We first note that, unlike cable operators,[44] satellite carriers have no obligation to carry low power television stations in any instance. We also note that, unlike cable operators, satellite carriers are not required to carry noncommercial educational translator stations with five watts or higher power.[45] We seek comment on these apparent differences and what impact they have on a satellite carrier's carriage responsibilities under Section 338. A question also remains about whether satellite carriers must carry "satellite television stations" as cable operators are required to do.[46] We believe that since such television stations are not specifically excluded by Section 338(h)(7), satellite carriers have an obligation to carry these entities if they carry other local market television stations. We seek comment on this interpretation. Finally, we ask if there are any other significant differences between the satellite carriage and cable carriage definitional requirements that affect this proceeding.

Distributor. Section 338(h)(1) of the Communications Act defines the term, distributor, as an "entity which contracts to distribute secondary transmissions from a satellite carrier and, either as a single channel or in a package with other programming, provides the secondary transmission either directly to individual subscribers or indirectly through other program distribution entities."[47] We note that the term distributor is not found in any other provision of Section 338, other than the definitional subsection. Given this omission, which may or may not have been purposeful, we seek comment on the definition of distributor and its relevance in this context.

(….continued from previous page)
transmission service from a satellite carrier and pays a fee for the service, directly or indirectly, to the satellite carrier or to a distributor." 17 U.S.C. §122(j)(4).

[42]47 U.S.C. §338(h)(7).

[43]47 U.S.C. §325(b)(7)(B).

[44]*See* 47 U.S.C. §534(h)(2).

[45]*See* 47 U.S.C. §535(l)(1)

[46]*Broadcast Signal Carriage Order*, 8 FCC Rcd at 2973. Satellite stations replicate substantially all of the programming of another full power television station in a market and also broadcast a minimum amount of original programming. *See generally* 47 C.F.R. §73.3555 at note 5.

[47]47 U.S.C. §338(h)(1).

B. Market Definitions

13. Section 338(h)(3) defines the term, local market, as having the meaning it has under Section 122(j) of title 17, United States Code.[48] Section 122(j)(2)(A) defines the term, local market, in the case of both commercial and noncommercial television broadcast stations, to mean the designated market area in which a station is located, and (i) in the case of a commercial television broadcast station, all commercial television broadcast stations licensed to a community within the same designated market area within the same local market; and (ii) in the case of a noncommercial educational television broadcast station, the market includes any station that is licensed to a community within the same designated market area as the noncommercial educational television broadcast station."[49] In addition to the area described in subparagraph (A), a station's local market includes the county in which the station's community of license is located.[50] Section 122(j)(2)(C) defines the term, designated market area to mean the market area, as determined by Nielsen Media Research and published in the 1999-2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates or any successor publication."[51]

14. At the outset, we inquire as to why subsections (i) and (ii) were added to the overall section. It appears that they clarify that the local market includes a geographic area and all broadcast stations licensed or located within that designated area. We seek comment on this view of subsections (i) and (ii). We also seek comment on when to change the reference to the 1999-2000 Nielsen publications to reflect changes in market structure and market conditions. We note, in the cable context, that the rules account for a market update every three years.[52] We ask whether the rules we implement under this section should be updated on a triennial basis, at another interval (*e.g.*, every year, every five years, etc.) or not at all. We also note that the cable industry is required to use the 1997-98 Nielsen publications to determine local markets for broadcast signal carriage purposes up until January 1, 2003,[53] yet satellite carriers are obliged to use the 1999-2000 Nielsen publications for carriage purposes. We ask whether satellite carriers and cable operators should be required to use the same annual Nielsen market publications so that both may rely on the same market definition, and thus have virtually the same carriage obligations.

15. It is important to note that a regulatory mechanism exists to expand or contract the size of a local television market for cable broadcast signal carriage purposes. Pursuant to Section 614(h)(1)(C), at the request of either a broadcaster or a cable operator, the Commission may, with respect to a particular commercial television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of the Act's mandatory carriage provisions.[54] In considering market modification requests, the Act provides that the

[48] 47 U.S.C. §338(h)(3).

[49] 17 U.S.C. §122(j)(2)(A).

[50] 17 U.S.C. §122(j)(2)(B).

[51] 17 U.S.C. §122(j)(2)(C).

[52] *See* 47 C.F.R. §76.55(e)(2).

[53] 47 C.F.R. §76.55(e)(2)(i).

[54] 47 U.S.C. §534(h)(1)(C).

Commission shall afford particular attention "to the value of localism" by taking into account such factors as (1) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community; (2) whether the television station provides coverage or other local service to such community; (3) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and (4) evidence of viewing patterns in cable and non-cable households within the areas served by the cable system or systems in such community.[55] The Commission's inclusion of additional communities within a station's market imposes new carriage requirements on cable operators subject to the modification request while the grant to exclude communities from a station's market relieves a cable operator from its obligation to carry a certain station's television signal.[56]

16. No such statutory mechanism exists for satellite broadcast signal carriage purposes in Section 338. As a result, different carriage patterns may emerge between cable operators and satellite carriers in certain markets because a cable operator may be carrying stations that have expanded their market area while not carrying others because those stations were deleted from the relevant market area. We seek comment on whether the Commission has the authority to implement a market modification mechanism similar to Section 614(h) in order to provide satellite carriers and broadcast stations the ability to modify markets for satellite carriage purposes. If so, should we use the same procedural and evidentiary standards used for cable market modifications?[57] Alternatively, should the Commission's previously granted market modifications be applicable to satellite carriers in the affected market areas? We seek comment on whether Commission action in this area may further the Congressional goal of harmonizing the carriage obligations between cable operators and satellite carriers.

C. Broadcast Station Delivery of a Good Quality Signal

17. Section 338(b)(1) states that, "A television broadcast station asserting its right to carriage under subsection (a) shall be required to bear the costs associated with delivering a good quality signal to the designated local receive facility of the satellite carrier or to another facility that is acceptable to at least one-half the stations asserting the right to carriage in the local market."[58] A host of novel technical and definitional questions arise under this particular provision.

[55] *Id.*; 47 C.F.R. §76.59.

[56] *See Carriage of the Transmissions of Digital Television Broadcast Stations: Amendment of Part 76 of the Commission's Rules*, Notice of Proposed Rulemaking, CS Docket No. 98-120, 13 FCC Rcd 15092, 15129 (1998) ("Digital Broadcast Signal Carriage Issues").

[57] 47 C.F.R. §76.59.

[58] 47 U.S.C. §338(b)(1). Subsection(b)(2) of the SHVIA adds that the regulations issued under subsection (g), (regarding primary video, material degradation for both commercial and noncommercial television stations, and digital television for commercial television stations) shall set forth the obligations necessary to carry out this subsection. 47 U.S.C. §338(b)(2). These issues are discussed in greater detail below.

18. We first seek comment on the term "local receive facility." Section 338(h)(2) defines the term local receive facility as "the reception point in each local market which a satellite carrier designates for delivery of the signal of the station for purposes of retransmission."[59] There are a variety of possible technical configurations that a satellite carrier might use to receive, uplink, and distribute local market broadcast signals. Direct broadcast satellite operators, such as DirecTV and Echostar, generally appear to have one central uplink facility in the center of the country that relays content from the ground to the satellites involved. Broadcast signals from broadcast markets across the country need to be delivered to this facility. This could be accomplished using either a satellite or a terrestrial relay. It appears likely that the most economically feasible means would be to aggregate the signals in each local market at one point and deliver them over the facilities of an interstate telecommunications carrier to the uplink site(s). If this is correct, the "local receive facility" would be co-located at suitable carrier's switching center or "point-of-presence." We seek comment on whether such a facility should be considered the "local receive facility" for purposes of Section 338. We note that local receive facilities could also resemble, in a technical sense, a cable operator's headend, because that is where signals are received and processed. We seek comment on the parameters under which a satellite carrier may construct and designate such a facility. Aside from the above stated options, we also seek comment on other reception points a satellite carrier can consider to satisfy the provision's requirements. Finally, we seek comment on the procedures by which a satellite carrier must inform local market television stations of the location of the receive facility.

