

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

To: The Commission

COMMENTS OF BRUNSON COMMUNICATIONS, INC.

Brunson Communications, Inc. (“Brunson”), licensee of television broadcast station WGTW, Channel 48, Burlington, New Jersey, submits its comments on the Emergency Petition of National Association of Broadcasters and Association of Local Television Stations to Modify or Clarify Rule, which was filed with the Commission on January 4, 2002. The Petition was filed because of the actions of EchoStar Communications Corporation (“EchoStar”) in discriminating among local television stations on its DISH satellite system. Brunson urges the Commission to issue a clarification to its present rules, rather than re-open the Satellite Home Viewer Improvement Act (“SHIVA”) rule making proceeding for another round of comments. Brunson notes that EchoStar’s unlawful activity will continue while any rule making proceeding is pending.

SHIVA requires, in exchange for the compulsory copyright license conferred thereby, a direct broadcast satellite system that carries one television station licensed to a market area to carry the other stations licensed to the same area. Local station carriage is to be nondiscriminatory and at contiguous channel positions.¹ The Commission implemented the nondiscrimination provisions of SHIVA by promulgating Section 76.66(i) of the Rules, which provides, in part

¹ In pertinent part, Section 338(d) of the Communications Act of 1934, as amended by SHIVA, reads: “[T]he satellite carrier shall retransmit the signal of the local television broadcast stations to subscribers

(i) Channel positioning.

(1) No satellite carrier shall be required to provide the signal of a local television broadcast station to subscribers in that station's local market on any particular channel number or to provide the signals in any particular order, except that the satellite carrier shall retransmit the signal of the local television broadcast stations to subscribers in the stations' local market on contiguous channels.

...

(4) Within a market, no satellite carrier shall provide local-into-local service in a manner that requires subscribers to obtain additional equipment at their own expense or for an additional carrier charge in order to obtain one or more local television broadcast signals if such equipment is not required for the receipt of other local television broadcast signals.

...

EchoStar has discriminated among local television stations in some markets by placing the signals of some favored local television stations on its primary North American satellites located at 110° and 119° West longitude (both of which can be viewed using EchoStar's DISH 500 receive antenna), while placing the signals of other local television stations on satellites located at 62.5°, 129°, and 148° West longitude. Signals from these other satellites cannot be received on the DISH 500 receive antenna; a customer must have a second antenna and associated equipment to view these signals.

in the stations' local market *on contiguous channels* and provide access to such station's signals at a nondiscriminatory price and *in a nondiscriminatory manner* on any navigational device, on-screen program guide, or menu." (Emphasis supplied.)

In the Philadelphia DMA, EchoStar has relegated WGTW and a few other stations to carriage on a satellite located at 129° West longitude. By so doing, EchoStar has made judgments that programming from these stations is unworthy of carriage in a channel line-up with the other local stations and EchoStar's other programming. This discrimination unlawfully deprives viewers of their right to receive all local programming. This action is in derogation of EchoStar's obligation to operate in the public interest as a Commission licensee.

A. Legal Requirements

Section 338(d) of the Communications Act of 1934, as amended by the Satellite Home Viewers Improvement Act of 1999, provides:

No satellite carrier shall be required to provide the signal of a local television broadcast station to subscribers in that station's local market on any particular channel number or to provide the signals in any particular order, except that the satellite carrier shall retransmit the signal of the local television broadcast stations to subscribers in the stations' local market *on contiguous channels* and provide access to such station's signals at a nondiscriminatory price and *in a nondiscriminatory manner* on any navigational device, on-screen program guide, or menu.² (Emphasis supplied).

The Commission has already held that "Section 338(d)'s nondiscrimination provision bars satellite carriers from discriminating against some broadcast stations by requiring subscribers to purchase additional receiving equipment in order to access some, but not all, local signals."³ The

² 47. U.S.C. 338(d).

³ *Implementation of the Satellite Home Viewer Improvement Act of 1999, Order on Reconsideration*, FCC 01-249 (September 5, 2001), para 40 ("*Recon. Order*").

analysis does not end with a financial comparison. If nondiscrimination were merely a matter of price, there would have been no need for Congress to add the further clause “and in a non-discriminatory manner.”

