Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

OPPOSITION TO PETITION FOR MODIFICATION OR CLARIFICATION

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SUMMARY

EchoStar Satellite Corporation ("EchoStar") opposes the Emergency Petition ("Petition") filed by the National Association of Broadcasters ("NAB") and the Association of Local Television Stations ("ALTV") (collectively the "broadcasters") requesting that the Commission "modify or clarify" the rules implementing the must carry provisions of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA").[1] Requesting clarification of a rule they mischaracterize as "ambiguous," the broadcasters ask, in essence, that the Commission condemn EchoStar's plan for compliance with must carry obligations.

Contrary to the broadcasters, however, EchoStar's plan is in harmony with the spirit as well as the letter of both SHVIA and the Commission's rules. When EchoStar's satellite suppliers failed to timely deliver its two spot-beam satellites, EchoStar faced a choice between severely disrupting consumers' service, including through dropping local service in many markets, or quickly developing another means of complying with the must carry law, utilizing all of its orbital locations. EchoStar chose to meet its must carry obligation in the least disruptive way possible to consumers, spreading must carry station signals across its satellite fleet and providing subscribers with any necessary additional equipment free of charge. Nevertheless, the broadcasters seek to thwart EchoStar's compliance plan and render hundreds of thousands of Direct Broadcast Satellite ("DBS") subscribers without local service.

Because neither the statute nor the rule is ambiguous, there is no basis for amending the rule in the guise of "clarification." Nor does the Commission have the statutory authority to modify the must carry rule as the broadcasters suggest, since the focus of the statute is on price

[1] 47 U.S.C. § 338 (2001).

discrimination and EchoStar is not charging different prices for must carry channels. The consequence of granting the broadcasters' request – loss of local service to subscribers – was not the goal of SHVIA. Accordingly, the Commission should reject the broadcasters' request.

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To: The Commission

OPPOSITION TO PETITION FOR MODIFICATION OR CLARIFICATION

EchoStar hereby opposes the Petition filed the broadcasters requesting that the Commission "modify or clarify" the rules implementing the must carry provisions of the SHVIA.

I. ECHOSTAR'S MUST CARRY PLAN

EchoStar's must carry compliance plan originally hinged on the deployment of two spot-beam satellites supplied by two different manufacturers, Lockheed Martin and Loral Space. In late 2001, after numerous failures by the manufacturers to meet extended delivery deadlines,[2] it became clear that the satellites would not be operational by the January 1, 2002 statutory deadline to carry over 200 additional qualified local broadcast signals. EchoStar's central satellites are too capacity constrained to carry all qualified local signals. EchoStar cannot

[2] *See, e.g.*, Letter from Sandra McMahan, EchoStar VII Contract Manager, Lockheed Martin Commercial Space Systems, to Charles W. Ergen, Chairman and Chief Executive Officer, EchoStar Communications Corp. (dated Dec. 10, 2001) (appended hereto as Attach. A).

move existing programming on central satellites to eastern or western satellites without significantly disrupting customer expectations and violating contractual obligations to programmers. Therefore, EchoStar faced a dilemma in which it would be forced to take down local service in multiple local markets, disenfranchising as many as one million subscribers if it could not quickly develop another means of complying with the must carry law, utilizing all of EchoStar's orbital locations. EchoStar chose the least disruptive means of accomplishing the goal of continuing local service to its subscribers.

EchoStar proceeded to carry roughly half of the additional local must carry station signals on its central satellites. It placed the remaining local signals on its eastern and western satellites, which require a second dish to be viewed.[3] To comply with the law, as described in detail below, EchoStar now provides free of charge such equipment to any subscriber who requests it. This includes installation. As EchoStar Chairman and Chief Executive Officer Charlie Ergen recently stated on his popular "Charlie Chat" program,[4] the two-dish solution is an interim measure -- without doubt, if and when EchoStar's pending merger with Hughes Electronics is approved, EchoStar will have enough capacity to carry all qualified local stations on the central satellites and will move all local station signals to those central satellites.

