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Analog and Digital Must-Carry Obligations Of Cable And Satellite Television Operators In the United States

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AND SATELLITE TELEVISION OPERATORS
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By
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**I
MUST-CARRY BACKGROUND**

In the United States, cable television operators¹ bear a statutory obligation to reserve up to one-third of their channel capacity for the compulsory carriage of significantly viewed local, terrestrial broadcast

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¹ Direct Broadcast Satellite operators do not have a must-carry obligation. However, the decision to carry one local broadcast station in any market triggers an obligation to carry all other signals. Since January 1, 2002 a DBS operator must-carry, upon request, the signals of all television broadcast stations within a local market when the operator opts to carry any single station. Congress imposed this "carry one carry all" requirement to ensure that DBS operators do not "cherry pick" and carry only network affiliates, an outcome it deemed detrimental to the viability of all broadcast television station operators. *See* IMPLEMENTATION OF THE SATELLITE HOME VIEWER IMPROVEMENT ACT OF 1999, 15 FCC Reg. 5445, (2000); IMPLEMENTATION OF THE SATELLITE HOME VIEWER IMPROVEMENT ACT OF 1999: ENFORCEMENT PROCEDURES FOR RETRANSMISSION CONSENT VIOLATIONS, 15 FCC Reg. 2522 (2000). IMPLEMENTATION OF THE SATELLITE HOME VIEWER IMPROVEMENT ACT OF 1999: BROADCAST SIGNAL CARRIAGE ISSUES, 16 FCC Reg. 16,544 (2001); KVMD ACQUISITION CORP. v. DIRECTV, INC., 16 FCC Reg. 22,040 (2001).

television stations.² In 1992 Congress enacted a law codifying previous regulatory requirements established by the Federal Communications Commission (“FCC”) that imposed a compulsory, “must carry” responsibility on grounds that the national interest requires affirmative efforts to maintain the commercial viability of terrestrial television broadcasters.³

While many critics consider must-carry a “taking” of property and an intrusion into the speaker/programmer rights of cable television operators, reviewing courts consider the intrusion a lawful exercise of economic regulation. In 1997, the Supreme Court of the United States deemed must-carry obligations lawful, “content-neutral,” regulation of cable television operators even though such regulation subordinates and conditions cable

² See, e.g., Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). Specifically, the 1992 rules obligated cable systems with more than 12 channels of video programming to set-aside up to one-third of their capacity for the retransmission of all commercial VHF and UHF stations broadcast in the local market; carry non-commercial stations (Public Broadcasting System affiliates); and carry up to two low-power TV stations broadcast locally where less than one-third of channel capacity was filled by commercial full-power stations. See DEFINITION OF MARKETS FOR PURPOSES OF THE CABLE TELEVISION MANDATORY TELEVISION BROADCAST SIGNAL CARRIAGE RULES, REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING, 11 F.C.C.R. 6201 (1996).

³ In the United States, terrestrial television broadcasters qualify for special regulatory safeguards in light of their free accessibility. This is in contrast with cable and satellite television that require direct subscription payments. See, *Turner Broad. Sys., Inc. v. FCC (Turner-II)*, 520 U.S. 180, 194 (1997) (recognizing that terrestrial broadcast television “is an important source of information to many Americans...by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression”); *Turner Broad. Sys., Inc. v. FCC (Turner-I)*, 512 U.S. 622, 663 (1994) (acknowledging that terrestrial broadcast television “is demonstrably a principal source of information and entertainment for a great part of the Nation’s population.”(quoting *United States v. Sw. Cable Co.*, 392 U.S. 157, 177 (1968))); REVIEW OF COMMISSION’S REGULATIONS GOVERNING TELEVISION BROAD., REPORT & ORDER, 14 F.C.C.R. 12,903, 12,912 P 18 (1999) (finding that television is “the primary source of news and entertainment programming for American” and “play[s] a leading role in shaping democratic debate and cultural attitudes”).

operators' constitutionally protected speaker and expression rights.⁴ Ironically, changed marketplace conditions and technological innovation substantially reduce the publics' interest in, and direct reception of, terrestrial broadcast television signals.⁵