19. In addition, we seek comment on the meaning of the statutory phrase, "to another facility that is acceptable to at least one-half the stations asserting the right to carriage in the local market." We read the statute to mean that a satellite carrier may establish a regional receive facility as long as one-half of broadcasters agree to that location. For example, a satellite carrier may establish a receive facility for all of New England, which encompasses several DMAs, as long as 50% of the relevant broadcasters agree on the location. We seek comment on this interpretation. We also inquire about the process by which broadcast television stations agree to the establishment and location of another facility. What did Congress intend when it included the term "acceptable?" What happens with those broadcast stations that do not agree to the location of the other facility? Who should pay to transmit the broadcast signals to such a facility? May the stations in the minority file a complaint with the Commission concerning the location of such a facility?

20. We also inquire about what constitutes a "good quality signal" as that term is used in Section 338. Under the current cable carriage regime, television broadcast stations must deliver either a signal level of -45dBm for UHF signals or -49dBm for VHF signals at the input terminals of the signal processing equipment, to be considered eligible for carriage.[60] We note that a broadcaster that does not provide a good quality signal to a cable system headend is not qualified for carriage. In this situation, a cable system is under no obligation to carry such a signal, but the broadcaster has an opportunity to provide equipment necessary to improve its signal to the requisite level and gain carriage rights.[61] We seek comment on whether Congress intended the same result for broadcasters that do not provide a good quality signal to the local satellite receive facility. We also seek comment on whether the signal quality

[59] 47 U.S.C. §338(h)(2).

[60] 47 U.S.C. §534(h)(1)(B)(iii); 47 C.F.R. §76.55(c)(3).

[61] *Broadcast Signal Carriage Order*, 8 FCC Rcd at 2991. A broadcast station may use microwave facilities, fiber-optics, or even a translator station to improve the quality of its signal, and therefore be qualified for carriage. *Id.*

parameters under Section 614 and the Commission's cable regulations are appropriate in the satellite carriage context.

21. With respect to the manner of testing for a good quality signal, we note that the Commission has adopted a method for measuring signal strength in the cable carriage context. Generally, if a test measuring signal strength results in an initial reading of less than -51 dBm for a UHF station, at least four readings must be taken over a two-hour period. If the initial readings are between -51 dBm and -45 dBm, inclusive, readings must be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results. For a VHF station, if the initial readings are less than -55 dBm, at least four readings must be taken over a two-hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, readings should be taken over a 24-hour period, with measurements no more than four hours apart to establish reliable test results.[62] The Commission stated that cable operators are further expected to employ sound engineering measurement practices; thus, signal strength surveys should, at a minimum, include the following: (1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; (2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; (3) height of the antenna above ground level and whether the antenna was properly oriented; and (4) weather conditions and time of day when the tests were done.[63] We seek comment on whether we should require the same signal testing practices for measuring a broadcaster's signal strength in the satellite context.

22. We also seek comment on the costs of delivering a good quality signal. Under the mandatory cable carriage provisions of Section 614, television stations are "required to bear the costs associated with delivering a good quality signal or a baseband video signal to the principal headend of the cable system."[64] The Commission has stated that such costs may be for "improved antennas, increased tower height, microwave relay equipment, amplification equipment and tests that may be needed to determine whether the station's signal complies with the signal strength requirements, especially if the cable system's over-the-air reception equipment is already in place and is otherwise operating properly."[65] We seek comment on which of these cost elements in the cable context are applicable in the satellite context. Are there any additional costs, in a Section 338 setting, that are not mentioned above?

D. Duplicating Signals

23. Section 338(c)(1) states that:

> Notwithstanding subsection (a), a satellite carrier shall not be required to carry upon request the signal of any local commercial television broadcast station that substantially duplicates the signal of another local commercial television broadcast station which is secondarily transmitted by the satellite carrier within the same local market, or to carry upon request the signals of more than one local commercial television

[62] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, 9 FCC Rcd 6723, 6736 (1994) ("Must Carry Reconsideration").

[63] *Id.*

[64] 47 U.S.C. §534(b)(10); 47 C.F.R. §76.60(a).

[65] *Broadcast Signal Carriage Order*, 8 FCC Rcd at 2991.

> broadcast station in a single local market that is affiliated with a particular television network unless such stations are licensed to communities in different states.[66]

24. Section 614(b)(5) similarly provides that a cable operator is not required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network.[67] The Commission has decided that, based on the legislative history of this section, two stations "substantially duplicate" each other "if they simultaneously broadcast identical programming for more than 50 percent of the broadcast week."[68] For purposes of this definition, identical programming means the identical episode of the same program series.[69] The Commission noted that its interpretation was consistent with the 1992 Cable Act's legislative history that indicates that this phrase refers to the "simultaneous transmission of identical programming on two stations" and which "constitutes a majority of the programming on each station."[70] We seek comment on whether we should apply the Commission's determination of what constitutes "substantial duplication" under Title VI to this section of the SHVIA.

25. We seek comment on the phrase, "affiliated with a particular television network." In this situation, we ask what definition of "television network" applies under this provision because that term is not specifically defined in Section 338. We note that Section 339(d) includes a definition of television network for purposes of satellite carriage of distant signals: "The term 'television network' means a television network in the United States which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated broadcast stations in 10 or more States."[71] We ask whether we should implement the Section 339(d) definition for the purposes of administering the duplication provision at issue here. Are there any alternative definitions that we should consider?

26. We also inquire about the application of the statutory phrase, "unless such stations are licensed to communities in different states." Congress stated that this phrase addresses unique and limited cases, including such station pairs as WMUR (Manchester, New Hampshire) and WCVB (Boston, Massachusetts) in the Boston DMA (both ABC affiliates) as well as WPTZ (Plattsburg, New York) and WNNE (White River Junction, Vermont) in the Burlington-Plattsburgh DMA (both NBC affiliates), in which mandatory carriage of both duplicating local stations upon request assures that satellite subscribers will not be precluded from receiving the network affiliate that is licensed to a community in the state in

[66] 47 U.S.C. §338(c)(1).

[67] 47 U.S.C. §534(b)(5).

[68] 8 FCC Rcd at 2980-81. The Commission has stated, in the cable carriage context, that programs in foreign languages (e.g., MacNeil/Lehrer in Spanish) are not duplicative of the same programs broadcast in English, because they target different audiences. *Id.* at 2971.

[69] *Id.*

[70] *See Must Carry Reconsideration*, 9 FCC Rcd at 6733, quoting House Committee on Energy and Commerce, H.R. Rep. No. 628, 102d Cong., 2nd Sess. (1992) at 94.

[71] 47 U.S.C. §339(d)(5).

which they reside.[72] We seek comment on whether there are other similar situations that must be addressed as we proceed with adopting rules here. In addition, we seek comment on whether there are other regulatory issues that may arise in this situation.