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[3] In one market, Philadelphia, some local stations are carried on leased FSS capacity.

[4] The "Charlie Chat" is a regular feature provided to EchoStar's subscribers consisting of one-hour on-air sessions in which Mr. Ergen describes recent developments and answers questions from viewers. As noted below, Mr. Ergen addressed the question of the second satellite dish for certain local signals in his most recent "Charlie Chat."

II. THE REGULATORY PROHIBITION IS LIMITED TO "PURCHASE" OF A SECOND DISH BECAUSE THE COMMISSION LACKS THE STATUTORY AUTHORITY TO PROHIBIT A SECOND DISH THAT IS PROVIDED FOR FREE

EchoStar's decision to proceed with its "free second dish" plan rests directly on the language of the Commission's regulation. *See* 47 C.F.R. § 76.66(i)(4). In that regulation, the Commission spoke clearly and precisely on the scope of the prohibition imposed:

> 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.

47 C.F.R. § 76.66(i)(4) (emphasis added). The regulation by its express terms does not apply here. The limiting phrases "at their own expense" and "for an additional carrier charge" make clear that the prohibition is restricted to instances where the subscriber pays for the additional equipment. Because EchoStar has relieved subscribers of the burden of paying for the additional equipment, including installation, its plan is plainly justified under the regulation.

Apart from the fact that the regulation unambiguously permits EchoStar's compliance plan, there is good reason why the prohibition is limited to "purchase" of a second dish: the Commission lacks the statutory authority to promulgate a broader prohibition. Section 338(d) of the SHVIA specifically enumerates the types of discrimination prohibited with respect to carriage of local broadcast television stations under the must carry rule. As explained below, the only plausible basis under the statute for the Commission's authority is the prohibition on price discrimination between local stations. That prohibition is not implicated, however, when subscribers are not required to purchase a second dish or pay for its installation.

A. The Commission Lacks Statutory Authority To Prohibit Use of A Second Dish For Which There Is No Charge To The Customer

The Commission does not have the authority to promulgate a rule prohibiting use of a second dish for two primary reasons. First, the Commission may not act outside the authority conferred upon it by Congress, and SHVIA provides no authority for such a prohibition. Second, Congress itself considered an outright prohibition of second dishes, and rejected it. The Congressional rejection of a very similar ban militates, at a minimum, in favor of a narrow construction of the statute.

It is axiomatic that "an administrative agency is a creature of statute, and can only act within the jurisdiction conferred by its enabling statute."[5] Simply put, the Commission may not ban the use of second dishes, under any set of circumstances, in the absence of statutory authority for doing so.

Section 338(d) of SHVIA specifically enumerates the types of discrimination prohibited with respect to carriage of local television stations under the must carry rules. Satellite providers may not discriminate between local stations with respect to (i) price; (ii) channel positioning; or (iii) placement of channels on navigational devices, on-screen program guides, and menus.[6] The provision of some local stations through means of a second dish is

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[5] *High-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 n.3 (3d Cir. 1981) (quoting Dickinson, *Administrative Justice and Supremacy of Law* 41 (1927)). *See also Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it" to do so.); *Regents of Univ. of Georgia v. Carroll*, 338 U.S. 586, 597-98 (1950) (The FCC "must find its powers within the compass of the authority given it by Congress.").

[6] 47 U.S.C. § 338(d) states:

> No satellite carrier shall be required to provide the signal of a local television station to subscribers in that station's local market on

(Continued ...)

clearly not related to channel positioning or placement of channels on navigational devices. Thus, the prohibition on price discrimination is the only possible basis for the Commission to prohibit use of second dishes.