The FCC subjects cable television to extensive "ancillary" regulation, despite the absence of public spectrum usage based on the perceived need to avert the potential for adverse harm to the economic viability of "free"

⁴ *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (holding that because must-carry requirements did not directly affect content and First Amendment speakers' rights, the Court should use a less rigorous "intermediate scrutiny" to determine whether the requirements were narrowly tailored to advance Congress's interests in preserving the benefits of free, over-the-air local broadcast television, promoting the widespread dissemination of information from a multiplicity of sources, and promoting fair competition in market for television programming). In an earlier case, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994), the Court made its intermediate scrutiny determination holding that must-carry provisions served important government interests by preserving free broadcast television, by promoting widespread dissemination of information, and by promoting fair competition. The First Amendment to the United States Constitution prohibits the legislature from making laws "respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

⁵ Approximately 90 percent of United States households view video content from non-broadcast television sources. As of June 2004, 92.3 million households subscribed to a Multi-channel Video Programming Distributor with 71.6 percent subscribing to a franchised cable operator, 25.1 percent receiving their video programming from a Direct Broadcast Satellite operator, and 3.3 percent of subscribers accessing video content from other types of providers including broadband services, wireless cable, and private cable ventures. See ANNUAL ASSESSMENT OF THE STATUS OF COMPETITION IN THE MARKET FOR THE DELIVERY OF VIDEO PROGRAMMING, 20 F.C.C.R. 2755, (2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-13A1.doc. See also, National Cable and Telecommunications Association, *2004 Year-End Industry Overview* (2004), http://www.ncta.com/pdf_files/NCTAYearEndOverview04.pdf; National Cable and Telecommunications Association, *Industry Statistics: Statistics & Resources*, <http://www.ncta.com/Docs/PageContent.cfm?pageID=86> (last visited Mar. 16, 2006).

broadcast television. Cable television has the capability of diverting audiences and revenues from broadcasters by offering consumers more video choices. Must-carry requirements ensure that cable television subscribers still have the option of viewing local terrestrial broadcast signals. This requirement preempts a marketplace determination whether consumers still want to view content available from local broadcasters. Legislative and regulatory preemption of marketplace decision making results in part from the appreciation that most consumers would favor some terrestrial broadcaster sources of news and coverage of major events, e.g., major network affiliated stations,⁶ but largely disfavor unaffiliated, minor stations whose programming cannot match that available from subscription cable or satellite networks.

Critics of must-carry requirements state that the primary beneficiaries include marginal television broadcasters, such as home shopping channels and broadcasters operating in a foreign language, while cable operators incur an unnecessary handicap in having to abandon carriage of additional video content due to the compulsory carriage of signals few viewers would care to

⁶ Must-carry constitutes one of many legislative and regulatory initiatives designed to promote the availability of local broadcasting, despite the fact that broadcast stations typically retransmit national network content most of the time. Nevertheless, the concept of “localism” has a firm foundation for justifying what one could consider “protectionist” safeguards. *See, e.g., Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984) (recognizing that the FCC “historically has followed a policy of ‘localism’ as a sound means of promoting the statutory goal of efficient public service”); COMPETITION, RATE DEREGULATION AND COMMISSION’S POLICIES RELATING TO PROVISION OF CABLE TELEVISION SERVICE, 5 F.C.C.R. 4962, 5039-40 (1990) (acknowledging that localism has been a driving force in FCC policy for the previous fifty years); SATELLITE DELIVERY OF NETWORK SIGNALS TO UNSERVED HOUSEHOLDS FOR PURPOSES OF SATELLITE HOME VIEWER ACT, 14 F.C.C.R. 2654, 2659 (1999) (“Localism has been a central principle of broadcast policy since the Radio Act of 1927”); Amendment of Subpart L, Part 91, to Adopt Rules & Regulations to Govern the Grant of Authorizations in Bus. Radio Serv. for Microwave Stations to Relay Television Signals to Cmty. Antenna Systems, First Report & Order, 38 F.C.C. 683, 699-700 at 44-48 (1965) [hereinafter CATV First Report & Order]; *see also Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1439-40 (D.C. Cir. 1985) (concluding that one of the cardinal objectives of the FCC was “the development of ‘a system of [free] local broadcasting stations,’ such that ‘all communities of appreciable size [will] have at least one television station as an outlet for local self-expression’” (quoting *United States v. Sw. Cable Co.*, 392 U.S. 157, 174 (1968))).

