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December 14, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Via HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals – TW-A325
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Nonduplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals, CS Docket No. 00-2

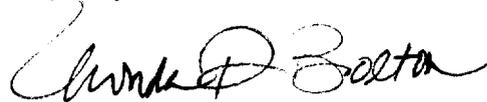
Dear Ms. Salas:

On behalf of EchoStar Satellite Corporation (“EchoStar”), enclosed please find for filing an original and eleven copies of the EchoStar’s Petition for Reconsideration in the above-referenced matter.

Also enclosed in an additional copy of EchoStar’s Petition which we ask you to date-stamp and return with our messenger.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Rhonda Rivens Bolton
Counsel for EchoStar Satellite Corporation

Enclosures

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Satellite Home)
Viewer Improvement Act of 1999:)
)
Application of Network Nonduplication,)
Syndicated Exclusivity, and Sports)
Blackout Rules to Satellite Retransmissions)
of Broadcast Signals)

CS Docket No. 00-2

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To the Commission:

PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, EchoStar Satellite Corporation ("EchoStar") hereby petitions the Commission to reconsider certain portions of its *Report and Order*¹ in the above-captioned proceeding. The Satellite Home Viewer Improvement Act required the Commission to promulgate syndicated exclusivity ("syndex"), network nonduplication ("nondup") and sports blackout rules (collectively, "blackout rules") for retransmissions of the six nationally distributed superstations. The statute also required the Commission to *consider* whether to impose sports blackout rules for satellite retransmissions of all distant network stations under a specific standard – to the extent

¹ *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Nonduplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals*, CS Docket No. 00-2, Report and Order, (rel. Nov. 2, 2000) ("*Report and Order*").

technically feasible and not economically prohibitive. In doing so, the Commission did not go nearly as far as it should have to recognize the distinctive characteristics of nationwide satellite coverage and help the national satellite distributors cope with a regime of localized deletion requests of often unpredictable location, frequency and scope.

As to the nationally distributed superstations, the Commission *first*, properly recognized the need for a phase-in period, but established a significantly truncated period compared to the one year requested by EchoStar. In EchoStar's view, the 120 days initially allowed by the Commission to comply with deletion requests will likely be insufficient to permit EchoStar to adequately assess the burden from the rules, evaluate whether to continue providing its superstation package in light of that burden, and if so, consider how best to comply with deletion requests. *Second*, this truncated phase-in period is especially inadequate because the Commission refused to adopt the national standard for deletion supported by EchoStar (under which nationwide deletions would be triggered by requests coming from a significant number of broadcasters across the nation, rendering protection zones irrelevant). Instead, the Commission adopted a localized system based on 35 (or 55) mile protection zones. This requires EchoStar to establish an elaborate system of protection zones to determine eligibility of a particular household for certain superstation programming, side by side with the completely different but equally elaborate "unserved household" method for determining eligibility for network stations. EchoStar has yet to determine how cumbersome the addition of yet another eligibility method to its subscriber qualification system will be, and will report to the Commission in this regard.

Third, the Commission imposed impracticably short notice periods for compliance with superstation sports blackout rules. The Commission appropriately made some

adjustments to the notice periods set forth in the cable rules. These adjustments reflect both a recognition by the Commission that localized requests create significant difficulties for nationwide distributors, and an acknowledgment that the Commission does have the statutory flexibility to *adapt* the cable rules instead of mechanically adopting them. Unfortunately, the Commission did not exercise that flexibility except in very limited ways. In any event, the Commission *should* go farther here and establish a 60-day notice period for regularly scheduled events and no blackout requirements for unscheduled events.

Fourth, the Commission should reverse its decision to impose sports blackout rules on the satellite retransmissions of *all* network stations. While the Commission had the discretion not to impose any such rules, the Commission misapplied the statutory standard and held the satellite carriers to a greater evidentiary burden to prove infeasibility than should reasonably be expected of them. Moreover, the Commission enacted the very cumbersome obligation to comply with an almost random pattern of local deletion requests despite the complete lack of proportion between this burden and the miniscule practical significance of the rule for its intended beneficiaries. While the burden on satellite carriers will be largely unaffected by the number of households affected by the rule, the rule matters only for the few households in a protection zone that are unserved. All other households will not be eligible to receive the distant signal importing the local sports event in any case.

I. THE COMMISSION SHOULD RECONSIDER THE TRANSITION TIME NEEDED TO COMPLY WITH THE BLACKOUT RULES

As to the nationally distributed superstations, the Commission properly recognized the need for a phase-in period, but established a significantly truncated period

compared to the one year requested by EchoStar. In EchoStar’s view, the 120 days initially allowed by the Commission to comply with deletion requests will likely be insufficient to permit EchoStar to adequately assess the burden from the rules, evaluate whether to continue providing its superstation package in light of that burden, and if so, to consider how best to comply with deletion requests. Moreover, this truncated phase-in period is especially inadequate in light of the fact that the *Report and Order* does not address the relationship between the localized system adopted for superstation and network sports blackout requirements and the completely different but equally elaborate “unserved household” method for determining eligibility for network stations.

The Commission should reconsider its decision to allow only a 120-day transition period to comply with the blackout rules. The Commission acknowledged that satellite carriers would need time to phase-in compliance with the blackout rules,² but denied EchoStar’s request for the same one year transition granted to cable operators because “the satellite carriers have not asserted that they need time to develop new equipment” as did cable operators.³ This assertion ignores the primary difficulty for satellite carriers, which is more significant for satellite carriers than the lack of equipment was for cable systems – satellite carriers simply need time to develop the means to implement the myriad deletion requests that will result from the blackout rules, if the means can be developed at all. The Commission disregarded this assertion as well, stating that it “[did] not believe that EchoStar’s one-year proposal would serve its stated purpose of enabling satellite carriers to review deletion notices and plan a year in advance before

² *Report and Order* ¶ 48.

