

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

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

To: The Commission

**COMMENTS OF PAXSON COMMUNICATIONS CORPORATION
ON PETITIONS FOR RECONSIDERATION**

Paxson Communications Corporation (“Paxson”) hereby submits these Comments in support of the Emergency Petition filed jointly on January 4, 2002, by the National Association of Broadcasters (“NAB”) and the Association of Local Television Stations, Inc. (“ALTV”) in CS Docket No. 00-96.

In the Emergency Petition, NAB and ALTV urge the Commission to modify or clarify its rules to prevent direct broadcast satellite (“DBS”) operators from discriminating against must-carry television stations in violation of the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”). Specifically, the Emergency Petition seeks an end to EchoStar’s practice of requiring subscribers to install additional equipment in order to receive “disfavored” must-carry stations through the DISH network system. As the owner of the largest broadcast television station group in the United States and the creator of the seventh and newest over-the-air broadcast network, PAXTV, Paxson has a vital interest in this proceeding.

Paxson urges the Commission to grant the Emergency Petition promptly and to impose such sanctions as are necessary to ensure EchoStar’s immediate compliance with its obligations under SHVIA.

I. The Commission Must Be Vigilant In Its Application Of Satellite Must-Carry Rules To Ensure The Continued Success Of Local Television Stations.

Section 307(b) of the Communications Act of 1934, as amended, requires the Commission to allocate television stations to local areas. By ensuring a localized broadcast service, the FCC has provided consumers the ability to receive programming directed at the needs and interests of their community. As a result, local businesses and politicians can communicate with local audiences, who in turn benefit from the dissemination of local programming, including coverage of local news, events, political debates, weather, and emergency information, including local EAS warnings. Consequently, the manner in which the Commission implements the satellite must-carry requirements has a significant effect on television viewers across the country and on the viability of free over-the-air television.

By affording cable must-carry rights to broadcast stations, Congress in the 1992 Cable Act enabled UHF stations to reach audiences comparable to those reached by their VHF competitors.¹ Without cable must-carry rights, many UHF television stations simply would not have survived because they would have been denied access to the majority of the viewers residing within their markets. The importance of must-carry for these stations simply cannot be overstated: Mandatory carriage of these stations on cable and satellite systems is absolutely critical to their viability. For this reason, the very success of PAXTV depends to a large extent on the ability of Paxson's UHF stations to obtain and maintain mandatory carriage rights on cable and satellite systems.

¹ See generally, *1998 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Inquiry, 13 FCC Rcd 11276, ¶¶ 26-27 (1998) (observing that UHF stations have benefited from effective cable must-carry rules).

The scores of UHF stations benefiting from cable must-carry now form the distribution platform for new television networks such as PAXTV, WB, UPN, Telemundo and Univision. These networks provide new competition and vitality to broadcast television, as well as additional programming choices for the American consumer.

As satellite operators increase their share of the multichannel video programming market, the need for fair and effective mandatory carriage rights in the satellite context is every bit as important to the health of the television industry as cable mandatory carriage rights were in 1992. DBS operators have seen significant gains in market share throughout the country, and satellite penetration already exceeds 15% in a significant number of markets and continues to increase throughout the country. As consumers continue to switch from cable and over-the-air television service to satellite service, local television stations that are not carried by DBS operators in accordance with SHVIA will lose a significant portion of their audience (*i.e.*, 15% or more of their local market audience), and such audience losses will translate into significant revenue losses for these stations (*i.e.*, again 15% or greater revenue loss). These revenue losses will have a devastating effect on these stations' operations.

Congress was fully cognizant of the importance of satellite must-carry rights for local television stations (especially for UHF stations and those that are not affiliated with the Big Four networks), and, for this reason, Congress imposed must-carry rights on DBS operators. Nevertheless, to avoid undue constitutional and technical burdens on these operators, Congress mandated must-carry rights only to the extent that DBS operators avail themselves of the local-into-local compulsory copyright license bestowed upon them by legislative grace. As a result, satellite operators can elect to

avoid the must-carry requirements altogether by foregoing the compulsory license scheme. Indeed, DirecTV and EchoStar already avoid must-carry obligations in roughly four-fifths of the nation's television markets because they do not offer local-into-local service in those areas.

