

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

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

SECOND REPORT AND ORDER, MEMORANDUM OPINION AND ORDER,
AND SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

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separate statements.

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I. INTRODUCTION AND SUMMARY

1. The actions taken in this Order represent another step in the Commission's ongoing efforts to complete the transition from analog to digital television. In this Order, we amend the rules to require satellite carriers to carry digital-only stations upon request in markets in which they are providing any local-into-local service pursuant to the statutory copyright license,¹ and to require carriage of all high definition ("HD") signals in a market in which any station's signals are carried in HD. In recognition of the capacity and technological constraints faced by satellite carriers, the latter requirement will be phased-in over a four-year period. These decisions are consistent with Section 338 of the Act's instructions that the Commission implement comparable, rather than identical, carriage rules between cable and direct broadcast satellite ("DBS"), and is supported by the record in this proceeding. As discussed below, this decision also addresses a carriage complaint and Application for Review filed by Station WHDT-DT, Stuart, Florida. The Further Notice of Proposed Rulemaking ("FNPRM") seeks comment on the application of the statutory requirement for nondiscriminatory treatment in carriage of standard definition ("SD") and HD signals.

II. BACKGROUND

2. The Communications Act of 1934, as amended (the "Act"), requires cable systems and satellite carriers to carry the signals of local commercial and noncommercial broadcast stations in their local markets. Cable systems are presumptively required to carry all local television stations in all television markets,² while satellite carriers are only required to carry all television stations in a local television market if they carry one local television signal in that market under the compulsory copyright license ("carry-one, carry-all").³ Commercial television stations may however, choose to be carried pursuant to voluntary retransmission consent agreements rather than by mandatory carriage.⁴ Generally, every three years commercial television stations must elect to either grant retransmission consent or pursue their mandatory carriage rights.⁵ Noncommercial ("NCE") television stations may only elect mandatory carriage (NCE stations do not have retransmission consent rights),⁶ but are nonetheless free to negotiate issues related to voluntary carriage with cable operators and satellite carriers.⁷

¹ See amended rule Section 76.66(b)(1) in Appendix C, *infra*.

² See 47 U.S.C. § 534; *Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965 (1993) ("Cable Must Carry Order"). See also *Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723 (1994) ("Cable Must Carry Reconsideration Order").

³ See 47 U.S.C. § 338. *But cf. Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, MB Docket No. 05-181, FCC 05-92, *In the Matter of Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act, Report and Order*, 20 FCC Rcd. 14242 (2005) ("SHVERA Alaska/Hawaii Carriage Order") (noting that Section 210 of the SHVERA amended Section 338(a) of the Act to require satellite carriers to carry the analog and digital signals of television broadcast stations in local markets in Alaska and Hawaii).

⁴ See 47 U.S.C. § 325(b)(1).

⁵ See 47 C.F.R. § 76.64(f).

⁶ See 47 U.S.C. § 325(b)(2)(A).

⁷ See *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules and Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, 2613 (2001) ("First Report and Order" or "Further Notice").

III. SECOND REPORT AND ORDER

3. The Commission's *First Report and Order and Further Notice of Proposed Rulemaking* in this proceeding adopted rules for cable carriage of digital broadcast signals pursuant to retransmission consent and mandatory carriage when a local television station is broadcasting only a digital signal.⁸ The Commission concluded that digital-only stations are entitled to elect mandatory cable carriage.⁹ The *First Report and Order* did not make a similar determination with respect to satellite carriage, which had only recently been implemented with respect to analog signals.¹⁰ Instead, in the *Further Notice*, we solicited comment on how to implement digital broadcast signal carriage rules for satellite carriers.¹¹

A. Digital-Only Carriage

4. We conclude that providing digital-only stations with mandatory satellite carriage in local-into-local markets now furthers the completion of the digital transition by assuring that any station - - whether a new digital station or a station that is returning its analog spectrum -- will have satellite carriage rights. Section 338(a) of the Act states that satellite carriers must carry, "upon request the signals of all television broadcast stations located within that local market."¹² This provision makes no distinction between analog and digital signals, and we find that any such distinction would be inappropriate. Furthermore, Section 338(j) of the Act requires that the rules applying to satellite carriers be "comparable" to those governing cable companies in certain areas, including signal carriage. The Commission has required carriage of digital-only stations by cable operators, and a similar requirement is both appropriate and comparable for satellite carriers. This decision ensures that broadcasters and satellite subscribers can be confident of uninterrupted satellite carriage of local stations after the transition

⁸ See *First Report and Order*, 16 FCC Rcd 2598. This *First Report and Order* addressed issues in both the cable carriage docket (No. 98-120) and the satellite carriage docket (00-96). The Commission adopted a *Second Report and Order* in the cable docket only. See *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules, CS Docket No 98-120, Second Report and Order and First Order on Reconsideration*, 20 FCC Rcd 4516 (2005). The Commission also adopted a *Second Further Notice of Proposed Rulemaking* and a *Third Report and Order and Third Further Notice*, again in the cable docket only. See *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules, CS Docket No 98-120, Second Further Notice of Proposed Rulemaking*, 22 FCC Rcd 8803 (2007) and *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules, CS Docket No 98-120, Third Report and Order and Third Further Notice of Proposed Rulemaking*, 22 FCC Rcd 21064 (2007) (*Viewability Order* or *Third Further Notice*). This is therefore the *Second Report and Order* and *Second Further Notice* in the satellite docket (00-96).

⁹ See *First Report and Order*, 16 FCC Rcd at 2604. See also, *WHDT-TV-DT, Channel 59, Stuart, Florida: Petition for Declaratory Ruling that Digital Broadcast Stations have Mandatory Carriage Rights*, 16 FCC Rcd 2692, 2698-99 (2001) ("WHDT-DT Cable Order"). See also *Viewability Order*.

¹⁰ See *First Report and Order*, 16 FCC Rcd at 2658. See also, *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, 16 FCC Rcd. 1918 (2000) ("2000 DBS Order").

¹¹ See 16 FCC Rcd at 2658 (noting the Act's general directive that the Commission issue satellite carriage rules comparable to the cable carriage rules and seeking comment on how to apply the digital cable carriage rules to satellite carriers). Satellite carriage of local stations, including analog and digital signals, in Alaska and Hawaii is governed by the SHVERA amendment to Section 338 and by our rules adopted to implement that statutory amendment. See 47 U.S.C. § 338(a)(4), as amended by Section 210 of the SHVERA; 47 C.F.R. §§ 76.66(b)(2), (c)(6), (e)(3). See also *SHVERA Alaska/Hawaii Carriage Order*, 20 FCC Rcd 14242 (2005). Pursuant to Section 338(a)(4) of the Act, satellite carriers with five million or more subscribers must carry local stations in Alaska and Hawaii. This "must carry" requirement applied first to analog signals beginning December 8, 2005, and then to digital signals beginning June 8, 2007. See 47 C.F.R. § 76.66(b)(2).

¹² 47 U.S.C. § 338(a). See also Section 338(j).

to digital broadcasting for all full-power stations that will conclude on midnight, February 17, 2009.¹³ This conclusion is particularly important for the stations that are not affiliated with the top four networks and rely on “must carry” to reach viewers who are satellite subscribers. Congress adopted the carry-one, carry-all requirements with these stations particularly in mind,¹⁴ and our decision in this Order ensures the continued viability of these stations as they make their transition to all digital service.

B. HD Carry One, Carry All

5. We turn next to the manner of carriage, particularly with respect to material degradation during carriage of HD signals. For the reasons described below, we conclude that satellite carriage of local stations’ digital signals should conform to the nondiscrimination requirement adopted by the Commission in 2000.¹⁵ Therefore, with respect to carriage of digital-only signals, we require satellite carriers to carry each station in the market in the same manner, including carriage of HD signals in HD format if any broadcaster in the same market is carried in HD.

6. The Act requires that the Commission adopt rules for DBS “comparable” to those governing cable in the areas of material degradation, signal processing, carriage, and technical capacity.¹⁶ In the *2000 DBS Carriage Order*, the Commission discussed this requirement at length, particularly in

¹³ See Digital Television and Public Safety Act of 2005 (“DTV Act”), which is Title III of the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) (“DRA”) (*codified at* 47 U.S.C. §§ 309(j)(14) and 337(e)). DTV Act § 3002(a) amends Section 309(j)(14) of the Communications Act to establish February 17, 2009, as a new hard deadline for the end of analog transmissions by full-power stations. 47 U.S.C. § 309(j)(14)(A). DTV Act § 3002(b) directs the Commission to “take such actions as are necessary (1) to terminate all licenses for full-power television stations in the analog television service, and to require the cessation of broadcasting by full-power stations in the analog television service, by February 18, 2009; and (2) to require by February 18, 2009, . . . all broadcasting by full-power stations in the digital television service, occur only on channels between channels 2 and 36, inclusive, or 38 and 51, inclusive (between frequencies 54 and 698 megahertz, inclusive).” 47 U.S.C. § 309 Note. DTV Act § 3005(a) also created a coupon program to subsidize the purchase of digital-to-analog (“D-to-A”) converter boxes. *Id.*

¹⁴ See Joint Explanatory Statement of the Committee of Conference on H.R. 1554, 106th Cong. (“Satellite Conference Report”), 145 Cong. Rec. H11795 (daily ed. Nov. 9, 1999).

¹⁵ *2000 DBS Order*, 16 FCC Rcd 1918 at para 118. See also 47 C.F.R. § 76.66(k).