watch.⁷ On the other hand, efforts by cable and satellite operators to expand channel capacity generally make it possible to satisfy must-carry obligations while also offering a wide array of special interest content unavailable from terrestrial broadcasters that typically offer mass audience programming. Satisfying both regulatory and consumer requirements will become more difficult with the onset of both broadcast and non-broadcast high definition television that will require more bandwidth. Likewise, the onset of digital broadcast television will enable broadcasters to expand the number of channels they program thereby raising questions about the scope and nature of future must-carry obligations.

Supporters of must-carry emphasize that cable and satellite operators accrue legislative and regulatory benefits that balance out the financial burdens generated by compulsory signal carriage. For example, Congress conferred a financial benefit to cable and satellite operators by providing them with a compulsory license for the retransmission of copyrighted broadcast video content at attractive rates.⁸ Additionally when cable and satellite operators comply with must-carry obligations, individual broadcasters cannot demand additional financial compensation.⁹

⁷ See Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 Emory L.J. 1579 (Fall 2003); Thomas W. Hazlett, *Digitizing "Must-Carry" Under Turner Broadcasting v. FCC (1997)*, 8 Sup. Ct. Econ. Rev. 141 (2000).

⁸ See The Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2550, (codified at 17 U.S.C. § 111 (2000)). See also Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 67 Rad. Reg.2d (P&F) 1771 (1990). The Satellite Home Viewer Act of 1988 created a compulsory license for satellite broadcasting similar in structure to the cable compulsory license. Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3949 (codified as amended in scattered sections of 17 U.S.C.).

⁹ Broadcasters not electing must-carry may seek additional direct compensation for their consent to retransmission by cable and satellite operators. The retransmission consent rules in § 325 of the 1992 Cable Act, 47 U.S.C. § 325 (2004) prohibit cable operators from transmitting signals of commercial television stations without their consent, except when the broadcaster has chosen must-carry.

II BALANCING FIRST AMENDMENT AND PUBLIC POLICY GOALS

The must-carry issue in the United States has forced Congress and the FCC to make difficult balancing decisions. The First Amendment to the United States Constitution appears to impose an absolute prohibition on governmental restrictions on speech, but in application many types of speech fall outside the prohibition, e.g., obscenity and speech that creates a clear and present danger for immediate, unlawful behavior. Courts have interpreted the First Amendment differently as a function of which medium the court examines. For example, the Supreme Court has endorsed limitations of speaker rights in terms of time, place, and manner of speech where government has a compelling justification for partial suppression of speech and the imposed restrictions do not directly target a specific type of speech.¹⁰ Additionally the Court requires the legislature to specify any restriction as narrowly as possible to avoid over breadth that would possibly limit or constrain permissible speech.

Cable television and DBS operators do qualify for First Amendment speaker freedoms in terms of how they program their channel capacity. Accordingly, one could consider must-carry as a direct content-based restriction thereby obligating government to articulate a compelling justification. Courts have accepted as reasonable a government goal of promoting the economic viability of terrestrial broadcast television, both in terms of guaranteeing access by the public without having to pay for a subscription and in terms of broadcasters' contribution to the national interest in having an informed and involved electorate.¹¹

The nature and scope of judicial scrutiny applied to a media speech restriction depends on whether the restriction applies directly or indirectly on content. The Supreme Court considered must-carry "content neutral," because the restriction on cable speech applied to a type of signal that cable operators must-carry and not any type of specific content contained in that signal. In other words, must-carry favors broadcast television and not specifically any type of content produced and disseminated by a particular television broadcaster. For restrictions on First Amendment freedom that do not directly impact or favor content, the Court uses an "intermediate scrutiny" standard to consider the reasonableness of the restriction and its specificity.

The Supreme Court first articulated the intermediate scrutiny standard

¹⁰ See *Kovacs v. Cooper*, 336 U.S. 77 (1949).

