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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

February 8, 2001

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 Reply in support of its Petition for Reconsideration filed in the above-referenced matter.

Also enclosed is an additional copy of EchoStar's Reply 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 M. Bolton

Rhonda M. Bolton
Counsel for EchoStar Satellite Corporation

Enclosures

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List ABCDE

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

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

REPLY IN SUPPORT OF
ECHOSTAR SATELLITE CORPORATION'S PETITION FOR RECONSIDERATION

In accordance with Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, EchoStar Satellite Corporation ("EchoStar") hereby files its Reply in support of its Petition for Reconsideration of certain portions of the Commission's *Report and Order*[1] in the above-captioned proceeding. In short, EchoStar needs a longer transition period to assess the burden from the new rules and evaluate whether EchoStar can viably continue retransmission of the 5 national superstations. In addition, the burden on EchoStar from the new rules would be greatly exacerbated by the Commission's decision to impose sports blackout obligations for *all* network programming. EchoStar's system is very close to its maximum capacity in its ability to honor current black out requests. A possible need to install new software and upgrade smart cards for all of EchoStar subscribers would entail an expenditure in the $75-100 million range.

[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*").

I. ECHOSTAR NEEDS A LONGER TRANSITION PERIOD TO ASSESS THE BURDEN FROM THE NEW RULES

The parties opposing EchoStar's Petition chide EchoStar for requesting that the Commission lengthen the 120 day transition period to give EchoStar adequate time to comply with the Commission's network nonduplication, syndicated exclusivity and sports blackout rules for satellite carriers.[2] However, none of the arguments against a longer transition period is persuasive.

The principal argument made by the Sports Leagues, MPAA and ALTV is that EchoStar has already had ample time since the passage of SHVIA on November 27, 1999 to assess the burdens that would arise as a result of the rules and to develop systems for complying with the rules.[3] What these parties overlook, however, is the fact that the burdens cannot be fairly evaluated, and the development of particularized systems for compliance could not meaningfully begin, until EchoStar actually receives requests for deletion of programming under the rules. Only then will EchoStar be aware of the extent and scope of these requests and more particularly the questions of what programming and what geographic areas are affected. These uncertainties are compounded by the "wildcards" of syndex and sports blackout: it is still completely unpredictable to EchoStar how many syndex and sports blackout requests there will

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[2] *See* Opposition of the Office of the Commissioner of Baseball, National Basketball Association, National Football League, National Hockey League and Division 1-A Athletic Director's Association, (collectively, the "Sports Leagues"); Opposition of the Motion Picture Association of America, Inc. ("MPAA"); and Opposition of the Association of Local Television Stations, Inc. ("ALTV").

[3] *See* Sports Leagues' Opposition at 4; MPAA Opposition at 2; ALTV Opposition at 3.

be, where they will come from, and how often.[4] The expectation that EchoStar could fully evaluate its obligations and finalize a plan for compliance when the magnitude of the obligations ultimately depends on the unknown plans of rights holders – and indeed the unknown rights, identity and geographical location of these holders – puts EchoStar in a "Catch-22" situation. The additional transition time EchoStar requests will provide a more adequate opportunity, once deletion requests are received and EchoStar's obligations are known, to assess those obligations, decide whether to continue retransmitting the 5 superstations or discontinue the current package, or finalize the means of compliance.[5]

ALTV makes the "red-herring" argument that satellite carriers should have no difficulty complying with the blackout rules since the rules "only apply to programming on five of the six existing superstations," the "universe of programming that could be deleted is limited to these stations" and accordingly, should be "easily manageable."[6] Likewise, cable systems must deal with deletion requirements for only a handful of distant network stations. The huge difference between cable and satellite obligations is that satellite carriers must deal with deletion

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[4] With regard to the impact of the syndicated exclusivity and network nonduplication rules, three of the superstations recently informed EchoStar that the rules could affect *all* of their programming from 8:30 a.m. until 9 p.m. If deletion requests are received for all of the affected programming, compliance with the rules would essentially wipe out all of this programming for superstation subscribers, calling into question whether EchoStar can continue to offer these superstations to subscribers.