¹⁶ Section 338(j) of the Act (47 U.S.C. § 338(j)) states that, “[t]he 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).” Section 614(b)(4)(A) (47 U.S.C. § 534(b)(4)) 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.” Section 615(g)(2) (47 U.S.C. § 535(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.” In the recent *Viewability Order*, we established that this prohibition with respect to cable would be enforced by reference to the comparability standard established for cable in 2001. *Viewability Order* at para 7. Thus, a cable operator may not provide a digital broadcast signal in a lesser format or lower resolution than that afforded to any other signal on the cable system, and HD signals must be carried in HD. The rules governing DBS providers, then, must be “comparable” to this nondiscrimination standard. *2000 DBS Order*, 16 FCC Rcd 1918 at paras 110-118.

regard to the question of material degradation.¹⁷ At that time, the Commission noted that satellite compression technology was evolving rapidly, and was therefore reluctant to adopt specific technical standards for digital carriage.¹⁸ The Commission's conclusion at the time was that treating all local television stations in a market in the same manner with regard to picture quality was the best way to establish regulations comparable to cable while still tailored to the unique circumstances of satellite operation. Thus, the Commission required that the signal processing, compression and encoding techniques a satellite carrier used to carry retransmission consent stations would also be used for mandatory carriage stations.¹⁹ This comparability standard for satellite carriers is also consistent with the Act's requirement for nondiscriminatory carriage of local broadcast signals.²⁰ We find that the approach taken by the Commission in 2000 remains appropriate as we approach the conclusion of the full-power digital transition. Thus, in order to provide for rules comparable to those of cable and consistent with the Commission's 2000 approach, we will continue to require satellite carriers to carry each digital broadcast station in the market in the same manner, including carriage of HD signals in HD format if any broadcaster in the same market is carried in HD.²¹

C. HD Carry-One, Carry-All Phase-In

7. We recognize that satellite carriers face unique capacity, uplink, and ground facility construction issues that must be factored into the timing of any HD "carry-one, carry-all" requirement. In recognition of the necessity for additional bandwidth to provide HD carry-one, carry-all, DIRECTV and DISH Network have submitted a joint proposal detailing a four-year phase-in period, starting in 2009, during which markets would be progressively transitioned to HD carry-one, carry-all.²² This proposal is

¹⁷ 2000 DBS Order, 16 FCC Rcd 1918 at paras 110-118.

¹⁸ *Id.* at 1969, para 118.

¹⁹ *Id.* See also 47 C.F.R. § 76.66(k). We note that the comparability standard applied to cable carriage compares carriage of local stations with any other programming, whether broadcast or non-broadcast. The comparability standard for satellite compares carriage of mandatory carriage local stations to local stations carried pursuant to retransmission consent.

²⁰ Section 338(d) of the Act, 47 U.S.C. § 338(d), states:

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 station's 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.

²¹ See note 17, *supra*.

²² Joint Proposal at 1 proposing a phase-in to 100% carry-one, carry-all HD carriage by February 2013. See Letter dated February 14, 2008 from Congressman John Salazar and others supporting the Joint Proposal on the basis that requiring full HD carriage in 2009 could force satellite carriers to drop niche services like Spanish language programming. See also Letters from Windstream dated February 26, 2008, and from the National Rural Telecommunications Cooperative dated March 12, 2008, expressing concern that immediate HD carry-one, carry-all could delay new services for rural customers; Letter from Satellite Industry Association dated March 5, 2008, outlining particular concerns about the satellite construction process; and March 6, 2008, statement in support of the Joint Proposal by Media Access Project. The National Association of Broadcasters ("NAB") urges the Commission to require satellite carriers to provide empirical evidence to support their lack of capacity claims. Letter from NAB dated March 6, 2008; *but see* Letter from NAB dated March 12, 2008, stating that it is not asking the Commission to require carriage of all local broadcast signals in HD in all 210 markets. The National Cable and (continued....)

designed to provide DIRECTV and DISH Network time to address satellite capacity issues inherent in providing HD carry-one, carry-all service.

8. We find the satellite carriers' proposal to be reasonable and technically sound. Satellite carriers have documented in the record that immediate HD carriage requirements would slow the rollout of HD markets and limit the number of markets that can be launched.²³ The record is persuasive that subscribers would be harmed by requirements that take effect on February 18, 2009, if satellite carriers are forced to drop other programming, including broadcast stations now carried in HD pursuant to retransmission consent,²⁴ in order to free capacity or if they are inhibited from adding new local-into-local markets. Therefore, because of the serious technical difficulties that we find satellite carriers face, we will permit them to "phase-in" their carriage of all HD signals on a market-by-market basis. Specifically, we conclude that by February 17, 2010, a satellite carrier must provide carriage of HD broadcast stations, in HD, in at least 15% of the markets in which they carry any station pursuant to the statutory copyright license in HD. This "HD carry one, carry all" requirement will apply to 30% of a satellite carrier's HD markets no later than February 17, 2011, 60% no later than February 17, 2012, and 100% by February 17, 2013.²⁵ Satellite carriers are required to carry each digital broadcast station in the market in the same manner, including carriage of HD signals in HD format if any local station in the same market is carried in HD. In addition, satellite carriers will be required to notify all local stations in a market at least 60 days prior to their launch of HD carry-one, carry-all in that market.²⁶ Our decision implements the statutory requirements in light of the severe technical limitations faced by satellite carriers.

9. Comparability to cable drives the development of DBS rules, but we are conscious that comparable is not the same as identical. We believe that the comparability standard permits a reasonable phase-in period. A significant number of the comments in the record developed in response to the FNPRM advocate and emphasize the importance of comparability.²⁷ Other commenters, however,

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Telecommunications Association ("NCTA") does not take a position on the DBS joint proposal but asks that similar consideration be afforded to small cable systems. Letter from NCTA dated March 12, 2008.

²³ DIRECTV February 19, 2008, *ex parte* at 1-2; EchoStar September 6, 2007, *ex parte*.

²⁴ Subscribers who now have access to some HD signals may be deprived of all HD service if a satellite carrier must drop current HD stations in a market because it does not have the capacity to carry all in HD.

²⁵ See amended rule Section 76.66(k)(2) in Appendix C, *infra*.

²⁶ See amended rule Section 76.66(d)(2)(vi) in Appendix C, *infra*.

²⁷ See Commercial Broadcasters FNPRM Comments at 41-42; Capitol Broadcasting January 22, 2004 *ex parte*; NAB *ex parte* in CS Docket No. 98-120 (filed Jan. 27, 2004); Ion Media Networks, *ex parte*, Jan. 30, 2008. Early in this proceeding, the Association of Public Television Stations ("APTS") argued that DIRECTV's plans, and similar plans by EchoStar to expand capacity, demonstrate that "mandated digital carriage would not unnecessarily burden satellite capacity." APTS *ex parte* in CS Docket Nos. 98-120, 00-96, CSR-5865-Z, at 2 (filed Oct. 29, 2004). See also, APTS Comments in Docket 06-189 (Nov. 29, 2006) at 25-26; APTS Comments in MB Docket No. 06-189 (Dec. 29, 2006) at 25-26; and APTS *ex parte* White Paper, The Case for Satellite Carriage of Digital Television Broadcast Signals in MB Docket No. 98-120, at 6-7 (Oct. 26, 2005) (contrasting DIRECTV and EchoStar's lack of capacity arguments with the carriers' plans to expand their capacity in order to carry local digital channels). In reply, EchoStar states that it provides HD local-into-local service in 26 markets but does not carry local public television digital signals because of capacity constraints. EchoStar Reply Comments in Docket 06-189 (Dec. 29, 2006) at 8. See also EchoStar *ex parte* in MB Docket No. 98-120, at 1 (filed Jun. 16, 2006); DIRECTV *ex parte* at 1 (filed Aug. 23, 2005) (stating that mandatory carriage of the entire over the air signal of broadcasters consumes significantly more space on a satellite facility). Recently, after the successful launch of the "DIRECTV 10" satellite, DIRECTV, APTS, and the Public Broadcasting Service ("PBS") announced an agreement under which DIRECTV will provide an HD feed of one PBS station in each new market where other broadcasters are carried in HD, beginning in 2008, and begin providing it in most of the 68 markets where HD is already provided. The agreement (continued....)

caution that rules based on cable “comparability” should not ignore the legitimate technical challenges faced by satellite carriers, which differ significantly from those faced by cable operators.²⁸ We agree that there are important differences between the two services.²⁹ As cable providers transition from providing analog signals to providing digital standard definition and high definition signals, they realize significant benefits in spectrum efficiency. Where a cable operator previously carried a single analog standard stream, post-transition they potentially carry ten digital standard definition streams, two high definition streams, or some combination of standard and high definition streams.³⁰ In contrast, DBS service has always been transmitted as a digital signal. Consequently, satellite carriers realize a net loss in the total number of program streams they may carry in a given bandwidth as they transition from standard definition to high definition signals. Where a satellite carrier previously carried approximately four standard definition streams, it is now capable of carrying only one high definition stream.³¹ Advanced technologies such as 8PSK modulation,³² DVB-S2,³³ and advances in digital compression technology,

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also provides for carriage of two national SD signals and the addition of PBS programs to DIRECTV’s video on demand offerings. There is also a commitment by DIRECTV to add an unspecified number of additional non-commercial local HD feeds after the conclusion of the DTV Transition in February 2009. John Eggerton, *DIRECTV, APTS, PBS Ink 10-Year Carriage Deal*, *Broadcasting & Cable* (Dec. 19, 2007), at <http://www.broadcastingcable.com/article/CA6514414.html?industryid=47171>. APTS has failed to reach a similar agreement with EchoStar. APTS letter in CS Docket No. 00-96 (filed Mar. 3, 2008).