27. Section 338(c)(2) states that:

> The Commission shall prescribe regulations limiting the carriage requirements under subsection (a) of satellite carriers with respect to the carriage of multiple local noncommercial television broadcast stations. To the extent possible, such regulation shall provide the same degree of carriage by satellite carriers of such multiple stations as is provided by cable systems under Section 615.[73]

Section 615(l)(1), in turn, provides that a local noncommercial educational television ("NCE") station qualifies for cable carriage rights if it is licensed by the Commission as an NCE station and if it is owned and operated by a public agency, nonprofit foundation, or corporation or association that is eligible to receive a community service grant from the Corporation for Public Broadcasting.[74] An NCE station is also considered qualified if it is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes.[75] For purposes of cable carriage, an NCE station is considered local if its community of license is within 50 miles of, or the station places a Grade B contour over, the principal headend of the cable system.[76] Cable systems are obliged to carry local noncommercial educational television stations under a statutory paradigm based upon a cable system's number of usable activated channels. Cable systems with: (1) 12 or fewer usable activated channels are required to carry the signal of one qualified local noncommercial educational station; (2) 13-36 usable activated channels are required to carry no more than three qualified local noncommercial educational stations; and (3) more than 36 usable activated channels shall carry at least three qualified local noncommercial educational stations.[77] At the outset, we seek comment on whether this approach is applicable in the satellite context.

28. A cable operator with cable system capacity of more than 36 usable activated channels, and carrying the signals of three qualified NCE stations, is not required to carry the signals of additional stations the programming of which substantially duplicates the programming broadcast by another qualified NCE station requesting carriage.[78] The Act states that substantial duplication was to be defined by the Commission in a manner that promotes access to distinctive noncommercial educational television services.[79] The Commission concluded that an NCE station does not substantially duplicate the

[72]Conference Report at H11795.

[73]47 U.S.C. §338(c)(2).

[74]47 U.S.C. §535(l)(1).

[75]47 C.F.R. §76.55(a).

[76]47 U.S.C. §535(l)(2).

[77]*See* 47 U.S.C. §535(b) and (e); 47 C.F.R. §76.56(a).

[78]47 U.S.C. §535(e).

[79]*Id.*

programming of another NCE station if at least 50 percent of its typical weekly programming is distinct from programming on the other station either during prime time or during hours other than prime time.[80] We first seek comment on whether Congress, in drafting Section 338(c)(2) meant for the Commission to focus solely on the substantial duplication language of Section 615 to limit satellite carriage of NCE stations or whether it intended the Commission to prescribe other means to limit such carriage. If Congress meant for the Commission to concentrate on duplication, we ask whether we should apply the definition set forth in the cable carriage context or whether we should devise a new definition for satellite carriage purposes. If we are to develop additional carriage limitations, we ask what other rules should the Commission adopt to more narrowly tailor an NCE satellite carriage requirement to make it comparable to the NCE carriage obligations imposed on cable operators.

E. Channel Positioning

29. Section 338(d) of the Communications Act states that:

> No satellite carrier shall be required to provide the signal of a local television broadcast station to subscribers in that station's local market on any particular channel number or to provide the signals in any particular order, except that the satellite carrier shall retransmit the signal of the local television broadcast stations to subscribers in the stations' local market on contiguous channels and provide access to such station's signals at a nondiscriminatory price and in a nondiscriminatory manner on any navigational device, on-screen program guide, or menu.[81]

The Conference Report notes that the obligation to carry local stations on contiguous channels is to ensure that satellite carriers position local stations in a way that is convenient and practically accessible for consumers.[82] The statutory directive for channel positioning clearly states that satellite carriers are required to present local broadcast channels to satellite subscribers in an uninterrupted series. We seek comment, however, on whether broadcast signals carried under retransmission consent must be contiguous with the television stations carried under Section 338 or whether they may be presented to satellite subscribers in a non-contiguous manner.

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[80] *Broadcast Signal Carriage Order*, 8 FCC Rcd at 2970. In the cable carriage context, the Commission treated the duplication provisions of Sections 615(b)(2) and Section 614(b)(5) separately. The Commission noted that the two provisions were intended to accommodate different situations and were addressed separately in the statute and its legislative history. *Id.* at 2980.

[81] 47 U.S.C. §338(f)(1). The satellite carriage channel positioning scheme is quite different from the requirement imposed on cable operators. Under Section 614(b)(6) commercial television stations may choose among four channel positioning options vis-à-vis cable operators: (1) the channel number on which the station broadcasts over-the-air; (2) the channel on which the station was carried on July 19, 1985; (3) the channel on which it was carried on January 1, 1992; and (4) any other channel number as is mutually agreed upon by the station and the cable operator. 47 U.S.C. §534(b)(6); 47 C.F.R. §76.57(a). Noncommercial television stations have three channel positioning options under Section 615(g)(5): (1) the channel number on which the station is broadcast over-the-air; (2) the channel on which the station was carried on July 19, 1985; and (3) any other channel number as is mutually agreed upon by the station and the cable operator. 47 U.S.C. §535(g)(5); 47 C.F.R. §76.57(b).

[82] Conference Report at H11795.

30. We also seek comment on the phrase, "provide access to such station's signals at a nondiscriminatory price and in a nondiscriminatory manner on any navigational device, on-screen program guide, or menu." We specifically seek comment on what rules the Commission should develop to ensure that television stations are accessible to satellite subscribers on nondiscriminatory terms. We ask whether there are any existing Commission rules that we may use as a model to develop regulations for this particular situation. We ask whether Congress meant that television station signals carried pursuant to mandatory carriage requests may cost no more per channel to subscribers than packages of retransmission consent television station signals or other satellite service packages. We seek comment on whether Congress meant that electronic program guide information concerning required television station signals should be presented to subscribers in the same fashion as other programming services provided by the satellite carrier.

F. Content To Be Carried

31. Section 338(g) states that, "The regulations prescribed [under Section 338] shall include requirements on satellite carriers that are comparable to the requirements on cable operators under sections 614(b)(3). . . .and 615(g)(1)."[83] Section 614(b)(3) states that:

> A cable operator shall carry in its entirety, on the cable system of that operator, the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers. Retransmission of other nonprogram-related material (including teletext and other subscription and advertiser supported information services) shall be at the discretion of the cable operator. Where appropriate and feasible, operators may delete signal enhancements, such as ghost canceling, from the broadcast signal and employ such enhancements at the system headend or headends.[84]

Section 615(g)(1), which is the noncommercial equivalent of the commercial television station provision in Section 614(b)(3), states that:

> A cable operator shall retransmit in its entirety the primary video, accompanying audio, and line 21 closed caption transmission of each qualified local noncommercial educational television station whose signal is carried on the cable system, and, to the extent technically feasible, program-related material carried in the vertical blanking interval, or on subcarriers, that may be necessary for receipt of programming by handicapped persons or educational or language purposes. Retransmission of other material in the vertical blanking interval ["VBI"] or on subcarriers shall be within the discretion of the cable operator.[85]

[83] 47 U.S.C. §338(g).

[84] 47 U.S.C. §534(b)(3).

[85] 47 U.S.C. §535(g)(1).

We seek comment on the applicability of these requirements in the satellite carriage context, especially in light of the term "comparable" contained in Section 338(g), above. We recognize that the Commission has not specifically defined "primary video" in the rules and has instead relied on the language of Section 614(b)(3)(B) to clarify the scope of the term for purposes of cable broadcast signal carriage.[86] In view of this history, we seek comment on whether a specific definition of primary video is required for satellite carriers to fulfill the requirements contained in Section 338.