¹¹ *Turner-II*, 520 U.S. at 180-82.

when it determined that a Vietnam War protestor should face jail time for burning his draft card even though he sought to make a political statement of opposition to the war.¹² Because government could articulate a reasonable justification for prohibiting draft card destruction, e.g., effective administration of the conscription process, the Supreme Court upheld a criminal conviction, despite the symbolic, political expression exhibited by destruction of the draft card.¹³

III DIGITAL MUST-CARRY¹⁴

During the transition from analog to digital television, terrestrial broadcasters typically simulcast both formats.¹⁵ In 2001, the FCC tentatively

¹² See *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968).

¹³ *Id.* at 380.

¹⁴ For more extensive background on digital must-carry, see Michael M. Epstein, "Primary Video" And Its Secondary Effects On Digital Broadcasting: Cable Carriage of Multiplexed Signals Under the 1992 Cable Act and the First Amendment, 87 Marq. L. Rev. 525 (2004); Joel Timmer, Broadcast, Cable and Digital Must Carry: The Other Digital Divide, 9 Comm. L. & Pol'y 101 (Winter, 2004); Andrew D. Cotlar, *The Road Not Yet Traveled: Why The FCC Should Issue Digital Must-Carry Rules For Public Television "First,"* 57 Fed. Comm. L.J. 49 (Dec. 2004) Albert N. Lung, *Must-Carry Rules In The Transition To Digital Television: A Delicate Constitutional Balance*, 22 Cardozo L. Rev. 151 (Nov. 2000).

¹⁵ The FCC assigned television broadcasters an additional 6 Megahertz channel to facilitate the transition to digital television. With two channels, broadcasters can simulcast an analog and digital signal thereby, offering consumers the chance to extend the usable life of their existing television sets, but as well the opportunity to use digital television sets to receive enhanced and high definition television broadcasts. See ADVANCED TELEVISION SYSTEMS AND THEIR IMPACT UPON THE EXISTING TELEVISION BROADCAST SERVICE, 12 F.C.C.R. 12,809 (1997); 47 U.S.C. § 309(j)(14)(A) (2004).

(By law, broadcasters must relinquish one of their two channels on February 17, 2009 or when 85% of households have a digital television set, whichever is later. "A full-power television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond February 17, 2009."); 47 U.S.C. § 309(j)(14)(A)(2006).

concluded that mandatory "dual carriage" of both signals would violate cable operators' First Amendment programming rights:

[A] dual carriage requirement appears to burden cable operators' First Amendment interests substantially more than is necessary to further the government's substantial interests of preserving the benefits of free over-the-air local broadcast television; promoting the widespread dissemination of information from a multiplicity of sources; and promoting fair competition in the market for television programming.¹⁶

The FCC must decide what changes to make in light of the transition to digital television, particularly in light of the ability of television broadcasters to generate many different program feeds within a conventional six megahertz channel and the fact that broadcasters will have two channels to use during the transition.¹⁷ The Commission might refrain from imposing dual

(Extensions to the 31 December 2006 deadline occur under any one of the three following circumstances: (A) one or more of the stations in that market licensed to or affiliated with one of the four largest national television networks is not broadcasting a digital signal; (B) digital-to-analog converter technology is not generally available in that market; or (C) 15 percent or more of the television households in the market do not subscribe to a multi-channel video programming distributor that carries the DTV signal of each of the television stations broadcasting in DTV in the market, and do not have either (1) at least one DTV television receiver or (2) at least one analog television receiver equipped with digital-to-analog converter technology.). Congress has since extended the deadline to February 17, 2009. (Public Law 109-171).

¹⁶ CARRIAGE OF DIGITAL TELEVISION BROADCAST SIGNALS AMENDMENTS TO PART 76 OF COMMISSION'S RULES, 16 F.C.C.R. 2598 (2001).

¹⁷ *Id.* at 2600 ("[W]e find it necessary to issue a Further Notice of Proposed Rulemaking addressing several critical questions at the center of the carriage debate including, inter alia: (1) whether a cable operator will have the channel capacity to carry the digital television signal of a station, in addition to the analog signal of that same station, and without displacing other programming or services; (2) whether market forces, through retransmission consent, will provide cable subscribers access to digital television signals and television stations' access to carriage on cable systems; and (3) how the resolution of the carriage issues would impact the digital transition process. The responses to these and other inquiries will help determine the answer to the dual carriage issue. In the Further Notice, we also raise questions concerning the

channel carriage responsibilities, or it might impose such a requirement on a transitional basis. Additionally the FCC will have to decide what portion of broadcasters' content qualifies for must-carry.¹⁸ The Commission has tentatively decided that digital-only television broadcasters have must-carry rights only as to their "primary video"¹⁹ stream and other "program-related content."²⁰

applicability of the rules and policies we adopt herein to satellite carriers under the Satellite Home Viewer Improvement Act of 1999 ('SHVIA').")