²⁸ See DIRECTV July 7, 2005, *ex parte*; DIRECTV *ex parte* in CS Docket No. 98-120 (filed Oct. 13, 2004); See also EchoStar January 31, 2003, *ex parte*; DIRECTV February 25, 2003, *ex parte*; EchoStar August 31, 2007, *ex parte*; EchoStar September 6, 2007, *ex parte*; DIRECTV September 7, 2007, *ex parte*; DIRECTV October 3, 2007, *ex parte*.

²⁹ *Id.*

³⁰ Utilizing analog carriage of standard definition signals, a single programming stream consumes 6 MHz of a cable operator’s bandwidth. Using MPEG 2 compression, a standard definition program stream is generally compressed to a bitrate of approximately 4 Mbps (million bits per second). Using MPEG 2 compression, a high definition program stream is generally compressed to a bitrate of approximately 12 to 15 Mbps. The use of MPEG 4 compression would provide similar quality program streams at a lower bitrate, however, as MPEG4 is not yet widespread, generalizing on the use of MPEG 2 provides a reasonable, conservative estimate. Cable operators generally employ either 64 QAM (quadrature amplitude modulation) or 256 QAM encoding for digital service, which in 6 MHz provides either 28 Mbps or 38 Mbps (64 and 256 QAM respectively). Therefore, using 64 QAM, a cable operator could reasonably substitute one HD and several SD for a single analog SD program stream. See Cisco System, *Bandwidth Optimization*, available at http://www.scientificatlanta.com/products/customers/prod_bbaccess_Bandwidth_Mgmt-pg2.htm (visited Feb. 29, 2008). See also Wikipedia, *Quadrature Amplitude Modulation*, available at http://en.wikipedia.org/wiki/Quadrature_amplitude_modulation (visited Feb. 29, 2008).

³¹ Assuming MPEG 2 compression, a single HD stream requires approximately 12 to 15 Mbps and a single SD stream requires approximately 3 to 4 Mbps, yielding a loss of three or four SD stream when an additional HD stream is added to the same bandwidth. While these numbers will vary for MPEG 4 compression, the ratios will be essentially unchanged. This is due to the amount of information being encoded. A single 16 x 9 aspect ratio SD stream contains 720 horizontal pixels and 240 vertical pixels (interlaced every other frame for an effective number of 480 vertical lines). This means that approximately 172,800 pixels are encoded with each frame. For a 1080i high definition signal, there are 1920 horizontal pixels and 540 vertical pixels, yielding a total of approximately 1,036,800, or approximately 6 times the amount of data.

³² QPSK and 8PSK are two techniques for modulating a radio frequency signal with digital information. 8PSK allows for 1.5 times as many bits per second as QPSK within the same bandwidth. Some of these extra bits may be required for more robust error correction since 8PSK is more susceptible to errors under the same carrier-to-noise conditions. Additional modulation schemes are available with 16, 32, 64, ... 2ⁿ phases providing 2, 2.5, 3, ... n/2 times the bit rate of QPSK, each with increasing levels of error susceptibility and therefore requiring increasing levels of error correction and/or carrier-to-noise performance.
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such as MPEG-4 AVC/H.264³⁴ and Windows Media Video 9,³⁵ could potentially increase satellite capacity.³⁶ However, these likely improvements will be unable to compensate for the inherent differences in the nature of the transition from standard to high definition programming for satellite carriers.

10. Due to the time required to design, construct, and place in service new satellite capacity, as well as the required ground facilities to receive these new digital signals and uplink them to their satellites, satellite carriers must plan capacity availability many years in advance.³⁷ Currently, DISH Network is providing service using most of its licensed transponders at all of its licensed orbital locations.³⁸ DIRECTV is also facing bandwidth limitations, in part due to post launch issues with satellite DIRECTV 10³⁹ and the delay of satellite DIRECTV 11's launch.⁴⁰ In order to meet the requirements of HD carry-one, carry-all for all markets, both DIRECTV and DISH Network assert that they will be required to launch additional satellites.⁴¹ DIRECTV has recently launched DIRECTV 11, which will
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³³DVB-S2 is a standard for digital video broadcast via satellite. See <http://www.dvb.org/documents/DVB-S2%20Presentation.pdf>. It employs advanced modulation techniques, forward error correction, and parity checks to provide a claimed 30% improvement over the standard bit rate capacity of a given satellite transponder.

³⁴ ISO MPEG-4 AVC and ITU-T H.264 are two identical standards for an advanced video compression technique promulgated by the International Standards Organization (ISO) and the International Telecommunication Union Telecommunication Standardization Sector (ITU-T), respectively. It is claimed to allow a given video format at a given quality level to be transmitted at a bit rate 50% or lower than the bit rate for the same video compressed using MPEG-2.

³⁵ Windows Media Video 9 is a video codec developed by Microsoft. Microsoft claims it allows video to be transmitted at bit rates of 26%-50% of those required for video encoded using MPEG-2, depending on the format of the video signal. See <http://www.microsoft.com/windows/windowsmedia/9series/codecs.aspx#comparison>.

³⁶ DIRECTV and EchoStar are currently using MPEG-4 to carry local HD signals in some markets. See *HDTV World-CNET Reviews* http://www.cnet.com/4520-7874_1-5108854-5.html?tag=print (visited Mar. 13, 2007). In the Ku band, satellite carriers have been allocated approximately 500 MHz of bandwidth, approximately one half the capacity of a modern cable system. However, satellite carriers utilize a number of techniques to reuse spectrum, including: doubling spectrum through polarity (sending two signals on the same frequency, one right-hand circularly polarized, the other left-hand circularly polarized), utilizing diversity of location (broadcasting on the same frequency from different location on the orbital arc, such as 101°, 111°, and 119° west longitude), and via the use of spot beams (which use the same frequency to beam different signals to different parts of the country). See also DISH Network DBS Must Carry Overview and Support Materials, Mar. 12, 2008, B2-3.

³⁷ Satellite Industry Association *ex parte* letter dated March 5, 2008.

³⁸ DISH Network February 15, 2008, *ex parte* at 1.

³⁹ DIRECTV, *DIRECTV 10 In-Orbit Testing Underway* (press release), Sept. 14, 2007. ("While testing of DIRECTV 10's capability continues, it appears that a portion of the anticipated spot-beam capability may not be fully available.") See also DIRECTV March 10, 2008, *ex parte* at 7.

⁴⁰ DIRECTV: Rocket Failure Won't Stop HD Expansion, *Broadcasting and Cable*, Feb. 5, 2007, <http://www.broadcastingcable.com/article/CA6413222.html>. (explaining that the January 30, 2007, destruction of the NSS-8 satellite that also damaged the Sea-Launch platform did not damage DIRECTV's DIRECTV 11 satellite, but will necessitate a delay of several months for repairs).

⁴¹ DISH Network February 11, 2008, *ex parte* at 1. DISH Network asserts that it will require three additional satellites to meet its obligations. DIRECTV asserts that it will need at least one more satellite, in addition to the two already planned, to comply with an HD carry-one, carry-all requirement and that operation in the "reverse band" (17/24 GHz) or more Ka band spectrum will be necessary. DIRECTV March 10, 2008, *ex parte* at 1 and DIRECTV February 13, 2008, *ex parte* at 1-2.

expand its DBS capacity.⁴² DISH Network considers its next two satellites as replacements for existing satellites in its fleet, and expects little additional capacity as a result.⁴³ As both parties have attested, satellite construction and launch is a lengthy process, generally taking approximately four years.⁴⁴ Both parties have applications for satellites in the new 17/24 GHz BSS service, but these applications are currently pending and it is expected that the construction of the 17/24 GHz BSS satellites will take three years or longer.⁴⁵

11. Further, for satellite carriers, the capacity used for local channels is separate from the capacity used for national channels and the two are generally not interchangeable.⁴⁶ As a result, even if a local station is not presently broadcasting in HD or is only broadcasting a minimal amount of HD programming, a satellite carrier must set aside capacity when planning new satellite construction to accommodate the possibility of future HD programming. This capacity would go unused, or lie fallow, until the stations are actually broadcasting in HD.⁴⁷ Reservation of otherwise unused “fallow bandwidth” is particularly burdensome because a higher percentage of a satellite carrier’s capacity is dedicated to local channel carriage relative to the percentage necessary for a cable operator.⁴⁸ Thus, while the combined bandwidth of the satellite carriers’ entire fleets are substantially larger than that of a cable provider’s plant, neither DIRECTV’s nor EchoStar’s current fleet is capable of carrying in HD all the local stations of all the local-into-local markets they currently serve.

⁴² Sea Launch Current Mission: DIRECTV 11, http://www.sea-launch.com/current_launch.htm (visited Mar. 20, 2008).

⁴³ EchoStar 11 is intended as a replacement for EchoStar 6 located at 110° W.L. *Application for Launch and Operating Authority for EchoStar 11*, International Bureau File No. SAT-LOA-20070622-00085, Granted Jan. 11, 2008. AMC 14 is intended as a replacement for EchoStar 3 located at 61.5° W.L. *Application for Launch and Operating Authority for the AMC-14 Satellite*, International Bureau File No. SAT-LOA-20071221-00183, Filed Dec. 21, 2007. The satellite launched on March 19, 2008. Sky Report, March 20, 2008.

⁴⁴ See DIRECTV February 13, 2008, *ex parte* at 2. (“The design, construction, and launch of a new spot-beam satellite takes roughly four years – approximately six months to submit satellite specifications, three months to secure a manufacturer, thirty-six months to build and launch the satellite, three months to raise its orbit, and one month to test the satellite.”) See also DISH Network DBS Must Carry Overview and Support Materials, Mar. 12, 2008 at B1-2.