32. In the *Broadcast Signal Carriage Order*, the Commission decided that the factors enumerated in *WGN Continental Broadcasting, Co. v. United Video Inc.* ("*WGN*")[87] provided useful guidance for what constitutes program-related material.[88] The *WGN* case addressed the extent to which the copyright on a television program also included program material in the VBI of the signal. The *WGN* court set out three factors for making a copyright determination. First, the broadcaster must intend for the information in the VBI to be seen by the same viewers who are watching the video signal. Second, the VBI information must be available during the same interval of time as the video signal.[89] Third, the VBI information must be an integral part of the program. The court in *WGN* held that if the information in the VBI is intended to be seen by the viewers who are watching the video signal, during the same interval of time as the video signal, and as an integral part of the program on the video signal, then the VBI and the video signal are one copyrighted expression and must both be carried if one is to be carried. We seek comment on whether the *WGN* program-related analysis applies in the context of satellite broadcast signal carriage.

33. With regard to the "technical feasibility" of the carriage of program-related material in the VBI or on subcarriers, the Commission stated in the *Broadcast Signal Carriage Order* that such carriage should be considered "technically feasible" if it does not require the cable operator to incur additional expenses and to change or add equipment in order to carry such material.[90] The Commission noted that it would consider signal carriage to be "technically feasible" if only nominal costs, additions or changes of equipment are necessary.[91] We seek comment on whether the consideration of technical feasibility should be different in the context of satellite broadcast signal carriage.

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[86] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992—Broadcast Signal Carriage Issues*, Notice of Proposed Rulemaking, 7 FCC Rcd 8055, 8062 (1992) ("NPRM") (Section 614(b)(3)(B) provides that the cable operator shall carry the entirety of the program schedule of any television station included on its system unless carriage of specific programming is prohibited, and other programming is authorized to be substituted, pursuant to Section 76.67 (regarding sports broadcasts) or Subpart F of Part 76 of the Commission's rules (regarding nonduplication protection and syndicated exclusivity)).

[87] *WGN*, 693 F.2d 622 (7th Cir. 1982).

[88] *Broadcast Signal Carriage Order*, 8 FCC Rcd at 2986. The Commission declined to further define "program-related," apart from the WGN analysis, noting that carriage of information in the VBI was rapidly evolving. Close captioning information, and television ratings data are some examples of the material carried in the vertical blanking interval.

[89] The court stated that this could be available on a different channel from the video. *WGN*, 693 F.2d at 626.

[90] *Broadcast Signal Carriage Order*, 8 FCC Rcd at 2986.

[91] *Id.*

34. Finally, we note that satellite carriers are required to pass through closed captions regardless of the particular arrangements by which the broadcast station is carried.[92] Section 79.1 of the Commission's rules, adopted to implement Section 713 of the Act, requires that all video programming distributors, as defined in Section 79.1(a)(2), shall deliver all programming received from the video programming owner or other origination source containing closed captioning to receiving television households with the original closed captioning data intact in a format that can be recovered and displayed by decoders meeting the standards of Section 15.119.[93] We take this opportunity to ask whether satellite carriers have, or will have, any difficulties in passing through closed captioning information to its subscribers. If so, we seek comment on what measures the Commission should take to ensure that captioning information reaches its intended audience.

G. Material Degradation

35. Section 338(g) states that, "The regulations prescribed [by the Commission under Section 338] shall include requirements on satellite carriers that are comparable to the requirements on cable operators under sections 614(b)(4). . . .and 615(g)(2)."[94] Section 614(b)(4)(A) states that, "The signals of local commercial television stations that a cable operator carries shall be carried without material degradation. The Commission shall adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal."[95] Section 615(g)(2), which is the noncommercial equivalent of the commercial television station provision in Section 614(b)(4), states that, "A cable operator shall provide each qualified local noncommercial educational television station whose signal is carried in accordance with this section with bandwidth and technical capacity equivalent to that provided to commercial television broadcast stations carried on the cable system and shall carry the signal of each qualified local noncommercial educational television station without material degradation."[96]

36. The Conference Report noted that because of unique technical challenges on satellite technology and constraints on the use of satellite spectrum, satellite carriers may initially be limited in their ability to deliver must carry signals into multiple markets.[97] According to the Conference Report: "New compression technologies, such as video streaming, may help overcome these barriers, and if deployed, could enable satellite carriers to deliver must carry signals into many more markets than they could otherwise."[98] The Commission is urged, pursuant to its obligations under Section 338, or in any other related proceedings, "to not prohibit satellite carriers from using reasonable compression,

[92]We note that the closed captioning rules apply to both local and distant television stations.

[93]47 C.F.R. §79.1(c). *See also* 47 U.S.C. §613.

[94]47 U.S.C. §338(g).

[95]47 U.S.C. §534(b)(4).

[96]47 U.S.C. §535(g)(2).

[97]Conference Report at H11795.

[98]*Id.*

reformatting, or similar technologies to meet their carriage obligations, consistent with existing authority."[99]

37. When implementing the material degradation provision for cable carriage, the Commission relied on the technical standards as updated in the *Cable Technical Report and Order*, in defining the scope of the requirement.[100] The *Cable Technical Report and Order* specifically addressed the issue of preventing material degradation of local television signals carried on cable systems by adopting a number of technical standards and providing that cable operators must make reasonable efforts and use good engineering practices and proper equipment to guard against unnecessary degradation in the signal received and delivered to the cable subscriber.[101] The Commission stated that the standards adopted in the *Cable Technical Report and Order* were sufficient to satisfy the material degradation requirements contained in the 1992 Cable Act.[102] In declining to adopt regulations in addition to those found in the *Cable Technical Report and Order*, the Commission stated that further rules may have the unwarranted effect of impeding technological advances and experimentation in the cable industry.[103] Standards specific to digital communications were not adopted. Given the technological differences between cable operators and satellite carriers, we seek comment on whether reliance on Commission precedent in the cable carriage context regarding material degradation is appropriate and whether technical standards mirroring those in the cable television field would be warranted. We seek comment on whether we should develop new rules for satellite carriers, and if so what such rules should be, consistent with the Congressional direction on digital compression and taking into account the unique technical aspects of satellite carriage of broadcast signals.

38. It is important to note that our concerns here revolve around the satellite carrier's treatment of the broadcast signal on the equipment it controls or authorizes. Thus, our focus does not involve picture quality issues that may arise because of the type of television receiver used since the satellite carrier has little control over the use of these devices. Moreover, our analysis of material degradation recognizes that dish placement on or near the subscriber's premises can affect the quality of the picture received, but that the satellite carrier cannot control how and where dishes are installed.[104]

[99] *Id.*

[100] *See* 7 FCC Rcd at 8063 *citing Cable Television Technical and Operational Requirements, Report and Order* in MM Docket Nos. 91-169 and 85-38, 7 FCC Rcd 2021 (1992) ("Cable Technical Report and Order") and *Cable Television Technical and Operational Requirements Memorandum Opinion and Order* in MM Docket Nos. 91-169 and 85-38, FCC 92-508 (1992) ("Cable Technical Reconsideration").

[101] *Broadcast Signal Carriage Order*, 8 FCC Rcd at 2990.; *see also*, *NPRM*, 7 FCC Rcd at 8063.

[102] *See* 8 FCC Rcd at 2990.

[103] *Id.*

[104] For example, if the dish is not properly situated or is obfuscated by foliage, the satellite carrier cannot be held responsible for the resulting degradation of picture quality.