¹⁸ To date the FCC has put off such a decision. See *infra* at n.19.

¹⁹ Id. 16 F.C.C.R. at 2622. ("[W]e conclude that 'primary video' means a single programming stream and other program-related content. With the advent of digital television, broadcast stations now have the opportunity to include in their video service a panoply of program-related content. Indeed, far more video content is possible broadcasting a digital signal than broadcasting in an analog format. For example, a digital television broadcast of a sporting event could include multiple camera angles from which the viewer may select. The statute contemplates and our rules require that cable operators provide mandatory carriage for this program-related content. In contrast, if a digital broadcaster elects to divide its digital spectrum into several separate, independent, and unrelated programming streams, only one of these streams is considered primary and entitled to mandatory carriage. The broadcaster must elect which programming stream is its primary video and the cable operator is required to provide mandatory carriage to only such designated stream").

²⁰ Id. 16 F.C.C.R. at 2619 (citations omitted). (A Further Notice of Proposed Rulemaking will create a definition of "program-related content." However, in referring to the Commission's consideration of the issue in analog systems, the Commission tentatively concluded that material in broadcaster's vertical blanking intervals related to its primary video feed qualifies for carriage, but additional content, such as Internet-based material, would not. "First, Section 614(b)(3) of the Act entitled 'Content to be Carried,' states that a cable operator shall carry in its entirety the 'primary video' of the station. Second, it requires carriage of the 'accompanying audio' and 'line 21 closed caption transmission' of each station. Third, the operator must-carry 'to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers.' The statute is specific that 'Retransmission of other material in the vertical blanking interval or other nonprogram-related material (including teletext and other subscription and advertiser-supported information services) shall be at the discretion of the cable operator.'"); see also Id. 16 F.C.C.R. at 2622 ("Based on the language in 614(b)(3), Congress was concerned that mandatory carriage be limited to the broadcaster's primary program stream but also include related content as described here. In the

In a recent decision ²¹ the FCC resolved whether cable operators must carry both the digital and analog signals of a station during the transition when terrestrial television stations continue to broadcast analog signals, commonly termed the dual carriage issue. The Commission also stated how it will construe the “primary video” carriage limitation contained in Section 614(b)(3)(A) of the Communications Act for commercial stations and Section 615(g)(1) for noncommercial stations.²² The matter of mandatory multicast carriage arises when a broadcaster chooses to transmit multiple digital television streams.

The FCC affirmed its tentative conclusion not to require cable operators simultaneously to carry broadcasters’ analog and digital signals. The Commission also reaffirmed its prior determination that cable operators should not have to carry more than the single, primary digital programming stream from any particular broadcaster. The decision states that mandatory dual carriage was not necessary either to advance the governmental interests as identified by Congress and the Supreme Court, or to facilitate the transition from analog to digital television:

We therefore affirm our earlier conclusion that the Act is ambiguous on the issue of dual carriage. The statute neither mandates nor precludes the mandatory simultaneous carriage of both a television station’s digital and analog signals. Further, we do not believe that mandating dual carriage is necessary either to advance the governmental interests identified by Congress in enacting Sections 614 and 615 and upheld [by the Supreme Court] or to effectuate the DTV transition. Since no evidence or arguments submitted on reconsideration gives us any reason to question our original judgment, we deny the petitions for

FNPRM we seek comment on the appropriate parameters for ‘program-related’ in the digital context”).

²¹ Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission’s Rules, Second Report and Order and First Order on Reconsideration, CS Docket No. 98-120, FCC 05-27 (rel. Feb. 23, 2005); *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-27A1.doc [hereinafter cited as Digital Must-carry Reconsideration Order].