⁴⁵ The Commission’s milestone rules that apply to 17/24 GHz BSS satellites allow up to five years to launch and operate a spacecraft after grant of license. See 47 C.F.R. § 25.164(a).

⁴⁶ To carry a national channel in the spot beams set aside for local channels, a satellite carrier would be required to carry that national channel in *dozens* of spot beams covering the entire country, rather than once in a CONUS beam. Conversely, to carry a local channel on a transponder designated for CONUS service would be particularly inefficient as that channel could only be permissibly viewed in a single DMA.

⁴⁷ March 12, 2008, *ex parte* from DISH Network at 5 explaining that it reserved capacity to accommodate HD carriage for stations in Alaska and Hawaii and that approximately one-third, of this capacity, i.e. three transponders, remains empty today. DISH Network explains that this capacity cannot be repurposed but must remain available for broadcasters if and when they begin HD broadcasting.

⁴⁸ In a hypothetical market in which a cable operator wishes to provide 10 local channels and 200 national channels, approximately 5% of the cable operator’s capacity would be dedicated to local channels. If this hypothetical remains true across all 210 local markets and a satellite carrier wishes to provide the same 200 national channels, then the satellite carrier would be providing 2100 local channels (10 channels times 210 markets) and 200 national channels, thus dedicating over 91% of its capacity to local programming.

12. The record shows that satellite carriers have legitimate capacity concerns at this time.⁴⁹ A phased-in HD carriage requirement would not only give satellite carriers time to increase their capacity, but might also alleviate the problem of potential wasted capacity that might occur from bandwidth lying fallow. At this time, many stations, particularly those not affiliated with the top four networks, are broadcasting relatively little or no HD programming.⁵⁰ We believe the demand for such programming will increase as more consumers purchase HD equipment spurred on by falling equipment costs and a broader choice of available programming. With increased demand and assurance of future satellite carriage, broadcasters will be more likely to invest the funds necessary to begin HD broadcasting. A phased-in HD carriage requirement with a defined time schedule will encourage broadcasters in their HD efforts as well as help satellite carriers avoid having to reserve capacity for stations not ready to use it.

13. We adopt the phase-in schedule for satellite carriage of all HD signals in part to afford satellite carriers the time and flexibility to launch local-into-local service in more markets. They will be working on a wide array of technical issues as they develop HD carry-one, carry-all for their HD markets, and we strongly encourage them to keep nationwide service in mind as they design, develop, and plan the use of their capacity.

14. Although we do not adopt rules in this Order requiring the expansion of local-into-local service by satellite carriers, we recognize that the availability of local broadcast signals in markets unserved by satellite would constitute a significant consumer benefit. Currently 182 of 210 United States market areas have local-into-local service from at least one of the national satellite carriers.⁵¹ Satellite-delivered local-into-local service throughout the nation would promote competition, localism, and diversity, particularly where broadcast signals cannot be received off-air. In those areas, residents are dependent on cable — where available — for the important local news, weather, and emergency information provided by local broadcasters. Thus, expanded satellite-delivered local-into-local service in all 210 television markets would serve the public interest.⁵²

D. Other Issues

15. *Carriage Election.* Pursuant to the Commission's decision in this Order, in any market in which a satellite carrier is currently offering or in the future offers local-into-local service pursuant to the statutory copyright license in 17 U.S.C. § 122, it must carry digital-only stations in that market upon request. In markets currently subject to "carry-one, carry-all," the rules pertaining to new stations will govern carriage elections for digital-only stations (whether new stations or stations that have returned

⁴⁹ We note that the Commission has initiated two proceedings that would expand available satellite spectrum. Use of this spectrum will not be possible, however, until completion of the satellite design, construction, and launch process that can not begin until after new spectrum is actually assigned. See *Establishment of Policies and Service Rules for the Broadcasting-Satellite Service at the 17.3-17.8 GHz Frequency Band Internationally, and at the 24.75-25.25 GHz Frequency Band for Fixed Satellite Services Providing Feeder Links to the Broadcasting-Satellite Service and for the Satellite Services Operating Bi-directionally in the 17.3-17.8 GHz Frequency Band*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 8842 (2007); *Amendment of the Commission's Policies and Rules for Processing Applications in the Direct Broadcast Satellite Service, Feasibility of Reduced Orbital Spacing for Provision of Direct Broadcast Satellite Service in the United States*, Notice of Proposed Rulemaking, 21 FCC Rcd 9443 (2006).

⁵⁰ DISH Network March 12, 2008, *ex parte* at 6.

⁵¹ *Id.* at Tab 8.

⁵² We note that DBS providers are not required to offer service to all residents of a local-into-local DMA, but are required to provide all stations if any service is provided. See *2000 DBS Order*, 16 FCC Rcd. 1918 at para 42.

their analog spectrum) and satellite carriers.⁵³ We do not believe it is necessary to amend the rule concerning new stations, but we determine in this Order that a station that turns off its analog signal and returns its licensed spectrum to the Commission and commences operation in digital-only prior to January 1, 2009 constitutes a “new station” for purposes of this rule. For markets in which local-into-local service is initiated after the release of this Order, stations and carriers should follow the rules for “new local-into-local service.”⁵⁴ By operation of this Order, digital-only stations are entitled to request carriage.⁵⁵

16. In compliance with the statutory mandate in Section 325 of the Act, the Commission established a regular schedule for carriage elections.⁵⁶ In accordance with this schedule, the Act requires broadcasters to elect, by October 1, 2008, whether they wish to engage in retransmission consent negotiations with satellite carriers or request mandatory carriage for the three-year period beginning January 1, 2009.⁵⁷ We conclude here that if a station elects must carry on October 1, 2008, for the 2009-2011 carriage cycle, satellite carriers must provide carriage of the station’s analog signal beginning (or continuing) on January 1, 2009, and concluding no earlier than the actual termination of analog service by that broadcaster. Once the station terminates analog service and begins broadcasting in digital, the carrier shall commence carriage of the station’s digital signal without any gap in carriage. To facilitate carriage and the final transition process, beginning January 1, 2009, satellite carriers must immediately commence carriage of the digital signal of stations that cease analog broadcasting prior to the February 17, 2009, statutory deadline,⁵⁸ provided, however, that broadcasters must notify the satellite carrier(s) on or before October 1, 2008, of the date on which they anticipate termination of their analog signal if it will be earlier than February 17, 2009.

17. Program-Related. The Commission’s rules for satellite carriage, adopted to implement Section 338(j) of the Act, include the same program-related requirements as apply to cable.⁵⁹ We

⁵³ See 47 C.F.R. § 76.66(d)(3).

⁵⁴ See 47 C.F.R. § 76.66(d)(2). This rule requires satellite carriers to notify each television broadcast station in a local market that the satellite carrier is commencing carriage in that market. We are amending this rule to require separate notification of the launch of full HD carriage. See note 27, *supra*.

⁵⁵ 47 C.F.R. § 76.66(d)(2). See also 47 C.F.R. § 76.66(d)(1)(iii). Amendments to this rule are subject to OMB approval under the Paperwork Reduction Act. We note that as part of their transition preparation, satellite carriers are beginning to carry the digital signal of local stations in lieu of the analog signal. See DIRECTV March 10, 2008, *ex parte* at 4; DISH Network DBS Must Carry Overview and Support Materials, Mar. 12, 2008 at A.3. We commend their voluntary efforts and the cooperation of the local stations involved. See *Third Periodic Review of the Commission’s Rules and Policies Affecting the Conversion To Digital Television*, MB Docket 07-91, Report and Order, 23 FCC Rcd 2994 (2007) (“*Third DTV Periodic Review*”), at Section V. G., ¶¶ 170-178. Local stations that have only a digital signal and that request carriage should be included in these efforts.

⁵⁶ 47 U.S.C. § 325(b)(3)(C)(i).

⁵⁷ Full-power broadcasters may choose to be carried on all of those cable systems in the same DMA to which they can deliver a good quality signal (must-carry), or they may choose to require those cable systems to seek the broadcaster’s consent before carrying the signal (retransmission consent). The broadcaster must notify affected cable systems if electing retransmission consent, or the station’s status will default to must-carry. 47 C.F.R. § 76.64.

⁵⁸ The *Third DTV Periodic Review* concluded that it is necessary to the completion of the transition to allow stations the flexibility to permanently reduce and/or terminate their analog service before the statutory deadline if necessary to achieve their transition. See generally, *Third DTV Periodic Review*, Section V.C.2 (analog service termination) and accompanying notes.

⁵⁹ See 47 U.S.C. §§ 338(j), 534(b)(3), 535(g)(1). Sections 614(b)(3)(A) and 615(g)(1) require carriage of program-related material. See 47 U.S.C. §§ 534(b)(3)(A), 535(g)(1). See also, *2000 DBS Order*, 16 FCC Rcd 1918 at paras. 104, 105.

conclude that certain over-the-air digital services, such as closed-captioning information and V-chip information, are sufficiently and incontrovertibly related to the broadcaster's primary digital video programming such that satellite carriers will be required to carry them when they carry a digital-only station (as we also require in the cable context).⁶⁰

18. Signal Quality. With respect to signal quality, because broadcast of digital signals differs from broadcast of analog signals, we must adjust the requirement for a good quality signal. In the context of cable carriage, the Commission has stated that the signal level necessary to provide a good quality digital television signal at a cable system's principal headend is -61 dBm.⁶¹ Broadcast stations must similarly deliver a good quality signal to a satellite carrier's designated local receive facility.⁶² For purposes of carriage by satellite carriers, we determine that -61 dBm is the signal level necessary to provide a good quality digital television signal at a satellite carrier's local receive facility. This is the same digital signal quality standard that our rules require in the cable context, and is consistent with our adoption of the same analog signal level for satellite as we used for cable carriage of analog signals.⁶³ The technology available to cable carriers for digital television signal reception is also available to satellite carriers, and there is nothing in the record to suggest that satellite carriers would require a different digital television signal level to obtain the reception quality necessary to carry the digital television signal. We therefore adopt this signal level.