39. We understand that satellite carriers use a different modulation system from cable operators -- quadrature phase-shift keying or "QPSK" -- as the principal format when transmitting video programming.[105] Thus, it is important to note at this juncture, the technical steps in the digital conversion process affecting the material degradation analysis. In satellite digital television systems, such as those implemented by DirecTV and Echostar, there are four layers of the system where video quality may be affected.[106] The first layer, known as the picture layer, is where decisions are made regarding the use of progressive or interlace scanning techniques as well as whether the picture will be produced in a standard definition or high definition format. The choices made in this layer will not likely affect the quality of retransmitted analog broadcasts.[107] In the second layer, the compression layer, decisions are made regarding the types of compression techniques used. The relevant digital standard, MPEG-2, supports a wide range of compression ratios and data rates. At this layer, the satellite carrier attempts to maximize the number of channels carried on each transponder and there is an effort to place a limit on the maximum data rate of each channel. Limiting the data rate may cause the picture quality to degrade, especially when certain video scenes involve rapid motion images or there is a greater degree of camera panning and zooming. The third layer is known as the transport layer and this is where the data are structured and organized into data packets. Since most digital video systems use the MPEG packet structure, there is little likelihood that any type of degradation would occur at this level. The final layer is the transmission layer and this is where data are modulated on to a carrier for transmission. The use of high efficiency modulation techniques, such as the cable industry's QAM[108] standard, permit greater data rate throughput. QPSK, however, is a lower order modulation and requires satellite carriers to limit the data rate or increase channel bandwidth. The chances for degradation to occur at this level are tied to the limiting data rate technique in the compression layer.

40. We specifically note that degradation may result when the satellite carrier encodes an analog broadcast signal and readies it for digital retransmission. During the encoding process, certain artifacts may be introduced into the original material that would have an effect on picture quality. The most dominant artifact is quantization[109] noise in the picture. This effect is often visible on edges of subjects and textured areas of the image. It is caused when there is a high amount of picture detail along with a high degree of picture activity and levels of quantization are restricted due to data rate reduction. Random noise can also be introduced into the source video. This can result in activity or "busyness" in detail areas of the picture and tiling or flicker in other areas of the picture. Such effects are caused by the encoder attempting to encode random noise. During the encoding process, data rate reduction in combination with rapid picture changes may result in another artifact known as the "dirty window," where noise appears stationary while the images behind it are moving.

[105] This is also a different digital format from the vestigial sideband modulation ("VSB") system that broadcasters are currently using to deliver over-the-air digital signals to viewers.

[106] We note that all digital video systems, including DBS, are based on MPEG standards for the compression of moving video images.

[107] Picture quality questions in this layer may arise in the future when satellite carriers decide to retransmit digital broadcast signals.

[108] QAM is the acronym for quadrature amplitude modulation.

[109] Quantization is part of the process by which analog signals are encoded into digital form. Specifically, it is the classification step that determines the number of bits to be used in the conversion process.

41. Understanding that satellite carriers use the technical process described above in retransmitting analog broadcast signals, and keeping in mind Congress's express statement that any reasonable type of digital compression technique is permissible, we seek comment on how to define material degradation for purposes of Section 338. The focus of our concern in this context is where the satellite carrier has made a conscious decision to increase the number of channels carried to the detriment of picture quality. Thus, we seek comment on how to define the term "material," but in the context of a deliberate action on the part of the satellite carrier. For example, when a broadcast television station freezes, "tiles" or looks "dirty" due to a satellite carrier's choice of encoding and compression techniques, should that be considered "material" or "immaterial" degradation? We also seek comment on whether there are certain compression ratios or encoding techniques that should be prohibited because their use would result in material degradation.

42. Aside from the matters discussed above, questions arise as to what standards and measurement techniques the Commission should employ where specific broadcast signal quality disputes arise. In the cable carriage context, where an operator carries the broadcaster's analog television signal, issues such as signal to noise ratios and ghosting have been the focus of concern. In the satellite carriage situation, where an analog broadcast signal is digitally transmitted by a satellite carrier, picture resolution is still important but bit error rates and data throughput are also relevant. Moreover, the technical standards that are employed to evaluate cable analog picture quality were adopted and refined over the course of many decades, yet the Commission has had relatively little experience in evaluating the analog to digital to analog conversion of the type involved in satellite broadcast signal carriage.[110] We seek suggestions for measurement standards that may be used in addressing signal degradation issues.

43. We also have questions concerning the phrase "similar technologies to meet their carriage obligations" as it is found in this section's legislative history. We first ask what is meant by the term "similar technologies." Are there any limits as to the kind of technologies a satellite carrier may use to fulfill its statutory mandates under Section 338? We specifically seek comment on whether the phrase encompasses "spot beaming," where a satellite carrier delivers programming to a discrete geographical location using a specialized satellite.[111] If so, what are the implications for using such technology in the satellite broadcast signal carriage context.

H. Digital Television

44. Section 338(g) states: "The regulations prescribed [by the Commission under Section 338] shall include requirements on satellite carriers that are comparable to the requirements on cable operators under sections 614(b)(4) . . . ."[112] Section 614(b)(4)(B) of the Act provides: "At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial

[110]We note that the signal is converted back to analog at the satellite set-top box so that the picture can be displayed on the analog television receiver.

[111]The coverage area or "footprint" of satellite systems can vary: (1) "global beam" where 1/3 of the earth is covered by a satellite; (2) "regional beam" where a couple of continents are covered by a satellite; (3) "conus coverage" which is the satellite footprint over the continental United States; and (4) "spot beam" as described above.

[112]47 U.S.C. §338(g).

television stations which have been changed to conform with such modified standards."[113] The Conference Report stated: "by directing the FCC to promulgate these must carry rules [found in Section 338], the conferees do not take any position regarding the application of must-carry rules to carriage of digital television signals by either cable or satellite systems."[114]

45. The Commission has adopted rules establishing a transitional process for the conversion from an analog to a digital form of broadcast transmission.[115] The rules allow each existing analog television licensee or each eligible permittee to construct or operate digital facilities with a roughly comparable service area using 6 MHz of spectrum, in addition to the 6 MHz of spectrum used for analog broadcasting. The broadcast station will transmit a signal consistent with the standards adopted in *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fourth Report and Order in MM Docket No. 87-268, giving it the flexibility to broadcast in a high definition mode, in a multiple program standard definition mode, in a datacasting mode, or a mixture of all three.[116] During the transition period, both the analog and digital television signals will be broadcast.[117] At the end of the transition which is scheduled for 2006, with certain statutory exceptions, the station is to cease broadcasting an analog signal and will return to the government 6 MHz of spectrum.[118]

46. The rules governing the transition from analog to digital broadcasting are found in *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order in MM Docket 87-268 ("Fifth Report and Order"). The *Fifth Report and Order* set forth a phased-in implementation schedule for the introduction of digital broadcast television. Construction requirements vary depending on the size of the television market and other factors. [119]

47. In July 1998, the Commission commenced a proceeding to determine the carriage obligations cable operators should have with regard to a broadcast station's digital television signal during the transition period to digital television. [120] We sought comment in that proceeding on how to accomplish the Congressional goals reflected in Section 614, Section 615, and Section 325 of the Act in light of the

[113]47 U.S.C. §534(b)(4)(B).

[114]Conference Report at H11795.

[115]47 C.F.R. §§73.622-624.

[116]*See* 11 FCC Rcd 17771 (1996).

[117]Commencing April 1, 2003, digital broadcast television licensees and permittees must simulcast at least 50% of the video programming transmitted on their analog channel; commencing April 1, 2004, there is a 75% simulcasting requirement; commencing April 1, 2005, there is a 100% simulcasting requirement until the analog channel is shut off. *Fifth Report and Order*, 12 FCC Rcd 12809, 12832.