From a practical perspective, however, it cannot plausibly be argued that "price discrimination" results merely because a second dish is necessary to receive certain local stations. Rather, the only way to read the Commission's rules in a manner consistent with the authority granted to the Commission is to equate a required *purchase* of a second dish with price discrimination. The theory is that if subscribers are required to purchase a second dish in order to receive some (but not all) local channels, price discrimination between local stations would exist and such discrimination could be proscribed by the Commission as a violation of SHVIA. Importantly, however, that is not what the broadcasters are seeking. Instead, the broadcasters urge the Commission to "modify" the must carry rule to prohibit "discrimination" in non-price terms as well, thereby equating the need to use a second dish to receive some stations with "discrimination" between stations. This the Commission cannot do.

It must be presumed as a matter of law that Congress did not grant such authority to prohibit all distinctions between local stations, because Congress expressly created such authority elsewhere in the Communications Act, but not in Section 338.[7] Specifically, in Title II

> any particular channel number or to provide the signals in any particular order, except that the satellite carrier shall transmit 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 [sic] signals at a nondiscriminatory price and in a nondiscriminatory manner on any navigational device, on-screen program guide, or menu.

[7] *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W] here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is

(Continued ...)

of the Communications Act governing common carriers, Congress broadly prohibited any "discrimination in charges, *practices*, classifications, regulations, *facilities or services*." 47 U.S.C. § 202 (emphasis added). Similarly, in the program access provision of Title III, discrimination with respect to "prices, *terms, and conditions*" is prohibited. 47 U.S.C. § 548(c)(2)(B) (emphasis added). In contrast, Congress did not include such broad language in Section 338, but chose to enact a narrower ban on discrimination: only differences with respect to channel positioning, price, and placement on navigational devices, on-screen program guides, and menus are proscribed. Other differences, including placing some channels on different orbital slots, are not.

In fact, most tellingly, Congress itself considered an outright prohibition of second dishes, and rejected it. The nondiscrimination provision in an earlier draft of SHVIA stated, in pertinent part:

> . . . . the satellite carrier shall transmit the signal of the local television broadcast stations to subscribers in the stations' local market on contiguous channels *which a subscriber may receive without the need to install an additional reception antenna or any other additional equipment* 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.[8]

The italicized language, if enacted, would have clearly prohibited a requirement of additional equipment to receive a local station under any circumstance. However, Congress chose to delete

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generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.").

[8] House Conferees' Counteroffer of the Copyright Satellite Statutory License Improvement Act, Discussion Draft, at 27 (Oct. 15, 1999) (emphasis added).

this language. And under well-established principles of statutory interpretation, this deletion cannot be ignored or dismissed as whim or accident. As the Supreme Court has instructed, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."[9]

In the rulemaking proceeding regarding the must carry rules, satellite carriers argued that Congress's rejection of a ban on second dishes prevented the Commission from acting to limit use of second dishes in any way.[10] On reconsideration of the must carry rules, the Commission considered this argument and opined that the deletion indicated that "Congress did not want to prohibit satellite carriers from requiring additional dishes generally," but left room for a narrower rule prohibiting a requirement that subscribers *purchase* additional equipment to gain access to some stations in a local market. *See Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, 16 FCC Rcd. 16544, 16566, ¶ 41 (2001) ("Order on Reconsideration"), *clarifying* 16 FCC Rcd. 1918, 1934 (2000) ("Must Carry Report and Order"). Thus, while the Commission did not agree with satellite carriers that the deletion prevented the Commission from adopting any limitation whatsoever on the use of second dishes, the Commission nonetheless acknowledged that a complete ban on second dishes, such as that urged here by the broadcasters, is inconsistent with

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[9] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citations omitted); *see also Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (deletion of a provision from a bill in conference committee "strongly militates[s] against a judgment that Congress intended a result it expressly decline to enact.").

[10] *See, e.g.,* Petition for Reconsideration of DIRECTV, Inc. (filed Feb. 22, 2001), at 21-23.

Congressional intent. The Congressional rejection of a very similar ban militates, at a minimum, in favor of a conservative construction of the nondiscrimination provision. Accordingly, the broadcasters' position must be rejected.