IV. MEMORANDUM OPINION AND ORDER—WHDT-DT APPLICATION FOR REVIEW

19. Guenter Marksteiner, licensee of television station WHDT-DT, Stuart, Florida (Ind. Ch. 59) filed a carriage complaint against EchoStar Communications Corporation ("EchoStar") challenging its refusal to carry the high definition digital television signal of WHDT-DT on its direct broadcast satellite system.⁶⁴ In light of our decision in this *Second Report and Order*, we grant the Application for Review filed by Guenter Marksteiner, licensee of television station WHDT-DT, Stuart, Florida (Ind. Ch. 59), seeking reversal of the Media Bureau's denial of WHDT's carriage complaint with respect to carriage of the station's digital signal. Carriage of the station's HD signal will be subject to the rules adopted herein providing for a phased-in HD carry-one, carry-all requirement.⁶⁵

20. We note that the Bureau's decision found that the Bureau lacked the authority to act on complaints regarding satellite carriage of digital television signals in the absence of Commission rules on the issue.⁶⁶ By this *Second Report and Order* we adopt such rules and order carriage of WHDT-DT, provided the station delivers a good quality signal to EchoStar's local receive facility for the West Palm Beach-Ft. Pierce DMA, consistent with our rules.⁶⁷

⁶⁰ See *First Report and Order*, 16 FCC Rcd at 2624.

⁶¹ See *First Report and Order*, 16 FCC Rcd at 2617, ¶¶ 44-46.

⁶² See 47 U.S.C. § 338(b)(1).

⁶³ *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, 16 FCC Rcd 1918 at ¶ 64 (2000) ("*DTV Local TV Signal Carriage Report and Order*").

⁶⁴ See *WHDT v. EchoStar*, 18 FCC Rcd 396 (MB 2003) ("WHDT Order").

⁶⁵ See amended Section 76.66(k)(2) set forth in Appendix B.

⁶⁶ WHDT Order ¶ 8.

⁶⁷ 47 C.F.R. §§ 76.66(a)(4) and (g).

V. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

21. We seek comment on the scope of satellite carriers' carriage obligations under Section 338 of the Act as the HD carriage requirement becomes effective. In those markets, satellite carriers will be carrying the HD signals from all stations broadcasting in HD. But many subscribers in those markets may not have HD-capable set-top boxes on all sets connected to the DBS system. In such markets, carriage of only an HD signal would mean that those subscribers without HD-capable equipment would not be able to view the programming.

22. In such circumstances, satellite carriers may wish to provide separate SD broadcast feeds in addition to the mandated HD feeds. We seek comment on whether satellite carriers should be required to carry the signals of *all* local broadcast stations in HD and SD if they carry the signals of *any* local station in the same market in both HD and SD. That is, we seek comment on whether the Act would prohibit satellite carriers from carrying some broadcast stations in both HD and SD but not others – e.g., under the carry-one, carry-all provisions of Section 338(a) of the Act or the non-discrimination provisions of Section 338(d) of the Act.

23. We also seek comment on the applicability of Section 338(g)(2) of the Act, added in 2004, which provides that “[i]f the carrier retransmits signals in the digital television service, the carrier shall retransmit such digital signals in such market by means of a single reception antenna and associated equipment.”⁶⁸ In local markets where a satellite carrier carries the signal of at least one local broadcaster in both HD and SD format, we seek comment on whether this provision requires that the operator do so for all broadcast stations in that market.

24. Finally, we seek comment on the Petition for Rulemaking filed by Rancho Palos Verdes (“RPV Petition”), which asks the Commission to adopt rules for satellite carriers that would be similar to the “viewability” provisions governing cable operators.⁶⁹ The statutory bases for the cable viewability rules do not appear to have express DBS equivalents. We seek comment on whether satellite carriers nonetheless have an obligation, under Sections 338(a), (d), (g), or any other provision, to provide all subscribers in a local-into-local market with the ability to view all stations carried pursuant to carry-one, carry-all requirements. As a policy matter, should the Commission impose such a requirement in the interests of regulatory parity and for the benefit of consumers?

25. Requiring similar treatment among broadcast stations could help ensure that consumers in local-into-local markets continue to receive all of their local broadcast signals, regardless of their subscription package. On the other hand, we seek comment on the impact of such a requirement on satellite carriers' ability to add local-into-local markets or to meet the HD implementation schedule set forth in the Order. We seek comment on these and any other legal, factual, or policy issues raised by the above discussion.

⁶⁸ 47 U.S.C. § 338(g)(2).

⁶⁹ Petition for Rulemaking filed by Rancho Palos Verdes Broadcasters, Inc. (filed Jan. 15, 2008).

VI. PROCEDURAL MATTERS

A. Second Report and Order

1. Final Regulatory Flexibility Act Analysis

26. As required by the Regulatory Flexibility Act of 1980 (“RFA”),⁷⁰ the Commission has prepared a Final Regulatory Flexibility Analysis (“FRFA”) relating to this *Second Report and Order*. The FRFA is set forth in Appendix A.

2. Paperwork Reduction Act of 1995 Analysis

27. The *Second Report and Order* has been analyzed with respect to the Paperwork Reduction Act of 1995 (“PRA”).⁷¹ This document contains new and/or modified information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. It will be submitted to the Office of Management and Budget (“OMB”) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we have assessed “the information collection burden for small business concerns with fewer than 25 employees.” We find that there is unlikely to be an increased administrative burden on businesses with fewer than 25 employees. Although we believe that some small business concerns with fewer than 25 employees will be impacted by the rules adopted herein, we do not believe that the requirements imposed in this document will create an information collection burden for these entities.

3. Congressional Review Act

28. The Commission will include a copy of this *Second Report and Order and Memorandum Opinion and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

B. Second Further Notice of Proposed Rulemaking

1. Initial Regulatory Flexibility Analysis

29. As required by the Regulatory Flexibility Act of 1980 (“RFA”),⁷² the Commission has prepared an Initial Regulatory Flexibility Analysis (“IRFA”) relating to this *Second Further Notice of Proposed Rulemaking*. The IRFA is set forth in Appendix B.

2. Initial Paperwork Reduction Act Analysis

30. This *Second Further Notice of Proposed Rulemaking* has been analyzed with respect to the PRA and does not contain proposed information collection requirements. In addition, therefore, it

⁷⁰ *See* 5 U.S.C. § 604. The RFA, *see* 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (“CWAAA”).

⁷¹ The Paperwork Reduction Act of 1995 (“PRA”), Pub. L. No. 104-13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

⁷² *See* 5 U.S.C. § 603.

does not contain any new or modified “information collection burden for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002.⁷³

3. Ex Parte Rules

31. Permit-But-Disclose. 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 Commission’s Rules.⁷⁴ *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.⁷⁵ Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

4. Filing Requirements

32. Comments and Replies. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules,⁷⁶ interested parties may file comments on or before 30 days after publication in the Federal Register, and reply comments on or before 45 days after publication in the Federal Register using: (1) the Commission’s Electronic Comment Filing System (“ECFS”), (2) the Federal Government’s eRulemaking Portal, or (3) by filing paper copies.⁷⁷

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.
 - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. 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, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, “get form.” A sample form and directions will be sent in response.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission’s

⁷³ The Small Business Paperwork Relief Act of 2002 (“SBPRA”), Pub. L. No. 107-198, 116 Stat 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); *see* 44 U.S.C. § 3506(c)(4).

⁷⁴ *See* 47 C.F.R. § 1.1206(b); *see also* 47 C.F.R. §§ 1.1202, 1.1203.

⁷⁵ *See id.* § 1.1206(b)(2).

⁷⁶ *See* 47 CFR §§ 1.415, 1.419.

⁷⁷ *See Electronic Filing of Documents in Rulemaking Proceedings*, 13 FCC Rcd 11322 (1998).

Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

33. Availability of Documents. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.

34. Accessibility Information. To request information in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at: <http://www.fcc.gov>.

C. Additional Information

35. For more information on this *Second Report and Order and Second Further Notice of Proposed Rule Making*, please contact Lyle Elder, Lyle.Elder@fcc.gov, or Eloise Gore, Eloise.Gore@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

VII. ORDERING CLAUSES

36. Accordingly, **IT IS ORDERED**, that, pursuant to authority found in Sections 4(i), 4(j), 303(r), 325, 336, 338, 614, and 615 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 325, 336, 338, 534, and 535, this *Second Report and Order* is HEREBY ADOPTED and the Commission's Rules **ARE HEREBY AMENDED** as set forth in Appendix C of this Order, and shall become effective 30 days after publication in the Federal Register except that: the requirement that broadcasters notify the satellite carrier of the date on which they anticipate termination of their analog signal (discussed in paragraph 16 of the Order), and Rule 76.66(d)(2)(vi), contain new information collection requirements under the PRA and shall not be effective until the FCC publishes a document in the Federal Register announcing OMB approval of and the effective date of these information collections. Also, Rules 76.66(d)(1)(ii), (iii), and (iv), 76.66(d)(2)(i), (ii), (iv), and (v), 76.66(d)(3), 76.66(d)(5)(i), 76.66(f)(3) and (4), 76.66(h)(5), and 76.66(m)(1) and (2) contain information collection requirements under the PRA that are modified by the changes to 76.66(b)(1), and shall not be effective as to stations to which these rules previously did not apply until the Commission publishes a document in the Federal Register announcing OMB approval of and the effective date of these information collections with respect to such stations.