B. Congress was concerned that DBS carriers might favor some stations over others

The “carry one, carry all” provisions of local-into-local were meant to put all local broadcasters on an equal footing *vis-a-vis* local viewers. Yet, WGTW is only available if customers specifically request equipment necessary to receive the station’s signal. Thus, customers must take affirmative steps to have the signal of WGTW available, before they even know what programming is offered by WGTW. Brunson has been informed that EchoStar does not charge its customers for the additional receive equipment that is required to receive the signal of WGTW. Regardless of the price paid by EchoStar’s customers to receive WGTW, EchoStar’s manner of carriage of WGTW unlawfully discriminates against Brunson. Congress clearly stated its intentions in this regard :

The proposed provisions are intended to preserve free television for those not served by satellite or cable systems and to promote widespread dissemination of information from a multiplicity of sources. The Supreme Court has found both to be substantial interests, unrelated to the suppression of free expression. Providing the proposed license on a market-by-market basis furthers both goals by preventing satellite carriers from choosing to carry only certain stations and effectively preventing many other local broadcasters from reaching potential viewers in their service areas. The Conference Committee is concerned that, absent must-carry obligations, satellite carriers would carry the major network affiliates and few other signals. Non-carried stations would face the same loss of viewership Congress previously found with respect to cable noncarriage.⁴

EchoStar’s policy requires that a customer first learn of the availability of additional local channels. Next, EchoStar compels its customers to go to the trouble of specifically requesting the equipment from EchoStar. Finally, customers must wait until the equipment can be installed before

⁴ *Joint Explanatory Statement of the Committee of Conference on H.R. 1554*, 106th Cong., 145 Cong. Rec. H11795 (daily ed. Nov. 9, 1999).

gaining access to the requested signal(s). This is not carriage as of the statutory deadline of January 1, 2002. Certainly, it is not preservation of free local television and promoting widespread dissemination of information from a multiplicity of sources.

C. FCC rules clearly forbid requiring purchase of additional equipment

This issue was addressed squarely by the Commission in its *Recon. Order*, in response to a petition filed by a group of Public Television stations:

The legislative drafting change, at most, indicated that Congress did not want to prohibit satellite carriers from requiring additional dishes generally, but the change does not imply that Congress wanted to allow satellite carriers to require additional dishes if such a requirement created discriminatory effects. We believe that *a limited prohibition on requiring subscribers to obtain a separate dish to receive some local signals when other local signals are available without the separate dish is necessary to give full effect to local station carriage requirements. Otherwise, as Public Television Stations argue, satellite carriers could structure local station packages and separate dish requirements to discourage consumers from subscribing to certain local stations, including local noncommercial stations.*⁵

Unfortunately, EchoStar proceeded exactly as predicted by Public Television Stations. It has packaged the local Philadelphia stations with the purpose and effect of discouraging consumers from obtaining the signals of certain local stations, including two noncommercial educational stations as well as WGTW. By these actions disrespecting their viewers, EchoStar will seriously undermine free television, especially that provided by small television stations.

EchoStar has fought with great vigor (in Congress, at the Commission, and in the courts) against any must-carry obligation. EchoStar appears to have intended all along to continue to “cherry pick” the stations it carries. By so doing, EchoStar could continue to discriminate in favor of large corporations and networks and against independent broadcasters. EchoStar clearly made

⁵ *Recon. Order*, note 5, *supra*, at 41 (emphasis supplied).

no preparations to carry all local stations by the statutory deadline for carrying local stations. EchoStar's premeditated noncompliance with the law should not be countenanced by the Commission. The Public Interest, as expressed by Congress, requires that EchoStar carry all local television stations if it carries one local television station. If EchoStar needs additional transponder capacity to do so, it can move some of its other programming to a secondary satellite. By so doing, EchoStar can free up capacity in order to fulfill its must-carry obligations.

D. Free Equipment Still Results in Discriminatory Treatment.

EchoStar's selection of the stations to be placed on its secondary satellites is not accidental or random. EchoStar has placed its choice of local network affiliates on its primary satellites located at 119° and 110° West longitude, both of which can be accessed via EchoStar's DISH 500 receive antenna. Other stations are placed on satellites that require specialized receive equipment. WGTW, for example, has more viewers than some of the other Philadelphia stations that EchoStar has placed on its favored satellites. Yet, EchoStar discriminates against WGTW viewers by refusing to make WGTW's programming available without difficulty. EchoStar provided no notice to Brunson that WGTW would be exiled to this satellite Siberia.

EchoStar is not treating its two slates of local channels equally. Its own employees have effectively admitted that WGTW and the other neglected channels are left out of the picture unless the customer takes the initiative. According to an EchoStar spokesman, "If the customers want those more obscure local channels, we will provide them the second dish and the installation at no charge."⁶ One of the definitions for obscure includes "in an inconspicuous position; hidden."⁷

⁶ Marc Lumpkin, EchoStar, as quoted in "DBS to Keep \$5.99 Local-TV Prices," *Multichannel News*, December 24, 2001.

Clearly, EchoStar's strategy is to make what it perceives as the "more obscure" local channels even more "obscure." EchoStar's placement of WGTW on a secondary satellite, together with the inability of the vast majority of its customers to view this satellite, effectively renders meaningless the compulsory carriage provisions of the Communications Act and the FCC regulations thereunder.