B. The Commission's Orders Show That It Was Cognizant of the Distinction Between Price Discrimination and Other Types of Distinctions

The Commission has already acknowledged that the price discrimination provision of SHVIA was intended to prevent discrimination against certain local stations with respect to the *price* charged to consumers, rather than the use of different orbital locations and second dishes to provide certain local stations, as the broadcasters suggest. As the Commission observed, "Section 338's anti-discrimination language prohibits satellite carriers from implementing *pricing schemes* that effectively deter subscribers from purchasing some, but not all, local television signals. Thus, . . . a satellite carrier must offer local television signals as a package or a la carte, at comparable rates." *Id.* at ¶ 43 (quoting Must Carry Report and Order, 16 FCC Rcd. at 1960) (emphasis added)).

By prohibiting satellite carriers from imposing an additional cost to subscribers to acquire some, but not all, of the local stations in a market, the Commission's rule regarding second dishes appears to be an attempt to address the expressed concern of Congress that there be no discrimination against must carry stations with respect to the price charged to consumers for those stations. The Commission cited, in particular, a concern that satellite carriers could use the purchase of additional equipment as a means to discourage subscribers from obtaining must carry channels if there were no restriction on satellite providers' ability to charge for second dishes. In the absence of the rule, the Commission speculated that "satellite carriers could structure local station packages and separate dish requirements to discourage consumers from

subscribing to certain local stations, including noncommercial [*i.e.*, must carry] stations."[11] Order on Reconsideration, 16 FCC Rcd. at 16566, ¶ 41.

The Commission's repeated references in the Order on Reconsideration to a prohibition on a requirement that subscribers "*purchase*" additional equipment, also confirm that statutorily proscribed price discrimination was the focus of the Commission's concern in connection with a second dish. *See id.* at ¶ 40 ("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.") (emphasis added) (citation omitted); *id.* ("the language of Section 338(d) . . . bars satellite carriers from requiring subscribers to *purchase* additional equipment when television stations from one market are segregated and carried on different satellites.") (emphasis added) (citation omitted); *id.* at ¶ 41 ("we affirm our rule prohibiting satellite carriers from requiring subscribers to *purchase* additional equipment to gain access to some, but not all of the local signals in a market.") (emphasis added). If the Commission were trying to prohibit more than that, as the broadcasters claim, it clearly lacked statutory authority to do so.

[11] The Commission also explained by way of example that under the rule, "DIRECTV may require an additional dish to receive all television stations from the Baltimore market, but it may not require subscribers to *purchase* the same to receive some Baltimore stations where the others are available using existing equipment." Must Carry Report and Order, 16 FCC Rcd. at 1961, ¶ 101 (emphasis added).

C. EchoStar's Plan Ensures That Subscribers Will Receive All Local Stations At The Same Cost and Therefore Does Not Violate The Prohibition Against Price Discrimination

As discussed above, the focus of the statute and the rule is on preventing discrimination against certain local stations based on the price charged to consumers for the stations. EchoStar's plan does not violate the prohibition against price discrimination in any way, as the plan ensures that subscribers will receive all local stations at the same cost.[12] Nor is the plan a "gambit," as the broadcasters allege, to avoid must carry obligations.

As stated above and as described at length in a letter from Charlie Ergen to the NAB, EchoStar's plan is an interim solution devised to deal with a major setback created by the failure of EchoStar's satellite contractors to timely deliver spot beam satellites to EchoStar.[13]

The allegation that EchoStar's offer is "illusory" is groundless. EchoStar has acted in good faith to publicize this offer and train its customer service representatives ("CSRs") to help customers obtain the second dish where necessary. In addition, EchoStar has committed to its retailers and its customers that it will provide any necessary additional equipment at no cost to the customer, meaning no additional subscription fee or installation cost.

First, EchoStar publicized this offer to customers by sending a letter to all of EchoStar's local station subscribers. The customer letter apprised subscribers that "new channels were added January 1st" to their local package "including UPN, WB, PBS (normally

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[12] EchoStar's plan is also consistent with the statute and the rule because it does not discriminate between must carry and retransmission consent stations. In each market where EchoStar provides local service, a large number of must carry signals are carried on the same satellites as the retransmission consent signals in that market.