37. **IT IS FURTHER ORDERED** that a station that commences operation as digital-only after this *Second Report and Order* is effective but before January 1, 2009, either because it is licensed to broadcast only a digital signal or because it turns off its analog signal and returns its licensed spectrum to the Commission and commences operation in digital-only, constitutes a "new station" for purposes of

Section 76.66(d)(3) of the Commission's Rules, 47 C.F.R. § 76.66(d)(3), and may request carriage as provided in that rule.

38. **IT IS FURTHER ORDERED** that the Application for Review filed by Guenter Marksteiner, licensee of digital television station WHDT-DT, Stuart, Florida, IS GRANTED to the extent described herein.

39. **IT IS FURTHER ORDERED** that the Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Second Report and Order, Memorandum Opinion and Order, and Second Further Notice of Proposed Rule Making*, including the Final and Initial Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

40. **IT IS FURTHER ORDERED** that the Commission SHALL SEND a copy of this *Second Report and Order and Second Further Notice of Proposed Rule Making* in a report to be sent to Congress and the General Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Further Notice of Proposed Rulemaking (Notice)*.² The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

A. Need for, and Objectives of, the Report and Order

2. This *Report and Order* adopts rules requiring satellite carriers to carry digital-only stations upon request in markets in which they are providing any local-into-local service pursuant to the statutory copyright license,⁴ and to require carriage of all high definition (“HD”) signals in a market in which any station’s signals are carried in HD. In recognition of the capacity and technological constraints faced by satellite carriers, the latter requirement will be phased-in over a four-year period. Our goals in adopting these rules are to facilitate the nation’s transition to digital broadcast television; to ensure that satellite subscribers will be able to experience the benefits of the digital transition by continued access to broadcast signals after the digital transition; and to ensure consistency with Section 338’s instructions that the Commission implement comparable, rather than identical, carriage rules between cable and DBS.

B. Summary of Issues Raised by Public Comments in Response to the IRFA

3. None.

C. Description and Estimate of the Number of Small Entities to Which the Report and Order Will Apply

4. The RFA 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 rules adopted herein.⁵ The RFA 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.⁶ 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 Administration (SBA).⁷ The rules adopted herein will directly affect small television broadcast stations and small satellite carriers. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission’s Rules and Implementation of the Satellite Home Viewer Improvement Act of 1999, *First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 2598, App. C (2001) (Notice).

³ See 5 U.S.C. § 604.

⁴ See amended rule Section 76.66(b) in Appendix C, *supra*.

⁵ 5 U.S.C. § 604(b).

⁶ 5 U.S.C. § 601(3) and (6).

⁷ 15 U.S.C. § 632.

5. *Television Broadcasting.* The SBA defines a television broadcasting station as a small business if such station has no more than \$13.0 million in annual receipts.⁸ Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.”⁹ The Commission has estimated the number of licensed commercial television stations to be 1,376.¹⁰ According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database (BIA) on March 30, 2007, about 986 of an estimated 1,374 commercial television stations (or approximately 72 percent) have revenues of \$13.0 million or less and thus qualify as small entities under the SBA definition. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations¹¹ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 380.¹² The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

6. In addition, 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 estimate 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. Also as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

7. *Satellite Carriers.* The term “satellite carrier” includes entities providing services as described in 17 U.S.C. § 119(d)(6) using the facilities of a satellite or satellite service licensed under Part 25 of the Commission’s rules to operate in Direct Broadcast Satellite (DBS) or Fixed-Satellite Service (FSS) frequencies.¹³ As a general practice, not mandated by any regulation, DBS licensees usually own and operate their own satellite facilities as well as package the programming they offer to their subscribers. In contrast, satellite carriers using FSS facilities often lease capacity from another entity that

⁸ See 13 C.F.R. § 121.201, NAICS Code 515120.

⁹ *Id.* This category description continues, “These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources.” Separate census categories pertain to businesses primarily engaged in producing programming. See Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

¹⁰ See News Release, “Broadcast Station Totals as of December 31, 2006” 2007 WL 221575 (dated Jan. 26, 2007) (“Broadcast Station Totals”); see http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269784A1.doc.

¹¹ “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 C.F.R. § 121.103(a)(1).

¹² See *Broadcast Station Totals*, *supra* FRFA note 11.

¹³ Part 100 of the Commission’s rules was eliminated in 2002 and now both FSS and DBS satellite facilities are licensed pursuant to Part 25 of the rules. *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331 (2002); 47 C.F.R. § 25.148.

is licensed to operate the satellite used to provide service to subscribers. These entities package their own programming and may or may not be Commission licensees themselves. In addition, a third situation may include an entity using a non-U.S. licensed satellite to provide programming to subscribers in the United States pursuant to a blanket earth station license.¹⁴ Since 2007, the SBA has recognized satellite television distribution services within the broad economic census category of Wired Telecommunications Carriers.¹⁵ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. The most current Census Bureau data, however, are from the last economic census of 2002, and we will use those figures to gauge the prevalence of small businesses in this category. Those size standards are for the two census categories of “Satellite Telecommunications” and “Other Telecommunications.” Under both prior categories, such a business was considered small if it had \$13.5 million or less in average annual receipts.¹⁶

8. *Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber’s location. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Wired Telecommunications Carriers.¹⁷ However, as discussed above, we rely on the previous size standard, Cable and Other Subscription Programming, which provides that a small entity is one with \$13.5 million or less in annual receipts.¹⁸ Currently, only two operators – DirecTV¹⁹ and EchoStar Communications Corporation (“EchoStar”)²⁰ – hold licenses to provide DBS service, which requires a great investment of capital for operation. Both currently offer subscription services and report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we acknowledge the possibility that there are entrants in this field that may not yet have generated \$13.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

9. *Fixed-Satellite Service (“FSS”).* The FSS is a radiocommunication service between earth stations at a specified fixed point or between any fixed point within specified areas and one or more satellites.²¹ The FSS, which utilizes many earth stations that communicate with one or more space stations, may be used to provide subscription video service. Therefore, to the extent FSS frequencies are used to provide subscription services, FSS falls within the SBA-recognized definition of Wired

¹⁴ See, e.g., *Application Of DirecTV Enterprises, LLC, Request For Special Temporary Authority for the DirecTV 5 Satellite*; *Application Of DirecTV Enterprises, LLC, Request for Blanket Authorization for 1,000,000 Receive Only Earth Stations to Provide Direct Broadcast Satellite Service in the U.S. using the Canadian Authorized DirecTV 5 Satellite at the 72.5° W.L. Broadcast Satellite Service Location*, 19 FCC Rcd. 15529 (Sat. Div. 2004).

¹⁵ 13 C.F.R. § 121.201, NAICS code 517110 (2007).

¹⁶ 13 C.F.R. § 121.201, NAICS codes 517410 and 517910 (2002).

¹⁷ 13 C.F.R. § 121.201, NAICS Code 517110 (2007).

¹⁸ 13 C.F.R. § 121.201, NAICS Code 515210 (2002).

¹⁹ DirecTV is the largest DBS operator and the second largest MVPD, serving an estimated 14.67 million subscribers nationwide, as of June 2005; see *2005 Cable Competition Report*, 21 FCC Rcd at 2540 ¶ 73.

²⁰ EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and the third largest MVPD, serving an estimated 11.45 million subscribers nationwide, as of June 2005. *Id.*

²¹ See 47 C.F.R. § 2.1(c).

Telecommunications Carriers.²² However, as discussed above, we rely on the previous size standard, Cable and Other Subscription Programming, which provides that a small entity is one with \$13.5 million or less in annual receipts.²³ Although a number of entities are licensed in the FSS, not all such licensees use FSS frequencies to provide subscription services. Both of the DBS licensees (EchoStar and DirecTV) have indicated interest in using FSS frequencies to broadcast signals to subscribers. It is possible that other entities could similarly use FSS frequencies, although we are not aware of any entities that might do so.

D. Description of Projected Reporting, Record Keeping, and Other Compliance Requirements for Small Entities

10. The rules adopted by this *Report and Order* primarily impose requirements on satellite carriers, and as discussed above few if any satellite carriers qualify as small entities. They require satellite carriers to carry digital-only stations upon request in markets in which they are providing any local-into-local service pursuant to the statutory copyright license, and require carriage of all HD signals in a market in which any station's signals are carried in HD. The carriage election rule requires notice to satellite carriers from broadcasters, including small broadcasters, but the *Report and Order* makes no changes to the rule. The one-time requirement that broadcasters notify satellite carriers of their station's transition date when making their carriage election is a *de minimis* additional burden on small broadcasters.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

11. 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 (among others): (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.²⁴

12. As a result of these rules, any small satellite carriers will face additional costs if they choose to provide local-into-local service, in that these rules impose additional requirements on the provision of local-into-local service, compliance with which will require the use of more technical capability than would otherwise have been the case. We note that these costs will not be any greater for small than for large companies, and we find that these rules are necessary in order to achieve the Commission's goals, discussed above.

13. As noted above, any additional costs borne by small broadcasters will be *de minimis*, consisting solely of additional information being provided in an existing communication. Furthermore, this additional information is designed to benefit broadcasters, by ensuring that their signals are carried without interruption after the transition. Thus, no alternative rule would be appropriate.

²² 13 C.F.R. § 121.201, NAICS Code 517110 (2007).