²² *See* 47 U.S.C. §§ 534(b)(3)(A), 535(g)(1).

reconsideration on this point.²³

As to the digital multicasting issue, the Commission affirmed its earlier conclusion that cable operators need not carry any more than one programming stream of a digital broadcast television station. Although the FCC also found the applicable statutory language ambiguous on the subject of multicast must-carry, the Commission determined that based on the current record such a requirement was unnecessary to further the purposes of the must-carry statute, as defined by the Supreme Court:

[B]ased on the current record, there is little to suggest that requiring cable operators to carry more than one programming stream of a digital television station would contribute to promoting “the widespread dissemination of information from a multiplicity of sources.” Under a single-channel must-carry requirement, broadcasters will have a presence on cable systems. Adding additional channels of the same broadcaster would not enhance source diversity. Furthermore, programming shifted from a broadcaster’s main channel to the same broadcaster’s multicast channel would not promote diversity of information sources. Indeed, mandatory multicast carriage would arguably diminish the ability of other, independent voices to be carried on the cable system.²⁴

IV

MUST-CARRY—DIRECT BROADCAST SATELLITE OPERATORS

A. The 1999 Act

The Satellite Home Viewer Improvement Act,²⁵ commonly referred to

²³ Digital Must-carry Reconsideration Order at ¶13.

²⁴ Digital Must-carry Reconsideration Order at ¶39.

²⁵ Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545, codified at 47 U.S.C. § 338. SHVIA amended the Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3949 that gave DBS operators a limited copyright license to retransmit the signals of distant network broadcast television stations only to unserved

as SHVIA, initially provided individuals in rural areas lacking access to terrestrial broadcast television²⁶ with opportunities to view up to two of each network affiliate stations via Direct Broadcast Satellite (“DBS”) service.²⁷ A 1999 amendment²⁸ provided DBS operators with a statutory copyright license, like that accruing to cable operators for retransmitting local programming. DBS operators previously had the right to retransmit local television signals without first obtaining the broadcaster’s retransmission consent and without having to make available all stations entitled to must-carry.

Beginning January 1, 2002, SHVIA required DBS operators to secure retransmission consent from local broadcast stations for carriage into areas where viewers could receive such signals off air, commonly referred to as “local into local.” Since January 1, 2002²⁹ a DBS operator must-carry, upon request,³⁰ the signals of all television broadcast stations within a local market when the operator opts to carry any single station.³¹ Congress imposed this “carry one carry all” requirement to ensure that DBS operators do not “cherry pick” and carry only network affiliates, an outcome Congress deemed detrimental to the viability of all broadcast television station operators. Broadcast television station management now must elect between

households that could not receive an adequate over-the-air signal via a conventional rooftop antenna.

²⁶ DBS access to local content is available only to subscribers located in areas lacking access to a “Grade B” broadcast television signal via a rooftop antenna and who have not received feeds of the nearest local network broadcast affiliates within the past ninety days via cable television.

²⁷ SHVIA amended the Copyright Act, 17 U.S.C. § 119(d)(2), to create a limited statutory copyright license for satellite carriers to rebroadcast over-the-air television signals to unserved areas.

²⁸ Pub. L. 106-113, 113 Stat. 1501, Appendix 1, codified at scattered sections in 17 and 47 U.S.C. (1999).

²⁹ 47 U.S.C. § 338(a)(3).

³⁰ See Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, 16 F.C.C.R. 16,544 (2001); *KVMD Acquisition Corp. v. DirecTV, Inc.*, 16 F.C.C.R. 22,040 (2001) (Broadcasters must bear the financial burden of delivering to DBS a signal of good quality whether via microwave, fiber optic or leased lines).

³¹ 47 U.S.C. § 325(b)(3)(C) of the Communications Act requires satellite carriers to obtain retransmission consent for the local broadcast signals they carry, requires broadcasters, until 2006, to negotiate in good faith with satellite carriers and other MVPDs with respect to their retransmission of the broadcasters’ signals, and prohibits broadcasters from entering into exclusive retransmission consent agreements.

retransmission consent and must-carry for a term of three years, with the first period actually running four years to 2006 so that the new cycle coincides with the time when cable television operators renegotiate with terrestrial television broadcasters for signal carriage rights.