[118]The return of the analog spectrum is subject to certain exceptions related to consumer acceptance of digital technology and other market-based conditions as provided for in the 1997 Balanced Budget Act. 47 U.S.C. §309(j)(14)(B) (Balanced Budget Act language concerning the reversion of the analog television spectrum to the Government). *See also Fourth Report and Order*, 11 FCC Rcd 17771 (1996); *Fifth Report and Order*, 12 FCC Rcd 12809 (1997); *Sixth Report and Order*, 12 FCC Rcd 14588 (1997).

[119]*Fifth Report and Order*, 12 FCC Rcd at 12840-41.

[120]*See Digital Broadcast Signal Carriage Issues*, 13 FCC Rcd 15092 *et. seq*.

significant changes to the relevant industries resulting from the conversion to digital operations. The thrust of the proceeding was to examine the timing and scope of digital broadcast signal carriage obligations for cable operators. The Commission proposed seven carriage options for the transition period ranging from an immediate dual carriage regime, where a cable operator would carry both the analog and digital signals at the same time, to the no carriage option, where a cable operator would be under no obligation to carry the station's digital signal until after the transition period has ended.[121]

48. When this proceeding was initiated, there was no satellite broadcast signal carriage requirement, and satellite carriers apparently did not find it necessary to comment on the issues addressed in that proceeding. Thus, we seek comment on whether satellite carriers should be required to carry digital broadcast television signals in addition to analog broadcast signals up until the time that television stations return their analog spectrum to the government. What are the costs and benefits of such a requirement? In what ways would a dual carriage rule limit the number of markets satellite carriers can serve with analog broadcast signals alone? Moreover, would satellite carriers have to drop existing non-broadcast programming to accommodate digital television signals? To what extent should any digital carriage requirements for satellite carriers be consistent with those for cable operators?

I. Compensation for Carriage

49. Section 338(e) states: "A satellite carrier shall not accept or request monetary payment or other valuable consideration in exchange either for carriage of local television broadcast stations in fulfillment of the requirements of this section or for channel positioning rights provided to such stations under this section, except that any such station may be required to bear the costs associated with delivering a good quality signal to the local receive facility of the satellite carrier."[122] We will consider the costs associated with delivering a good quality signal as part of our consideration of the several related local receive facility issues, discussed above. This provision largely parallels provisions applicable to cable operators that are found in Sections 614(b)(10) and 615(i) of the Act that are implemented in Section 76.60 of the Commission's rules. In the cable context, commercial broadcasters elect either must carry or retransmission consent to obtain carriage of their signals. If mandatory carriage is selected, there are no specific terms for carriage that must be requested, other than choosing the relevant channel positioning options available to broadcasters under the Act. If retransmission consent is selected, the operator may receive compensation from the broadcaster in exchange for carriage. We assume the same general policy is intended here and that a broadcaster seeking carriage rather than requesting carriage "in fulfillment of the requirements of [Section 338]" would simply negotiate carriage provisions, including payment terms, in the context of a retransmission consent negotiation. We seek comment on this interpretation. We also seek comment on the policy underlying this provision and its purpose in the statutory scheme.

J. Remedies

50. Section 338(a)(2) states that the remedies for any failure to meet the obligations under subsection (a) (carriage obligations) shall be available exclusively under Section 501(f) of title 17, United

[121] *Id.* at 15113-15116. The other stated options included the System Upgrade Proposal, the Phase-in Proposal, the Either-Or Proposal, the Equipment Penetration Proposal, and the Deferral Proposal.

[122] 47 U.S.C. §338(e). Sections 614(b)(10) and 615(i) impose substantially similar requirements on cable operators.

States Code.[123] New section 501(f)(1) states: "With respect to any secondary transmission that is made by a satellite carrier of a performance or display of a work embodied in a primary transmission and is actionable as an act of infringement under section 122, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local market of that station."[124] New section 501(f)(2) further provides: "A television broadcast station may file a civil action against any satellite carrier that has refused to carry television broadcast signals, as required under section 122(a)(2), to enforce that television broadcast station's rights under section 338(a) of the Communications Act of 1934."[125] As it appears that the Commission is not the statutory venue to remedy non-carriage of broadcast station signals by satellite carriers, we believe that there is no need for us to implement Section 338(a)(2). We seek comment on this view.

51. Section 338(f)(1) of the Communications Act states: "Whenever a local television broadcast station believes that a satellite carrier has failed to meet its obligations under subsections (b) through (e) of this section [(b) good signal required, (c) duplication not required, (d) channel positioning, and (e) compensation for carriage], such station shall notify the carrier, in writing, of the alleged failure and identify its reasons for believing that the satellite carrier failed to comply with such obligations. The satellite carrier shall, within 30 days after such written notification, respond in writing to such notification and comply with such obligations or state its reasons for believing that it is in compliance with such obligations. A local television broadcast station that disputes a response by a satellite carrier that it is in compliance with such obligations may obtain review of such denial or response by filing a complaint with the Commission. Such complaint shall allege the manner in which such satellite carrier has failed to meet its obligations and the basis for such allegations."[126] In addition, Section 338(f)(2) states: "The Commission shall afford the satellite carrier against which a complaint is filed under paragraph (1) an opportunity to present data and arguments to establish that there has been no failure to meet its obligations under this section.[127]

52. Section 338(f)(3) of the Communications Act states: "Within 120 days after the date a complaint is filed under paragraph (1), the Commission shall determine whether the satellite carrier has met its obligations under subsections (b) through (e). If the Commission determines that the satellite carrier has failed to meet such obligations, the Commission shall order the satellite carrier to take appropriate remedial action. If the Commission determines that the satellite carrier has fully met the requirements of such subsections, the Commission shall dismiss the complaint." We seek comment on the meaning of the phrase, "appropriate remedial action" for each of the relevant subsections. We also ask whether the payment of forfeitures for non-compliance would fall under the "appropriate remedial action" rubric.[128]

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[123] 47 U.S.C. §338(a)(2).

[124] 17 U.S.C. §501(f)(1)(as amended by Section 1002 of the SHVIA).

[125] 17 U.S.C. §501(f)(2).

[126] 47 U.S.C. §338(f)(1). The remedial provisions of the SHVIA are substantially similar to provisions applicable to cable operators set forth in Section 614(d)(1)-(3) of the 1992 Cable Act.

[127] 47 U.S.C. §338(f)(2).

[128] We note that there is a specific forfeiture provision for cable operator violations of the broadcast signal carriage rules. *See* 47 C.F.R. §1.80: *Table II-Violations Unique to the Service* (base amount of individual violation set at (continued…)

53. These provisions clearly state the remedial procedures for satellite carrier violations of Section 338, with subsection 338(a) providing a remedy for failure to carry and subsection 338(f) providing specific remedies for unique carriage violations. We seek comment on two additional issues, however. First, we seek comment on how the Section 501(f) remedial limitation in Section 338(a)(2) relates to the complaint process set forth in Section 338(f). For example, if a satellite carrier refuses to carry a broadcast station signal because of a signal quality dispute, would the broadcaster pursue its remedy in court, at the Commission, or would both fora be available? In addition, it appears that a broadcaster cannot file a complaint against a satellite carrier for non-compliance with the content-to-be-carried or material degradation provisions as the SHVIA specifically referenced those issues in Section 338(g) rather than in (b) through (e), as provided in Section 338(f). We seek comment on this interpretation. If this is the correct reading of the statute, should the Commission nonetheless include those issues as subject to the complaint process under its general authority to administer the Communications Act?