[5] Both the Sports Leagues and ALTV suggest that the number of deletion requests under the rules will be "limited," but offer no specific facts or figures to quantify more precisely how "limited" the number will be. *See* Sports Leagues Opposition at 3; ALTV Opposition at 5. EchoStar, of course, cannot reasonably rely on a vague suggestion to predict what its actual obligations will be.

[6] ALTV Opposition at 5.

requests for approximately the same number of distant stations as a cable system in each and every one of hundreds of protection zones, whereas each cable system operator has to worry about one local area. And this does not even take account of the sports blackout requirements for network programming. Even forgetting the difficulties associated with the potentially nationwide origin of deletion requests, a satellite carrier likely carries more distant network feeds than any single cable system does.[7]

Finally, the MPAA maintains that the Satellite Home Viewer Improvement Act of 1999 ("SHVIA") required that the blackout rules become effective within one year after SHVIA's November 29, 1999 enactment, and for that reason the Commission cannot extend the phase-in period.[8] The Commission has implicitly rejected already this argument in creating a 120-day phase-in period that extends beyond the supposed one-year "deadline" cited by MPAA. The rules have already become effective, the phase-in period is part and parcel of these rules, and the Commission has fully complied with the statutory deadline even though it has provided for a phase-in period – indeed MPAA does not argue otherwise. It is not the Commission's decision to create a phase-in period, but the length of the phase-in period, that is at issue here. Nor can

[7] Focusing on the Commission's statement that the development of new equipment is not an issue for satellite as it was for cable, ALTV argues that satellite carriers should not require the additional phase-in time requested by EchoStar. ALTV Opposition at 3. As shown above, however, the new rules may in fact require substantial upgrades to EchoStar's system. In addition, the difficulties arise from the fact that deletion requests may originate from any of hundreds of local areas covered by the nationwide satellite signal that must be implemented. Cable operators, by contrast, need only implement requests for the programming they carry, which typically involves very few imported signals, transmitted to the subscribers in the particular communities they serve.

[8] MPAA Opposition at 5.

the statute be read as barring reconsideration of the rules and MPAA does not appear to make that argument either.

In EchoStar's view, the potentially enormous burden the rules may create for satellite exceeds significantly the "economically prohibitive" statutory requirement, particularly if compared to the minimal benefits for sports rights holders from the network blackout requirement.[9] This is a requirement that can only burden satellite carriers and inconvenience consumers without substantially benefiting anyone, since distant network signals cannot be transmitted to served households anyway. Notably, none of the broadcast and sports interests contradicts the fact that network blackout requirements will be of limited, if any, benefit.

As discussed below, the new rules raise the possibility that EchoStar's entire conditional access system may have to be replaced depending on the number and complexity of deletion requests EchoStar receives. And if system replacement becomes necessary, the effort cannot be completed until nine to twelve months *after* deletion requests are received. It is quite clear that the decision to replace the conditional access system and the conversion process cannot be completed in the existing 120-day phase-in period, one more reason for the Commission to lengthen the phase-in period to one year after deletion requests are received by satellite carriers.

[9] 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." *Report and Order*, ¶ 60 (quoting Section 1008 of the SHVIA, to be codified at 47 U.S.C. § 339(b)(1)(B)).

II. THE BLACKOUT RULES WILL IMPOSE AN ECONOMICALLY PROHIBITIVE BURDEN UPON SATELLITE CARRIERS

The Sports Leagues, MPAA and ALTV maintain that satellite carriers have not proffered sufficient evidence to establish that the blackout rules will impose an unreasonable burden on satellite carriers.[10] The Sports Leagues add that EchoStar has not pointed to "any new evidence or study" at the reconsideration stage. *See* Sports Leagues Opposition at 7. EchoStar believes that adequate evidence of burden has already been placed in the record in these proceedings. To hold EchoStar to a higher standard of proof, as the *Report and Order* does, creates an untenable "Catch-22" situation: EchoStar was not, and still is not, in a position to fully evaluate the burden from these rules because it does not know how many requests it will receive, for what programming, and for what geographic areas. In those circumstances, the standard of proof created in the *Report and Order* is one that EchoStar was by definition doomed not to meet. Nevertheless, EchoStar is now in a better position to make a preliminary estimate of the possible burden of complying with the network blackout rules and to offer new evidence in that regard.[11]

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[10] However, the Sports Leagues imply that new evidence or a new study would warrant reconsideration. *See* Sports Leagues Opposition at 7 (stating that since EchoStar has not pointed to "any new evidence or study," EchoStar's request for reconsideration should be dismissed by the Commission).