[13] Mr. Ergen's letter is appended to the broadcasters' Petition as Exhibit B.

sold separately) plus many others depending on the city." The clear purpose of this statement was to get subscribers interested in the additional must carry channels, not to deter them from obtaining the channels. In the same vein, the second dish offer was raised only in a footnote, which also mentioned that the installation would be free: "Channels vary by market. Some channels may require the installation of additional hardware; installation available at no cost until 3/31/02."

Second, EchoStar Chairman Charlie Ergen has gone to great lengths to publicize personally this offer in his weekly and popular "Charlie Chat" show.[14] Mr. Ergen explained to viewers that the late delivery of spot beam satellites required EchoStar to implement the two dish solution, and that the law requires EchoStar to provide any necessary additional equipment free of charge, including installation. Mr. Ergen told viewers:

> Contact us [by dialing the toll-free number],[15] we'll schedule installation, we'll come out, put all the switches, put all the hardware in, put everything you need absolutely free, should you want [certain local channels].[16]

Third, EchoStar's CSRs have been trained to help customers receive the second dish. The training includes instruction about issues and changes by class and individual feedback, updates by email and on the CSCWeb. An internal memorandum to all CSRs includes the following model interaction between a subscriber and a CSR:

Customer: "Well, how much will it cost or how can I get that 2nd Dish?"

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[14] *See* note 4, *supra* (describing "Charlie Chat").

[15] 1-800-333-DISH

[16] Note: This quote was transcribed from a videotape of Mr. Ergen's appearance on "Charlie Chat," which has been repeatedly rebroadcast in recent weeks.

CSR: "Mr./Ms. __, DISH Network is going to provide you with a 2nd Dish and installation free of charge...."

Tellingly, EchoStar's promotional efforts have borne fruit: already, after only a few weeks, thousands of subscribers have taken advantage of EchoStar's offer of a free dish. The degree of response from subscribers taking advantage of this offer certainly belies the broadcasters' assertion that EchoStar only "half-heartedly" promoted the offer, and that a second dish represents a "hassle" that will cause subscribers to forgo receiving the signals available via the second dish.

D. The "Hassle Factor" Broadcasters Raise Is Both Factually Inaccurate And Not Cognizable Under The Price Non-discrimination Provision

The broadcasters make much of what they characterize as a "hassle factor" that, they say, will unfairly discriminate against stations carried on the eastern and western satellites. Not so. As described above, to be able to receive local stations carried on the eastern and western satellites, a subscriber need only make one phone call to schedule a free installation. Moreover, EchoStar today offers several highly successful services that require a second dish, including high definition ("HDTV") programming, foreign language networks, and other specialty services. Hundreds of thousands of subscribers have acquired a second dish *at their own expense* to receive the specialty programming they desire; it logically follows that subscribers will acquire a second dish *for free* to receive the local stations they desire. Finally, whereas the specialty services ordinarily require additional up-front expenditures, the free-second-dish offer allows customers to subscribe to HDTV, foreign language, or other specialty services without having to purchase the necessary equipment or pay for its installation. This is a give-away that can only be considered the opposite of a "hassle."

The broadcasters' pleading is glaringly bereft of any attempt to connect the professed "hassles" to the statute, no doubt because inherently subjective "hassles" are not cognizable under the price discrimination provision of SHVIA. Moreover, while the broadcasters purport to bemoan the "hassles" associated with a second satellite dish, they apparently see no hassle at all when consumers are required to use up to a 30-foot tall over-the-air antenna equipped with rotors in addition to a satellite dish to receive their network signals.[17] The broadcasters have argued strenuously for years that a consumer that can receive the local network stations only by means of such an antenna is a "served" household and therefore ineligible to receive distant network stations by satellite. Even though a tall antenna with rotors is undeniably a more inconvenient addition to a satellite dish than a second dish, the broadcasters have not viewed this as enough of a "hassle" to keep them from blocking consumers' access to distant network signals. The broadcasters' opportunistic laments about alleged consumer inconvenience are thus completely inconsistent with their position on who qualifies as a served household, and should be disregarded by the Commission