As stated in the 1992 Cable Act, a cable operator must obtain the broadcast operator's consent to retransmit a local broadcast signal.³² At the broadcaster's choice, a cable operator either shall comply with must-carry obligations³³ or may negotiate for retransmission consent.³⁴ [*MLP staff has added this paragraph.*]

The FCC also permits private negotiated copyright arrangements, outside the statutory process, to remain in force. However, broadcasters cannot secure an exclusive contract for carriage via one DBS operator, nor can either broadcasters or DBS operators fail to negotiate in good faith in must-carry/retransmission content discussions. The FCC established a two-part test for assessing whether good faith negotiations have occurred based on procedural standards, such as a willingness to meet and negotiate without a take it or leave it single offer, and the "totality" of the particular circumstances.³⁵

With the ability to provide local into local, DBS operators enjoy competitive parity with cable television operators in terms of access to, and delivery of broadcast television content.³⁶ However, as cable operators had

³² 47 U.S.C. § 325(b)(1).

³³ 47 U.S.C. § 534.

³⁴ 47 U.S.C. § 338.

³⁵ See Implementation of the Satellite Home Viewer Improvement Act of 1999, 15 F.C.C.R. 5445 (2000); Implementation of the Satellite Home Viewer Improvement Act of 1999: Enforcement Procedures for Retransmission Consent Violations, 15 F.C.C.R. 2522 (2000); Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues, CS Docket No. 99-363, First Report and Order, 15 F.C.C.R. 5445 (2000), recon. granted in part, 16 F.C.C.R. 15599 (2001); Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Reciprocal Bargaining Obligations, MB Docket No. 05-89, Notice of Proposed Rulemaking, 20 F.C.C.R. 5448 (2005) (proposing to extend good faith negotiation requirements on MVPDs).

³⁶ DBS operators are subject to the same content access restrictions applicable to cable operators, including Network Nonduplication, Syndicated Exclusivity, and Sports Blackout Rules. Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication,

done previously, DBS operators objected to must-carry on constitutional grounds. The DBS operators also disputed the FCC imposed conditions on how they can offer and price local channels.

In *Satellite Broadcasting and Communications Association v. FCC*,³⁷ the Fourth Circuit Court of Appeals rejected DBS operators' constitutional objections in much the same way as the Supreme Court rejected cable operators' objections to must-carry in *Turner Broadcasting System, Inc. v. FCC*.³⁸ The Fourth Circuit acknowledged that both DBS and cable television operators engage in speech protected by the First Amendment when making channel and content selections. However, the court applied the precedent established by the Supreme Court in the *Turner* cases that preserving "free" broadcast television constituted a content-neutral measure that imposes only incidental burdens on speech sufficient to pass muster using intermediate First Amendment scrutiny. The court held that imposing mandatory carriage requirements on satellite television operators furthers an important, narrowly drawn governmental interest:

- 1) preserving a multiplicity of local broadcast outlets; and
- 2) preventing the grant of a compulsory copyright license from undermining broadcast television competition, an outcome that could occur should DBS operators deprive their customers' access to non-network broadcast stations.

The court also affirmed the FCC's rules for implementing SHVIA, in particular rules that limit DBS operators' commercial options for offering local stations as a package of all stations for one price, or the option of buying any individual station on an *à la carte* basis.

Syndicated Exclusivity, and Sports Blackout Rules To Satellite Retransmissions of Broadcast Signals, Docket No. CS Docket No. 00-2, Report and Order, 15 F.C.C.R. 21,688 (2000), on reconsideration, 17 F.C.C.R. 27,875 (2002). These rules protect exclusive contractual rights that have been negotiated between program providers and broadcasters or other rights holders. These exclusive contractual rights are potentially threatened by cable and satellite systems that can import duplicative programming from distant sources beyond the control of the contracting parties.

³⁷ *Satellite Broadcasting and Communications Association v. FCC*, 275 F.3d 337 (4th Cir. 2001).

³⁸ *Turner-I*, 512 U.S. 622; *See also Turner-II*, 520 U.S. 180.