[11] This assessment is based on new facts that EchoStar could not have known during the rulemaking stage and circumstances that have developed since, such as the few deletion requests that EchoStar has already started receiving and the fact that EchoStar's ability to black out programming is now much closer to capacity than before. *See* 47 C.F.R. § 1.429 (b) (the Commission may consider a Petition for Reconsideration based on new facts "where the facts relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission," where "the facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such

(Continued ...)

The primary issue determining the impact is the number of different regions that must be defined as possible blackout zones, even more so than the number of programs and events to be blacked out. EchoStar's system requires each individual smart card in each consumer's receiver to be associated with a single blackout region for each of 12 different categories.

Because EchoStar currently implements only sports blackouts, these categories are typically established as individual sports for ease of management. For example, within category two, which might be professional baseball, a smart card is only capable of being in one of 128 different blackout zones. While this number of zones may appear sizable, this is not so if one considers that several teams in close proximity will likely have overlapping blackout zones. This situation will likely necessitate the creation of a mosaic of smaller zone "pieces" needed to make up a complete blackout zone. The complexity of creating such blackout zones will very rapidly consume EchoStar's blackout resources.

At this point, the uncertainty regarding the magnitude of deletion requests really comes into play. Although the Sports Leagues and others insist that the new blackout requirements should not present any difficulty since EchoStar currently blacks out sports programming, this is a flawed assumption. EchoStar currently only blacks out programming for ESPN and Fox Sports and EchoStar's blackout system is already near capacity. With great care and effort, the system is able to handle the current demands and normal changes of the leagues for the existing zones. However, if EchoStar receives requests requiring blackouts zones that are

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opportunity," or where the "Commission determines that consideration of the facts relied upon is required in the public interest.").

substantially different or more in number than those EchoStar currently uses, and if the number of requests increases significantly, which is expected with the addition of blackout requirements for network stations along with syndicated exclusivity and network nonduplication requests, EchoStar will likely have to totally replace its existing conditional access system with one with expanded capabilities – a replacement that requires, among other things, changing the smart cards for all EchoStar subscribers. A conservative cost estimate for a total system replacement is $123.5 million dollars.[12] This conversion effort is likely to take nine to twelve months *from the time that EchoStar receives all deletion notices.*

Moreover, the conditional access system is an integral part of EchoStar's service – any disruption or failure of service that occurs during a conversion to a new conditional access system puts EchoStar's entire service at grave risk. EchoStar has not quantified the risk of service outages to subscribers as part of this preliminary assessment.

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[12] The estimate breakdown is:

Computer systems, Qualification Test labs	$ 1.5 million
System Engineering test qualification and integration labor (90 man months)	1.5 million
Computer Systems, production, both uplinks, Replacement smart cards for 8 million receivers	63.5 million
Logistics and mailing costs for replacement (express)	42.0 million
Management and Call Center costs for customer disruption and confusion (est. 3 million calls @ $5/call)	15.0 million
Estimated Total	$123.5 million

III. CONCLUSION

For the foregoing reasons and those set forth in EchoStar's Petition, the Commission should prolong the phase-in period for the blackout rules and should not impose any sports blackout rules for network stations.

Respectfully submitted,

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Dated: February 8, 2001

DECLARATION

I, Rex Povenmire, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

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Dated: February 8, 2001

CERTIFICATE OF SERVICE

I, Rhonda M. Bolton, hereby certify that on this 8th day of February 2001 a true and correct copy of the foregoing Reply of EchoStar Satellite Corporation was served via first-class mail, postage pre-paid upon the following:

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