IV. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Act Statement and Initial Paperwork Reduction Act of 1995 Analysis

54. The initial regulatory flexibility analysis is attached to this order as Appendix A. This *Notice* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Notice*, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due at the same time as other comments on this *Notice*; OMB comments are due 60 days from date of publication of this *Notice* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

B. Ex Parte Rules

55. This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the rules. 47 C.F.R. §1.1206(b), as revised. Ex parte presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, ex parte or otherwise, are generally prohibited. Persons making oral ex parte presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. *See* 47 C.F.R. §1.1206(b)(2), as revised. Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

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C. Filing of Comments and Reply Comments

56. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments regarding this *Notice* on or before July 7, 2000 and reply comments on or before July 28, 2000. Comments may be filed using the Commission's Electronic Comment Filing System ("ECFS") or by filing paper copies.[129] Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form<your e-mail address." A sample form and directions will be sent in reply.

57. Written comments by the public on the proposed and/or modified information collections are due July 7, 2000. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before **[60 days after date of publication in the Federal Register.]** In addition to filing comments with the Secretary, a copy of any comments on the information collection(s) contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Edward C. Springer, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to Edward.Springer@omb.eop.gov.

58. Parties who choose to file by paper must file an original and four copies of each filing. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554. The Cable Services Bureau contact for this proceeding is Ben Golant at (202) 418-7111, TTY (202) 418-7172, or at bgolant@fcc.gov.

59. Parties who choose to file by paper should also submit their comments on diskette. Parties should submit diskettes to Ben Golant, Cable Services Bureau, 445 12th Street N.W., Room 4-A803, Washington, D.C. 20554. Such a submission should be on a 3.5-inch diskette formatted in an IBM compatible form using MS DOS 5.0 and Microsoft Word, or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the party's name, proceeding (including the lead docket number in this case, CS Docket No. 00-96), type of pleading (comments or reply comments), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, referable in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, 1231 20th Street, N.W., Washington, D.C. 20036.

[129] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

D. Ordering Clauses

60. Accordingly, **IT IS ORDERED** that pursuant to Section 1008 of the Satellite Home Viewer Act of 1999, **NOTICE IS HEREBY GIVEN** of the proposals described in this Notice of Proposed Rulemaking.

61. **IT IS FURTHER ORDERED** that the Consumer Information Bureau, Reference Information Center, shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Appendix A

Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act ("RFA"),[130] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on small entities by the possible policies and rules that would result from this Notice of Proposed Rulemaking ("Notice"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided above in paragraph 48. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[131] In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.[132]

2. *Need for, and Objectives of, the Proposed Rules.* Section 338(g) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 338(g), directed the Commission, within one year of enactment of the Satellite Home Viewer Improvement Act of 1999,[133] to "issue regulations implementing this section following a rulemaking proceeding." The relevant provisions concern the carriage of all local television broadcast station signals by satellite carriers commencing on January 1, 2002.

3. *Legal Basis*. The authority for the action proposed in this rulemaking is contained in Sections 1, 4(i) and (j), 338, 614 and 615 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 338, 534, and 535.

4. *Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply.* The IRFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules.[134] The IRFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under Section 3 of the Small Business Act.[135] Under the Small Business Act, a small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business

[130]*See* 5 U.S.C. §603. The RFA, *see* 5 U.S.C. §601 *et. seq*., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[131]*See* 5 U.S.C. §603(a).

[132]*See id.*

[133]Act of Nov. 29, 1999, Pub. Law 106-113, §1000(9), 113 Stat. 1501, Appendix A.

[134]5 U.S.C. §604(b)(3).

[135]5 U.S.C. §601(3)(incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632.) Pursuant to the RFA, the statutory definition of a small business applies, "unless an agency, after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such the term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register. 5 U.S.C. § 601(3).

Administration ("SBA").[136] The rules we will adopt as a result of the Notice will affect television station licensees and satellite carriers.

5. *Television Stations*. The proposed rules and policies will apply to television broadcasting licensees, and potential licensees of television service. The Small Business Administration defines a television broadcasting station that has no more than $10.5 million in annual receipts as a small business.[137] Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.[138] Included in this industry are commercial, religious, educational, and other television stations.[139] Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.[140] Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.[141]

6. Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

7. An element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimates that follow of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. As discussed further below, we could not fully apply this criterion, and our estimates of small businesses to which rules may apply may be over-inclusive to this extent. The SBA's general size standards are developed taking into

[136]15 U.S.C. §632.

[137]13 C.F.R. § 121.201, Standard Industrial Code (SIC) 4833 (1996).

[138]Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

[139]*Id*. *See* Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987), at 283, which describes "Television Broadcasting Stations (SIC Code 4833)" as:

> Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational and other television stations. Also included here are establishments primarily engaged in television broadcasting and which produce taped television program materials.

[140]Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

[141]*Id*.; SIC 7812 (Motion Picture and Video Tape Production); SIC 7922 (Theatrical Producers and Miscellaneous Theatrical Services (producers of live radio and television programs).

account these two statutory criteria. This does not preclude us from taking these factors into account in making our estimates of the numbers of small entities.

8. There were 1,509 television stations operating in the nation in 1992.[142] That number has remained fairly constant as indicated by the approximately 1,616 operating television broadcasting stations in the nation as of September 1999.[143] For 1992, the number of television stations that produced less than $10.0 million in revenue was 1,155 establishments.[144] Thus, the new rules will affect approximately 1,616 television stations; approximately 77%, or 1,230 of those stations are considered small businesses.[145] These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television affiliated companies.

9. *Small MVPDs*: SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating $11 million or less in annual receipts.[146] This definition includes cable system operators, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau data from 1992, there were 1,758 total cable and other pay television services and 1,423 had less than $11 million in revenue.[147] We address below services individually to provide a more precise estimate of small entities.

10. *DBS*: There are four licensees of DBS services under Part 100 of the Commission's Rules. Three of those licensees are currently operational. Two of the licensees which are operational have annual revenues which may be in excess of the threshold for a small business. The Commission, however, does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be impacted by these proposed rules. DBS service requires a great investment of capital for operation, and we acknowledge that there are entrants in this field that may not yet have generated $11 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

11. *HSD*: The market for HSD service is difficult to quantify. Indeed, the service itself bears little resemblance to other MVPDs. HSD owners have access to more than 265 channels of programming placed on C-band satellites by programmers for receipt and distribution by MVPDs, of which 115

[142]FCC News Release No. 31327, Jan. 13, 1993; Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, Appendix A-9.

[143]FCC News Release, Broadcast Station Totals as of September, 1999 (released November, 1999).

[144]The amount of $10 million was used to estimate the number of small business establishments because the relevant Census categories stopped at $9,999,999 and began at $10,000,000. No category for $10.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

[145]We use the 77 percent figure of TV stations operating at less than $10 million for 1992 and apply it to the 1999 total of 1,616 TV stations to arrive at 1,230 stations categorized as small businesses.

[146]13 C.F.R. §121.201 (SIC 4841).

[147]1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D, SIC Code 4841 (Bureau of the Census data under contract to the Office of Advocacy of the SBA).

channels are scrambled and approximately 150 are unscrambled.[148] HSD owners can watch unscrambled channels without paying a subscription fee. To receive scrambled channels, however, an HSD owner must purchase an integrated receiver-decoder from an equipment dealer and pay a subscription fee to an HSD programming package. Thus, HSD users include: (1) viewers who subscribe to a packaged programming service, which affords them access to most of the same programming provided to subscribers of other MVPDs; (2) viewers who receive only non-subscription programming; and (3) viewers who receive satellite programming services illegally without subscribing. Because scrambled packages of programming are most specifically intended for retail consumers, these are the services most relevant to this discussion.[149]

12. According to the most recently available information, there are approximately 30 program packagers nationwide offering packages of scrambled programming to retail consumers.[150] These program packagers provide subscriptions to approximately 2,314,900 subscribers nationwide.[151] This is an average of about 77,163 subscribers per program package. This is substantially smaller than the 400,000 subscribers used in the commission's definition of a small MSO. Furthermore, because this is an average, it is likely that some program packagers may be substantially smaller.