²³ 13 C.F.R. § 121.201, NAICS code 515210 (2002).

²⁴ 5 U.S.C. § 603(c)(1) – (c)(4).

F. Report to Congress

14. The Commission will send a copy of the *Second Report and Order*, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.²⁵ In addition, the Commission will send a copy of the *Second Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Second Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register.²⁶

²⁵ See 5 U.S.C. § 801(a)(1)(A).

²⁶ See 5 U.S.C. § 604(b).

APPENDIX B

Initial Regulatory Flexibility Analysis For the *Second Further Notice*

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),¹ the Commission has prepared this Initial Regulatory Flexibility Analysis (“IRFA”) of the possible economic impact on a substantial number of small entities by the policies and rules proposed in this *Second Further Notice of Proposed Rulemaking* (“*Second Further 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 *Second Further Notice* as indicated on the first page of the Order. The Commission will send a copy of the *Second Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).² In addition, the *Second Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposals

2. This *Second Further Notice* seeks comment on the scope of satellite carriers’ carriage obligations under Section 338 of the Act as the HD carriage requirement becomes effective. It asks whether satellite carriers should be required to carry the signals of *all* local broadcast stations in HD and SD if they carry the signals of *any* local station in the same market in both HD and SD. It also asks whether satellite carriers have an obligation, under Sections 338(a), (d), (g), or any other provision, to provide all subscribers in a local-into-local market with the ability to view all stations carried pursuant to carry-one, carry all requirements. It seeks comment on whether, as a policy matter, the Commission should impose such a requirement, and on the impact of such a requirement on satellite carriers’ ability to add local-into-local markets or to meet the HD implementation schedule set forth in the Order. Finally, it seeks comment on any other legal, factual or policy issues raised by the discussion in the *Further Notice* itself.

B. Legal Basis

3. The authority for the action proposed in this rulemaking is contained in Sections 4(i), 4(j), 303(r), 325, 336, 338, 614, and 615 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 325, 336, 338, 534, and 535.

C. Description and Estimate of the Number of Small Entities To Which the Proposals Will Apply

4. The RFA 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 rules adopted herein.⁴ The RFA 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.⁵ Under the Small Business Act, a small business concern is one which: (1) is independently owned and operated; (2) is not

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ See *id.*

⁴ 5 U.S.C. § 604(b).

⁵ 5 U.S.C. § 601(3) and (6).

dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁶ The rules adopted herein will directly affect small television broadcast stations and small satellite carriers. A description of these small entities, as well as an estimate of the number of such small entities, is provided below.

5. *Television Broadcasting.* The SBA defines a television broadcasting station as a small business if such station has no more than \$13.0 million in annual receipts.⁷ Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.”⁸ The Commission has estimated the number of licensed commercial television stations to be 1,376.⁹ According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database (BIA) on March 30, 2007, about 986 of an estimated 1,374 commercial television stations¹⁰ (or approximately 72 percent) have revenues of \$13.0 million or less and thus qualify as small entities under the SBA definition. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations¹¹ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 380.¹² The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

6. In addition, 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 estimate 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. Also as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

⁶ 15 U.S.C. § 632.

⁷ See 13 C.F.R. § 121.201, NAICS Code 515120.

⁸ *Id.* This category description continues, “These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources.” Separate census categories pertain to businesses primarily engaged in producing programming. See Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

⁹ See News Release, “Broadcast Station Totals as of December 31, 2006” 2007 WL 221575 (dated Jan. 26, 2007) (“*Broadcast Station Totals*”); see http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269784A1.doc.

¹⁰ We recognize that this total differs slightly from that contained in Broadcast Station Totals, supra FRFA note 23; however, we are using BIA’s estimate for purposes of this revenue comparison.

¹¹ “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 C.F.R. § 121.103(a)(1).

¹² See *Broadcast Station Totals*, supra FRFA note 11.

7. *Satellite Carriers.* The term “satellite carrier” includes entities providing services as described in 17 U.S.C. § 119(d)(6) using the facilities of a satellite or satellite service licensed under Part 25 of the Commission’s rules to operate in Direct Broadcast Satellite (“DBS”) or Fixed-Satellite Service (“FSS”) frequencies.¹³ As a general practice, not mandated by any regulation, DBS licensees usually own and operate their own satellite facilities as well as package the programming they offer to their subscribers. In contrast, satellite carriers using FSS facilities often lease capacity from another entity that is licensed to operate the satellite used to provide service to subscribers. These entities package their own programming and may or may not be Commission licensees themselves. In addition, a third situation may include an entity using a non-U.S. licensed satellite to provide programming to subscribers in the United States pursuant to a blanket earth station license.¹⁴ Since 2007, the SBA has recognized satellite television distribution services within the broad economic census category of Wired Telecommunications Carriers.¹⁵ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. The most current Census Bureau data, however, are from the last economic census of 2002, and we will use those figures to gauge the prevalence of small businesses in this category. Those size standards are for the two census categories of “Satellite Telecommunications” and “Other Telecommunications.” Under both prior categories, such a business was considered small if it had \$13.5 million or less in average annual receipts.¹⁶

8. *Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber’s location. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Wired Telecommunications Carriers.¹⁷ However, as discussed above, we rely on the previous size standard, Cable and Other Subscription Programming, which provides that a small entity is one with \$13.5 million or less in annual receipts.¹⁸ Currently, only two operators – DirecTV¹⁹ and EchoStar Communications Corporation (“EchoStar”)²⁰ – hold licenses to provide DBS service, which requires a great investment of capital for operation. Both currently offer subscription services and report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we acknowledge the possibility that there are entrants in this field that may not

¹³ Part 100 of the Commission’s Rules was eliminated in 2002 and now both FSS and DBS satellite facilities are licensed pursuant to Part 25 of the rules. *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331 (2002); 47 C.F.R. § 25.148.

¹⁴ See, e.g., *Application Of DirecTV Enterprises, LLC, Request For Special Temporary Authority for the DirecTV 5 Satellite*; *Application Of DirecTV Enterprises, LLC, Request for Blanket Authorization for 1,000,000 Receive Only Earth Stations to Provide Direct Broadcast Satellite Service in the U.S. using the Canadian Authorized DirecTV 5 Satellite at the 72.5° W.L. Broadcast Satellite Service Location*, 19 FCC Rcd. 15529 (Sat. Div. 2004).

¹⁵ 13 C.F.R. § 121.201, NAICS code 517110 (2007).

¹⁶ 13 C.F.R. § 121.201, NAICS codes 517410 and 517910 (2002).

¹⁷ 13 C.F.R. § 121.201, NAICS Code 517110 (2007).

¹⁸ 13 C.F.R. § 121.201, NAICS Code 515210 (2002).

¹⁹ DirecTV is the largest DBS operator and the second largest MVPD, serving an estimated 14.67 million subscribers nationwide, as of June 2005; see *2005 Cable Competition Report*, 21 FCC Rcd at 2540 ¶ 73.

²⁰ EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and the third largest MVPD, serving an estimated 11.45 million subscribers nationwide, as of June 2005. *Id.*

yet have generated \$13.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

9. *Fixed-Satellite Service (“FSS”)*. The FSS is a radiocommunication service between earth stations at a specified fixed point or between any fixed point within specified areas and one or more satellites.²¹ The FSS, which utilizes many earth stations that communicate with one or more space stations, may be used to provide subscription video service. Therefore, to the extent FSS frequencies are used to provide subscription services, FSS falls within the SBA-recognized definition of Wired Telecommunications Carriers.²² However, as discussed above, we rely on the previous size standard, Cable and Other Subscription Programming, which provides that a small entity is one with \$13.5 million or less in annual receipts.²³ Although a number of entities are licensed in the FSS, not all such licensees use FSS frequencies to provide subscription services. Both of the DBS licensees (EchoStar and DirecTV) have indicated interest in using FSS frequencies to broadcast signals to subscribers. It is possible that other entities could similarly use FSS frequencies, although we are not aware of any entities that might do so.

D. Description of Projected Reporting, Record Keeping, and other Compliance Requirements for Small Entities

10. The *Second Further Notice* seeks comment on rules that would primarily impose requirements on satellite carriers, and as discussed above few if any satellite carriers qualify as small entities. Small satellite carriers currently have obligations with respect to carriage of local commercial and non-commercial broadcast stations. The obligations would be increased by the rules contemplated in this Further Notice, but would not change in kind. As with existing statutory and regulatory requirements, small satellite carriers will need engineering and legal services to comply with the proposed rules, but if the proposed rules are implemented we do not anticipate that this need will be any different for small carriers than for large carriers. Small broadcast stations would be affected by the proposed rules, although likely in a positive way, and could be affected by other proposals raised in response to the *Further Notice*. Also, initially, broadcasters may need additional legal services.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

11. 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 (among others): (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.²⁴ We seek comment on the applicability of any of these alternatives to affected small entities.

12. The requirements proposed in the *Second Further Notice* would in most cases create minimal economic impact on small entities, and in some cases could provide positive economic impact. Station licensees and other parties are encouraged to submit comment on the proposals’ impact on small

²¹ See 47 C.F.R. § 2.1(c).

²² 13 C.F.R. § 121.201, NAICS Code 517110 (2007).

²³ 13 C.F.R. § 121.201, NAICS code 515210 (2002).