Unfortunately, **EchoStar has repeatedly attempted to avoid its must-carry obligations** while still availing itself of the royalty-free local-into-local license bestowed by SHVIA. Together with its trade association, EchoStar challenged the satellite must-carry rules in the federal courts – but lost both times.² Last summer, despite clear case law on point, EchoStar abused the must-carry election process to frustrate and delay the resolution of carriage elections until the FCC directed EchoStar to cease such conduct.³ Now, EchoStar seeks to carry certain must-carry stations in a manner that virtually ensures that those stations will never be viewed by its subscribers. As a simple matter of fairness and equity, and in order to ensure compliance with SHVIA, the Commission should be vigilant in enforcing the satellite must-carry requirements to ensure that EchoStar does not succeed in its effort to “eat its cake and have it, too.”

II. Requiring the Installation of Additional Equipment to Receive a Subset of Local Stations is Inconsistent with SHVIA and the Public Interest.

In enacting SHVIA, Congress afforded satellite operators flexibility in the manner in which they carry local broadcast station signals. Unlike cable operators, satellite operators need not carry stations on their over-the-air channel, create a “basic

² See *SBCA v. FCC*, Nos. 01-1151, 01-1271, 01-1272 and 01-1818, 2001 WL 1557809 (4th Cir. Dec. 7, 2001); *SBCA v. FCC*, No. 00-1571-A (E.D. Va. June 24, 2001).

³ *Implementation of the Satellite Home Viewer Improvement Act of 1999 – Broadcast Signal Carriage Rules, Order on Reconsideration*, CS Docket No. 00-96, FCC 01-249, ¶ 61 (rel. Sept. 5, 2001).

tier,” or order stations in any particular manner.⁴ The operators’ only obligation is to “provide access to [local stations’] signals at a nondiscriminatory price and in a nondiscriminatory manner” on navigation devices.⁵ EchoStar is not complying with these basic requirements. Instead, it is imposing illegal and unfair burdens on selected must-carry stations that are inconsistent with SHVIA’s nondiscrimination provisions and SHVIA’s very purpose.

In particular, EchoStar is carrying all of its “favored” programming channels (e.g., major network affiliates, cable networks, pay-per-view, Playboy, Extasy, etc.) on CONUS satellite slots. As a result, EchoStar subscribers in markets with local-into-local service can access certain network affiliates, all cable networks, all pay-per-view channels, and all *a la carte* channels without undertaking any additional tasks. They also can view these channels’ programming offerings easily on their on-screen Electronic Programming Guides (“EPGs”).

In contrast, “disfavored” must-carry stations – those associated with newer networks and those airing, for example, religious, foreign language, shopping, and other specialty programming – are carried by EchoStar on non-CONUS satellites. EchoStar’s subscribers therefore cannot watch the disfavored stations or even view their programming in the EPGs unless the subscribers first contact EchoStar, schedule an installation appointment, wait weeks or more for the installers to arrive, and have a second satellite dish and new set-top box or boxes installed (if installation of such equipment is even practical and permitted). Clearly, EchoStar is deliberately discriminating against those stations that air programming that it does not value as

⁴ 47 U.S.C. § 338(f)(1).

⁵ *Id.*

highly as ESPN2, The Erotic Network, and Dish Music-Moonscape, all of which are easily accessible to all customers.