B. Satellite Home Viewer Extension and Reauthorization Act

Congress passed and the President signed into law the Satellite Home Viewer Extension and Reauthorization Act of 2004³⁹ (“SHVERA”) that extends until 2010 the compulsory copyright license for DBS operators to deliver local and distant broadcast network stations, including superstations, i.e., major terrestrial broadcast television stations whose content also is available for carriage via cable television systems. SHVERA provides DBS operators with near parity with cable television operators regarding opportunities for accessing and delivering broadcast television channels. The law authorizes satellite delivery of distant analog broadcast network signals into the top 100 local markets in May 2006, as well as significantly viewed distant network and superstation signals. With some minor exceptions, DBS operators may serve the remaining markets in 2007 if no local digital signal is available and the distant signal does not originate from a station operating in a different time zone. The law also requires DBS operators to deliver all local terrestrial broadcast signals to a single receiving dish antenna.

SHVERA also revises copyright royalty rates and establishes a new process for adjustments to cable and satellite compulsory copyright license royalty rates. The law revises retransmission consent requirements and elections, including a new requirement that all Multichannel Video Programming Distributors (“MVPDs”) negotiate in good faith. The law orders the FCC to conduct studies and issue reports on signal measurement and carriage rules while the Copyright Office has to assess the impact of the compulsory copyright licensing process on program owners and to make recommendations on desirable changes.

³⁹ House of Representatives introduced SHVERA as H.R.4501, but it was passed as Title IX of the 2005 omnibus spending package. *See* The Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, § 202, 118 Stat 2809, 3393 (2004) (to be codified at 47 U.S.C. § 340). The SHVERA was enacted on 8 December 2004 as Title IX of the “Consolidated Appropriations Act”, 2005. It extended the statutory license for secondary transmissions under 17 U.S.C. § 119 (distant network broadcasts and superstations) and 17 U.S.C. § 122 (local broadcast signals) and amended the Communications Act of 1934 relating to must-carry, retransmission consent, signal carriage and broadcasting. *See also* House of Representatives, 108th Congress, 2d Session, House Rpt. 108-634, Satellite Home Viewer Extension And Reauthorization Act of 2004 (July 22, 2004); *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr634.108.pdf.

C. Extended Signal Importation Opportunities

SHVERA provides DBS operators with better opportunities to import distant broadcast signals into markets lacking “local-into-local” delivery of nearby signals and localities unserved by terrestrial broadcast network signals. DBS operators now have a compulsory copyright license permitting the retransmission of distant network signals to unserved households and of superstations to any subscriber without retransmission consent from the broadcaster, but subject to copyright royalty payments. The law allows retransmission of local and “significantly viewed” distant signals, including distant digital network signals.

Specifically for areas where no off-air reception exists, DBS carriers may continue delivering distant network signals to subscribers who have legally received them as of January 1, 2005 even if a local package of nearby network signals was, is, or becomes available. DBS operators may begin delivering distant network signals after January 1, 2005 as long as no package of nearby local network signals via satellite becomes available. If the nearest local network affiliate waives its right to prohibit distant signal importation, a DBS operator may import a distant network signal. However, DBS operators cannot deliver distant network signals to new subscribers if a nearby local signal becomes available via satellite.

D. Retransmission of Distant Digital Network Signals

SHVERA also offers DBS operators the opportunity to deliver distant digital network signals into “digital white areas” where the nearest network broadcaster does not currently offer digital content, or where adequate off-air reception does not occur. Additionally if a satellite subscriber previously received distant digital signals prior to enactment of SHVERA, such reception can continue even if a local digital package becomes available. For satellite subscribers otherwise eligible to receive distant digital signals, but located in an area where a DBS operators makes local analog signals available, the satellite operators may also deliver the same or a later time-zone distant digital network signals after April 30, 2006 for the top 100 markets and after July 15, 2007 for the remaining markets, if the subscriber also takes the local affiliate’s analog or subsequently available digital feed from the DBS operator. Satellite subscribers must drop the distant signal feed when a nearby broadcaster offers a digital feed that the subscriber can receive adequately off-air.

V
CONCLUSION

Must-carry requirements will persist in the United States even in a digital, convergent environment and despite growing interest in deregulation and reliance on marketplace forces. Elected officials recognize the still extensive power of the terrestrial broadcast media to influence the electorate and elections. Must-carry ensures that broadcasting remains an important medium and sustains the symbiotic relationship between the media and politicians.