³ *Id.*

implementing the deletions. We believe rights holders would not bother to submit deletion requests knowing that they would not be acted upon for a year.”⁴

On the contrary, rights holders would submit deletion requests sufficiently in advance to give satellite carriers the year that is needed to implement the requests *if the Commission simply required rights holders to do so*. The Commission should allow a one-year transition period for satellite carriers to comply with the rules, and establish a deadline for rights holders to submit deletion requests one year prior to the effective dates of the deletions.

Additional time is all the more necessary because the Commission refused to adopt the national standard for deletion supported by EchoStar, under which nationwide deletions would be triggered by requests coming from a significant number of broadcasters across the nation, rendering protection zones irrelevant. Rather, the Commission adopted a localized system based on 35 (or 55) mile protection zones. This appears to require EchoStar to establish an elaborate system of protection zones to determine eligibility of a particular household for certain superstation programming, side by side with the completely different but equally elaborate “unserved household” method for determining eligibility for network stations. Significantly, the relationship between the 35-mile zone of protection and the unserved household standard is not addressed at all by the *Report and Order*. EchoStar has undertaken an assessment of how cumbersome it will be to add yet another eligibility method to its subscriber qualification system, but cannot complete this assessment in the short period of time that has elapsed since the release of the blackout rules. EchoStar will report to the Commission once the results of the assessment are complete.

⁴ *Id.*

II. THE COMMISSION SHOULD ESTABLISH REASONABLY LONG NOTICE PERIODS FOR SPORTS BLACKOUT REQUESTS

The sports blackout rules promulgated by the Commission for the retransmissions of nationally distributed superstations also embody a serious mismatch between a very localized event, a sports game, and the nationwide service provided by satellite distributors. The nationwide nature of satellite systems and the complexity of blacking out programs in such systems mean that adequate time is needed to black out programming. The Commission appeared to acknowledge this fact, agreeing that “the challenge of implementing multiple, simultaneous blackouts and identifying and arranging substitute programming is greater for satellite carriers than for cable operators.”⁵

To account for this difference, the Commission required rights holders to notify satellite carriers within 48 hours of the time the telecast is scheduled.⁶ Yet the Commission established no limit on how close in time the scheduling of the event could be to the event itself. Worse still, the Commission allowed deletion requests for unscheduled events on only 24 hours’ notice.⁷ In keeping with its acknowledgment of the differences between cable and satellite systems, the Commission should reconsider its decision regarding notification periods and align the satellite sports blackout notification period with the nondup and syndex rules, *i.e.*, the notice should be given within 48 hours of scheduling, but in no event after the date indicated by the 60-day nondup/syndex rule. And the Commission should not allow deletion requests for unscheduled events.

⁵ *Id.* at ¶ 66.

⁶ *Id.* at ¶ 69

⁷ *Id.*

III. THE COMMISSION MISAPPLIED ITS DISCRETION IN IMPOSING SPORTS BLACKOUT REQUIREMENTS FOR NETWORK STATIONS

As the Commission acknowledged, SHVIA instructed the Commission to impose sports blackout rules on satellite carriers' retransmission of network stations only "to the extent technically feasible and not economically prohibitive."⁸ Thus, although the Commission was not required by statute to impose sports blackout rules for network stations, it nonetheless did so because, the Commission stated, it did not receive specific data, but received only "vague assertions and undocumented conclusions" as to the costs of implementing sports blackout protection for network stations.⁹ In doing so, the Commission held satellite carriers to an unjustifiably onerous burden: there was simply no historical evidence available to satellite carriers to illustrate the burdens from *future* compliance with an unprecedented cluster of unpredictable short-notice blackout requests. Equally significant, the Commission ignored the complete lack of proportion between the formidable burden imposed on satellite carriers and the marginal (at best) "benefits" conferred upon sports rights holders. Even if the inability of a consumer to watch a local sports event on television were to legitimately count as a benefit protecting local gate receipts, that benefit would extend only to the few households receiving the distant network signal within the protection zone – the majority of the households within the zone would be disqualified from receiving the distant signal importing the event anyway.

Because of the prospective nature of the proposed sports blackout protections, it stands to reason that satellite carriers can only estimate the potential burden presented by the

⁸ *Id.* at ¶ 60 (quoting Section 1008 of the SHVIA, to be codified at 47 U.S.C. § 339(b)(1)(B)).

⁹ *See id.* at ¶¶ 62-64.

rules until the carriers actually begin implementation. In advance of implementation, satellite carriers undertook to apprise the Commission, to the extent they were able, of the potential burdens.¹⁰ It is unreasonably onerous to require satellite carriers to prove the specific costs of implementation before satellite carriers receive the information from rights holders that would facilitate such specificity.

In addition to their overwhelming leverage, sports rights holders are sufficiently protected from the importation of local sports events via distant signals by the unserved household standard. They do not even stand to “benefit” significantly from the additional windfall bestowed on them in the form of the new discretionary black-out rules, as the rules will result in deletions only for the few unserved households in a protection zone. Of course, the limited practical significance of the rules does not necessarily lessen the difficulty that the satellite carrier would still confront in blacking out the sports programming for those few households.

IV. CONCLUSION

The blackout rules impose potentially enormous logistical difficulties on satellite carriers and fail to account for the unique characteristics of nationwide satellite service. For these reasons, the Commission should reconsider its decision regarding the blackout rules.

¹⁰ See, e.g., *id.* at ¶ 63 (DirecTV’s description of the necessity for additional personnel to implement sports blackouts alone).

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Respectfully submitted,

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Dated: November 14, 2000