13. *Description of Projected Reporting, Recordkeeping and other Compliance Requirements.* In order to implement the Satellite Home Viewer Improvement Act of 1999, the Commission has proposed to add new rules. We have yet to determine whether to amend existing provisions of the Commission's rules, or to adopt some other regulatory framework or procedures concerning satellite broadcast signal carriage. There are certain compliance requirements involving the satellite broadcast signal carriage process. Foremost is satellite carriers will have to carry all local television stations in a given market if it decides to carry at least one signal in a market[152] There will be costs relating to the time and effort involved in carrying all local broadcast signals.

14. In terms of recordkeeping, entities most will likely have to keep a record of their election status and entities may be required to maintain such information within their business environment and may also have to file such information with the Commission.

15. *Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered.* The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

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[148]Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Third Annual Report, CS Docket No. 96-133, 12 FCC Rcd 4358, 4385 (1996)(*"Third Annual Report").*.

[149]*Third Annual Report*, 12 FCC Rcd at 4385, ¶ 49..

[150]*Id.*

[151]*Id.*

[152]*Supra* at ¶ 8.

16. As indicated above, the Notice proposes to implement certain aspects of the Satellite Home Viewer Improvement Act of 1999. Among other things, the new legislation requires satellite carriers to carry all local television broadcast stations in a market, if it carries any local market television stations, by January 1, 2002. This document also discusses implementing regulations relating to the scope and substance of local broadcast signal carriage by satellite carriers. This legislation applies to small entities and large entities equally. At this time, small entities are not treated differently and might not be impacted differently, but we seek comment.

17. *Federal Rules Which Duplicate, Overlap, or Conflict with the Commission's Proposals*. None.

Appendix B

Section 338 of the Communications Act of 1934, as amended.

SEC. 338. CARRIAGE OF LOCAL TELEVISION SIGNALS BY SATELLITE CARRIERS.
(a) CARRIAGE OBLIGATIONS.--
(1) IN GENERAL.--Subject to the limitations of paragraph (2), each satellite carrier providing, under section 122 of title 17, United States Code, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located within that local market, subject to section 325(b).
(2) REMEDIES FOR FAILURE TO CARRY.--The remedies for any failure to meet the obligations under this subsection shall be available exclusively under section 501(f) of title 17, United States Code.
(3) EFFECTIVE DATE.--No satellite carrier shall be required to carry local television broadcast stations under paragraph (1) until January 1, 2002.
(b) GOOD SIGNAL REQUIRED.--
(1) COSTS.--A television broadcast station asserting its right to carriage under subsection (a) shall be required to bear the costs associated with delivering a good quality signal to the designated local receive facility of the satellite carrier or to another facility that is acceptable to at least one-half the stations asserting the right to carriage in the local market.
(2) REGULATIONS.--The regulations issued under subsection (g) shall set forth the obligations necessary to carry out this subsection.
(c) DUPLICATION NOT REQUIRED.--
(1) COMMERCIAL STATIONS.--Notwithstanding subsection (a), a satellite carrier shall not be required to carry upon request the signal of any local commercial television broadcast station that substantially duplicates the signal of another local commercial television broadcast station which is secondarily transmitted by the satellite carrier within the same local market, or to carry upon request the signals of more than one local commercial television broadcast station in a single local market that is affiliated with a particular television network unless such stations are licensed to communities in different States.
(2) NONCOMMERCIAL STATIONS.--The Commission shall prescribe regulations limiting the carriage requirements under subsection (a) of satellite carriers with respect to the carriage of multiple local noncommercial television broadcast stations. To the extent possible, such regulations shall provide the same degree of carriage by satellite carriers of such multiple stations as is provided by cable systems under section 615.
(d) CHANNEL POSITIONING.--No satellite carrier shall be required to provide the signal of a local television broadcast station to subscribers in that station's local market on any particular channel number or to provide the signals in any particular order, except that the satellite carrier shall retransmit the signal of the local television broadcast stations to subscribers in the stations' local market on contiguous channels and provide access to such station's signals at a nondiscriminatory price and in a nondiscriminatory manner on any navigational device, on-screen program guide, or menu.
(e) COMPENSATION FOR CARRIAGE.--A satellite carrier shall not accept or request monetary payment or other valuable consideration in exchange either for carriage of local television broadcast stations in fulfillment of the requirements of this section or for channel positioning rights provided to such stations under this section, except that any such station may be required to bear the costs associated with delivering a good quality signal to the local receive facility of the satellite carrier.
(f) REMEDIES.--
(1) COMPLAINTS BY BROADCAST STATIONS.--Whenever a local television broadcast station believes that a satellite carrier has failed to meet its obligations under subsections (b) through (e) of this section, such station shall notify the carrier, in writing, of the alleged failure and identify its reasons for

believing that the satellite carrier failed to comply with such obligations. The satellite carrier shall, within 30 days after such written notification, respond in writing to such notification and comply with such obligations or state its reasons for believing that it is in compliance with such obligations. A local television broadcast station that disputes a response by a satellite carrier that it is in compliance with such obligations may obtain review of such denial or response by filing a complaint with the Commission. Such complaint shall allege the manner in which such satellite carrier has failed to meet its obligations and the basis for such allegations.

(2) OPPORTUNITY TO RESPOND.--The Commission shall afford the satellite carrier against which a complaint is filed under paragraph (1) an opportunity to present data and arguments to establish that there has been no failure to meet its obligations under this section.

(3) REMEDIAL ACTIONS; DISMISSAL.--Within 120 days after the date a complaint is filed under paragraph (1), the Commission shall determine whether the satellite carrier has met its obligations under subsections (b) through (e). If the Commission determines that the satellite carrier has failed to meet such obligations, the Commission shall order the satellite carrier to take appropriate remedial action. If the Commission determines that the satellite carrier has fully met the requirements of such subsections, the Commission shall dismiss the complaint.

(g) REGULATIONS BY COMMISSION.--Within 1 year after the date of the enactment of this section, the Commission shall issue regulations implementing this section following a rulemaking proceeding. The regulations prescribed under this section shall include requirements on satellite carriers that are comparable to the requirements on cable operators under sections 614(b)(3) and (4) and 615(g)(1) and (2).

(h) DEFINITIONS.--As used in this section:

(1) DISTRIBUTOR.--The term 'distributor' means an entity which contracts to distribute secondary transmissions from a satellite carrier and, either as a single channel or in a package with other programming, provides the secondary transmission either directly to individual subscribers or indirectly through other program distribution entities.

(2) LOCAL RECEIVE FACILITY.--The term 'local receive facility' means the reception point in each local market which a satellite carrier designates for delivery of the signal of the station for purposes of retransmission.

(3) LOCAL MARKET.--The term 'local market' has the meaning given that term under section 122(j) of title 17, United States Code.

(4) SATELLITE CARRIER.--The term 'satellite carrier' has the meaning given such term under section 119(d) of title 17, United States Code.

(5) SECONDARY TRANSMISSION.--The term 'secondary transmission' has the meaning given such term in section 119(d) of title 17, United States Code.

(6) SUBSCRIBER.--The term 'subscriber' has the meaning given that term under section 122(j) of title 17, United States Code.

(7) TELEVISION BROADCAST STATION.--The term 'television broadcast station' has the meaning given such term in section 325(b)(7).