The primary synonym for "obscure" is "dark."⁸ "Dark" is an apt description of a television station with fewer viewers because it has been abused by bottleneck monopolists such as EchoStar.

WGTW is not carried on a channel that is contiguous with other local broadcast stations, as required by statute.⁹ WGTW is carried at channel position 1 on its satellite located at 129° West longitude, while the other Philadelphia stations are carried at positions 8150 through 8156 on EchoStar's primary satellite located at 110° West longitude and positions 8158 through 8164 on the 129° satellite. Clearly, given this channel placement, a viewer would need specifically to seek out WGTW in order to view its programming. WGTW is not contiguous to any local channel. Congress required contiguous channel placement "to ensure that satellite carriers position local stations in a way that is convenient and practically accessible for consumers."¹⁰ In the Commission's analysis of the effect of this provision, it reasoned that "a satellite carrier is obligated to carry both retransmission consent stations and mandatory carriage stations in a block on the satellite carrier's channel line-up." *Report and Order*, at 94. It is neither "convenient" nor "practically accessible for

⁷ Webster's New World Dictionary, 1982.

⁸ *Id.*

⁹ *Supra*, note 2.

¹⁰ Note 5, *supra*, as cited in *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, Retransmission Consent Issues*, 22 CR 655, 16 FCC Rcd 1918 (2000) ("*Report and Order*"), at ¶ 91.

consumers” to have local stations available on separate satellites, at noncontiguous channel placements. It is the opposite of “convenient” to have some stations only available upon specific request and after a wait for special equipment to be installed.

EchoStar’s actions in segregating some stations to one satellite, while carrying other stations on a separate satellite, is inherently discriminatory. Ironically enough, Brunson is a minority owned and operated company. EchoStar is clearly discriminating against WGTW and forcing it to the “back of the bus.” As the Supreme Court recognized in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), “separate...facilities are inherently unequal.” WGTW is “carried,” but on a separate satellite that is not viewable by EchoStar’s customers. Such carriage amounts to a second-class treatment that offends basic notions of equality.

E. Failure to Advertise

EchoStar heavily promotes its DISH 500 system, but no mention is made in promotional materials regarding how to receive all local stations. According to EchoStar’s Internet site, the System carries WGTW on a satellite that is located at 129° West longitude. Most of the remaining Philadelphia television stations (and all of the stations affiliated with major television networks) are transmitted from a satellite located at 110° West longitude. This difference in satellite orientation requires EchoStar’s customers who wish to receive the signal of WGTW to install an additional receive antenna and associated reception equipment. Customers will not install this additional equipment if they are not told it is available, or if they are busy, distracted, confused, preoccupied, or desire only to receive those Philadelphia television stations that are affiliated with major television networks. Customers must specifically request this equipment. EchoStar, if directly asked, states that it will provide the additional equipment to customers, upon request. However, few

(if any) EchoStar customers were able to receive the signal of WGTW by the statutory deadline of January 1, 2002. EchoStar made no notification to WGTW or to its viewers regarding the need for, and availability of, this equipment. Not surprisingly, very few EchoStar customers have the equipment.

EchoStar has made no announcement regarding the installation, maintenance, repair or replacement of this equipment. Simply put, EchoStar's relegation of some local stations to an unviewable position on an unknown and unviewable satellite is a sham and makes a mockery of its obligation to the public. It is difficult to conceive of a way EchoStar could be less hospitable to its obligation.

F. Increased Difficulties for Viewers

EchoStar's actions have the purpose and effect of discouraging viewing of stations on "wing" satellites. EchoStar receives no additional revenue by making these stations available, and has made reception as difficult as possible for its customers.

The difficulties for viewers that are referenced in the NAB Petition are echoed by the experience of untold numbers of Philadelphia area residents. As an illustration, Brunson received correspondence from a dissatisfied EchoStar customer who is located in the Philadelphia DMA. This customer was not given an equal opportunity to receive the stations, including WGTW, that EchoStar has relegated to second class status. He expressed concern that he would lose channels carried on EchoStar's satellite located at 61.5° West longitude if he wanted to receive the five Philadelphia stations that are now carried on the 129° West longitude satellite. In addition, he noted that EchoStar personnel did not return several phone inquiries regarding station carriage. Given the difficulty encountered by this experienced satellite television customer in even finding an EchoStar

representative who would discuss making available the signals of all the local Philadelphia stations, it is clear that EchoStar has little or no interest in making these signals available to its customers.

In view of the foregoing, Brunson urges the Commission to immediately clarify the provisions of 47 C.F.R. 76.66(i) to prevent EchoStar from discriminating among local broadcasters unlawfully.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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