²⁴ 5 U.S.C. § 603(c)(1) – (c)(4).

television stations. Every effort will be made to minimize the impact of any adopted proposals on small satellite carriers. Finally, we are mindful of the potential concerns of small entities and will, therefore, continue to carefully scrutinize our policy determinations going forward. We invite small entities to submit comment on how the Commission could further minimize potential burdens on small entities if the proposals provided in the *Second Further Notice*, or those submitted into the record, are ultimately adopted.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

13. None.

APPENDIX C

Amended Rules¹

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 76 – Multichannel Video and Cable Television Service

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 336, 339, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.66 is revised to read as follows:**§ 76.66 Satellite Broadcast Signal Carriage**

* * * * *

* * * * *

(b)(1) 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) of title 47, United States Code, and other paragraphs in this section. **Satellite carriers are required to carry digital-only stations upon request in markets in which the satellite carrier is providing any local-into-local service pursuant to the statutory copyright license.**

* * * * *

(d)(2)(vi) Satellite carriers shall notify all local stations in a market of their intent to launch HD carry-one, carry-all in that market at least 60 days before commencing such carriage.

* * * * *

(k) *Material degradation.*

(1) Each local television station whose signal is carried under mandatory carriage shall, to the extent technically feasible and consistent with good engineering practice, be provided with the same quality of signal processing provided to television stations electing retransmission consent, **including carriage of HD signals in HD if any local station in the same market is carried in HD.** A satellite carrier is permitted to use reasonable digital compression techniques in the carriage of local television stations.

(2) Satellite carriers must provide carriage of local stations' HD signals if any local station in the same market is carried in HD , pursuant to the following schedule:

¹ Changes are indicated in **bold**.

- (i) In at least 15% of the markets in which they carry any station pursuant to the statutory copyright license in HD by February 17, 2010;**
- (ii) In at least 30% of the markets in which they carry any station pursuant to the statutory copyright license in HD no later than February 17, 2011;**
- (iii) In at least 60% of the markets in which they carry any station pursuant to the statutory copyright license in HD no later than February 17, 2012; and**
- (iv) In 100% of the markets in which they carry any station pursuant to the statutory copyright license in HD by February 17, 2013.**

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

Re: In the Matter of Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues and Retransmission Consent Issues; WHDT-DT, Channel 59, Stuart, Florida, Application for Review, CSR-5978-M, Second Report and Order, and Memorandum Opinion and Order

Last fall, the Commission adopted an order that guarantees that all cable customers will be able to watch all broadcast stations after the digital transition. Specifically, the Commission took action to ensure cable operators continue to make signals of all broadcast stations viewable after the transition, as the statute requires. As a result, we significantly reduced the number of Americans potentially needing a converter box to watch broadcast stations post-transition. Thus, the Commission made sure the 34 million households that subscribe to analog cable will be able to continue to watch broadcast television after the transition as they did the day before. This allowed the Commission to focus its energies on assisting the over 14 million households that rely exclusively on over-the-air signals.

Today, the Commission adopts an order that will enable satellite subscribers to receive digital broadcast signals, as well. The Act requires that when a satellite operator chooses to carry any local broadcast signal, it must carry all full power local broadcast signals in that same market. The item adopted today clarifies that, in such a "local-into-local" market, where a full power television station is broadcasting only in digital the satellite operator must carry that digital signal upon request. This clarification is critical to ensuring that satellite customers, like cable customers, will continue to receive the same broadcast stations they saw the day before the transition on the day after the transition. We also require satellite carriers to carry each station in the market on the same terms, including carriage of HD signals in HD format if any broadcaster in the same market is carried in HD.

We continue to strive for regulatory parity in our policymaking. In this case, as it was last fall in the cable context, the American consumer is, and continues to be, our highest priority. Without the proper policies in place, some viewers may be left in the dark or be unable to realize the full opportunities offered by digital technology. The Commission remains committed to taking whatever actions are necessary to minimize the potential burden the digital transition could impose on consumers and maximize their ability to benefit from it.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: In the Matter of Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999; Local Broadcast Signal Carriage Issues and Retransmission Consent Issues – Second Report and Order, and Memorandum and Opinion and Order, CS Docket 00-96 and CSR-5978-M

I support today's Order, but not without some frustration that the delayed phase-in of local HD carriage on DBS may at least partly be due to our own inaction.

This item acts on a *Further Notice of Proposed Rulemaking* pending since 2001. In January 2003, Echostar briefed the FCC in detail about the potential technical impact of a local HD carriage requirement; DirecTV made a similar presentation to the FCC in October 2004. Had we taken proactive steps then, we might find ourselves in a very different factual circumstance than we find ourselves today. DirecTV, for instance, is scheduled to launch its D-11 satellite this week and its D-12 satellite in 2009. Some of this new capacity will be used for national HD service and some will provide local HD service via spot beams. The spot beams for these satellites have all been designed and cannot now be changed. Thus, DirecTV asserts—and Echostar makes a similar case—that it must design, build and launch at least one additional satellite in order to comply with today's HD mandate—hence the four-year timetable.

Had we acted earlier, could DirecTV and Echostar have designed their satellites differently in order to permit full local HD carriage before 2013? We may never know. One thing we do know is that, by waiting to act, we have rendered the question moot.

One last point. Now that we have addressed the impact of capacity constraints on DBS carriage obligations, I hope we turn quickly to the carriage issues raised by small cable operators. And my hope is that we approach those issues with the same sense of realism that we exhibit here.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: In the Matter of: Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Carriage Issues and Retransmission Consent Issues, CS Docket Nos.: 00-96; CSR-5978-M, Second Report and Order, and Memorandum Opinion and Order.

I am pleased to support this *Second Report and Order* because we clarify the post-DTV transition carriage obligations of direct broadcast satellite (DBS) operators, and we affirm that satellite-delivered local-into-local service in all 210 markets is indeed in the public interest.

In today's Order, we reaffirm that "carry-one, carry-all" continues to be the operative standard for DBS carriage of local commercial and noncommercial broadcast stations. Whether DBS operators carry the standard or high definition digital signals of local broadcast stations in a particular market, the standard is the same. If an operator carries the HD signal of one local station, it must carry the HD signals of all local stations in that market. Every broadcast station in the local market in which the DBS operator is providing local-into-local service must be carried on the same terms and in a non-discriminatory manner.

While all stations in a particular market are treated similarly, this *Order* acknowledges that existing technological and capacity challenges of DBS facilities may inhibit operators from treating all markets alike – and at the same time. Hence, after much discussion with the DBS and broadcast industries, we adopt a four-year schedule for satellite carriage of local HD signals in all local-into-local markets by 2013. This phase-in, planned implementation provides clear, quantifiable local HD carriage benchmarks for each year from 2010 to 2013. While this approach does not provide immediate HD carriage in all markets, it does establish a process to achieve the statutory and policy goals of the Commission and the DTV transition, while recognizing real capacity constraints faced by DBS operators.

This sensible and measured process is in sharp contrast to the more draconian requirements that my colleagues imposed on small cable systems and operators in the *First Report and Order*. In that order, the Commission simply refused to consider the valid and demonstrable capacity limitations of cable systems with channel capacity of 552 MHz or less. Without adequate reasoning or justification, the Commission requires the smallest of cable operators to undergo an expensive, timing-consuming, burdensome and often unpredictable waiver process at the Commission. Many leaders in Congress have expressed concern about the Commission's misguided approach.¹ Today, I ask my colleagues to extend to small cable system operators the same level of fairness and consideration we provide to DBS operators in the instant *Order*. Fair is fair.

Finally, I am pleased that the Commission has unequivocally stated that satellite-delivered local-into-local in all 210 markets is in the public interest, promoting competition against cable, diversity of programming, and local news and information. Indeed, DBS operators should endeavor to serve all markets with a satellite-delivered solution that treats all consumers the same and does not impose equipment costs on consumers who happen to live in areas that DBS operators may view as lower-priority service markets.

For these reasons, I support this item.

¹ See Letter from Senators John D. Rockefeller, Trent Lott, Byron L. Dorgan, Olympia J. Snowe, Gordon Smith, Jim DeMint and John R. Thune, to Honorable Kevin J. Martin, Chairman, FCC (November 15, 2007) (stating that the authors "can not find a compelling reason to force small cable operators to incur unnecessary financial hardship" and "this dual-carriage obligation is extremely burdensome to small cable operators").

**STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE**

Re: In the Matter of Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999; Local Broadcast Signal Carriage Issues and Retransmission Consent Issues; WHDT-DT, Channel 59, Stuart, Florida, Application for Review, CSR-5978-M, Second Report and Order, and Memorandum and Opinion and Order

Today's order is a good example of utilizing common sense in order to reach a positive consumer result through a practical industry-driven solution. Through this laudable collaboration by the affected parties, the Commission was presented with a reasonable proposal that aims to fulfill one of our top priorities: increased distribution of local news. The aggressive schedule the parties developed will ensure that by 2013 every citizen that resides in a market where broadcasters are providing high-definition signals will have access to those signals. I applaud the parties for their efforts, and thank the Media Bureau for their work on this item.

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

Re: Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, Implementation of the Satellite Home Viewer Improvement Act of 1999; Local Broadcast Signal Carriage Issues and Retransmission Consent Issues, CS Docket No. 00-96, CSR-5978-M, Second Report and Order, Memorandum and Order and Further Notice of Proposed Rulemaking

In this Order, the Commission requires DBS operators to carry each station in a local market on the same terms, including carriage of HD signals in HD format, if any broadcaster in the same market is carried in HD. I am pleased that we have adopted a plan that permits DirecTV and Echostar to come into compliance with this requirement within four years after the digital transition, with benchmarks that must be met at the end of each year. This approach balances the public interest in ensuring that satellite customers reap the benefits of digital technology with the business planning and technical needs of the operators. By our calculations, the compliance schedule is aggressive but achievable. I look forward to the results for viewers.

I thank the Media Bureau for their hard work on this Order.