EchoStar surely knows that its discriminatory carriage decision will harm the “disfavored” stations. Prior to SHVIA’s grant of a local-to-local license, EchoStar learned that subscribers will not install additional equipment to receive broadcast signals, particularly those that are not affiliated with the major broadcast networks. At that time, EchoStar subscribers interested in watching any broadcast station – including local network affiliates – were required to install an off-air antenna and additional cabling. EchoStar’s General Counsel testified before Congress that EchoStar was hindered in its ability to attract customers and compete against cable precisely because the law did not allow EchoStar to carry local broadcast signals.⁶ Indeed, the same problem persists today in markets not served that do not have local-into-local service, and EchoStar’s executives repeatedly have trumpeted the expansion of local-into-local service as the primary benefit resulting from EchoStar’s proposed acquisition of DirecTV. Because subscribers will not install additional equipment to receive local stations, especially a subset of local stations, EchoStar’s discriminatory carriage policy is essentially a non-carriage policy for the “disfavored” stations. EchoStar knows this!

EchoStar is mocking the very purpose of the satellite must-carry requirements. SHVIA was designed to promote alternative media voices and preserve a level economic playing field among broadcasters, including smaller stations not affiliated with the major networks. Indeed, Congress explicitly stated that the satellite carriage rules

⁶ *Reauthorization of the Satellite Home Viewers Act: Hearing Before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce, 106th Cong. 73 (1999).*

were “intended to . . . promote widespread dissemination of information from a multiplicity of sources.”⁷ Congress recognized that carriage requirements for cable had proven to be an effective tool in advancing that interest, “as attested by the appearance of several emerging networks, which often serve underserved market segments.”⁸ With cable as a guide, Congress provided carriage rules for DBS satellite operators in SHVIA to allow independent broadcast networks like PAXTV to flourish.

Congress also sought to protect economic competition among broadcasters when it enacted SHVIA and granted satellite operators the choice of a royalty-free copyright license. Congress understood that absent SHVIA’s safeguards, “satellite operators 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.”⁹ Congress did not want the grant of royalty-free licenses to have the unintended effect of benefiting some broadcasters over others. In fact, Congress enacted SHVIA “in order to erase inequities, not further them.”¹⁰

EchoStar’s conduct is plainly inconsistent with the will of the Congress that gave EchoStar a royalty-free local-into-local copyright license. As Congress recognized, consumers on the whole will not undergo the additional burden of installing a second satellite dish, replacing existing set-top boxes, and dealing with additional cabling to receive a subset of local stations. Indeed, EchoStar knows that

⁷ 145 Cong. Rec. H11792, 11795 (daily ed. Nov. 9, 1999) (Joint Explanatory Statement of Conference Committee).

⁸ *Id.*

⁹ 145 Cong. Rec. H11792, 11795 (daily ed. Nov. 9, 1999) (Joint Explanatory Statement of Conference Committee).

¹⁰ 145 Cong. Rec. H11792, 11818 (daily ed. Nov. 9, 1999) (statement of Rep. Jackson-Lee).

subscribers will not undergo such burdens even if doing so would allow the subscribers to receive local network affiliated stations.

This obvious and deliberate discrimination against must-carry stations threatens the ability certain stations to reach local audiences, which in turn threatens those stations' very viability. The public interest demands that EchoStar cease this discrimination immediately. Consequently, the Commission should afford EchoStar no more than twenty-four hours to come into compliance with the Commission's order in this proceeding. In addition, the Commission should launch an enforcement proceeding to determine the extent to which EchoStar has profited from its deliberate discrimination against certain must-carry stations (through, for example, receiving penalty payments from the satellite contractors). Thereafter, the Commission should order EchoStar to disgorge its ill-gotten gains and distribute those sums to the stations harmed by its conduct.

Conclusion

EchoStar is abusing the trust that the Commission and the public placed in it by deliberating discriminating against those television stations that broadcast foreign-language, religious, and other programming that its executives do not value highly. The Commission should immediately direct EchoStar to cease this discrimination and begin complying fully with its obligations, for anything short of full compliance threatens the very viability of free, local, over-the-air television broadcasting.

Respectfully submitted,

PAXSON COMMUNICATIONS CORPORATION

By: /s/ William L. Watson

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