In any event, the broadcasters' protests about alleged "hassles" should strike the Commission as familiar. In the must carry implementation proceeding, for example, the broadcasters asked the Commission to prohibit satellite carriers from "'requiring viewers to take extra steps (e.g., mouse or remote clicks) to obtain access to particular local stations, or from

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[17] *See Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act: Part 73 Definition and Measurement of Signals of Grade B Intensity, Report and Order*, 14 FCC Rcd. 2654 (1999), *Order on Reconsideration*, 14 FCC Rcd 17373 (1999). *See, e.g.*, Comments of National Association of Broadcasters, CS Docket No. 98-201 (filed Dec. 11, 1998) at 43-50 (recommending use of 20-30 foot antennas for testing and objecting to the use of "a household's own unknown, and potentially defective, equipment" and requesting that the test antenna be pointed in the direction of the station <u>for all stations</u>).

placing . . . [must carry] stations on different screens.'" Must Carry Report and Order, 16 FCC Rcd. at 1959, ¶ 96 (quoting comments submitted by NAB in the must carry rulemaking proceeding). The Commission rejected this argument and stated that it did "not believe that Congress meant to bar satellite carriers from requiring viewers to take extra steps to reach a local television station on an electronic program guide, when it promulgated the SHVIA." *Id.* The broadcasters also argued that a la carte pricing was unfairly discriminatory against must carry stations because requiring customers to take the affirmative step of selecting a given station would put less popular stations at a disadvantage. The Commission rejected this notion too. *See* Must Carry Report and Order, 16 FCC Rcd. at 1960, ¶ 99 ("We do not believe that the statute requires satellite carriers to sell all local television stations as one package to subscribers. . . . Nor did Congress explicitly prohibit sale of local television stations on an a la carte basis."). The Fourth Circuit Court of Appeals agreed. *See Satellite Broadcasting and Communications Ass'n v. FCC*, No. 01-1151, 2001 WL 1557809 (4th Cir. Dec. 7, 2001), at *25-26. Just as it is not discriminatory to require a subscriber to make extra mouse clicks or select stations from a list of available choices, it is not discriminatory to allow a subscriber to choose channels that require additional equipment when such equipment is provided at no additional cost. The Commission should therefore reject the broadcasters' latest "hassle" theory, as it did the previous ones.

III. CHANGING THE RULE TO IMPOSE A "ONE-DISH" REQUIREMENT (EVEN IF PERMISSIBLE) WOULD REQUIRE A NEW RULEMAKING

Rather than discuss the operative language of the regulation, the broadcasters seize on selected portions of the Commission's Order on Reconsideration in an unsuccessful

effort to contradict the regulation's text.[18] The broadcasters argue that the Commission intended to go much farther than what the regulation's text says. Even though they never pressed these objections during the initial rulemaking, the broadcasters now ask the Commission to "clarify" or "modify" the regulation so that the prohibition is widened to include cases where the second dish is provided without cost or charge. This effort at reconstruction of the regulation should be rejected.

First, the broadcasters have failed to present their objections in a timely fashion. They did not raise their challenge to the qualifying language concerning "expenses" and "costs" before the Commission during the initial rulemaking, which became final on September 26, 2001. That language appeared in both the proposed rule and the Commission's DBS Must Carry Report and Order.[19] The broadcasters therefore had a sufficient opportunity to present their objections, but failed to do so. Consequently, the instant petition is an untimely collateral attack on the Commission's rulemaking, and the challenge that the broadcasters press here is procedurally barred.[20]

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[18] *See* Petition at 3-5 (*citing* Must Carry Report and Order).

[19] *See* Must Carry Report and Order, 16 FCC Rcd. at 1961 (stating that the statute and proposed regulation "bar[] satellite carriers from requiring subscribers *to purchase* additional equipment when television stations from one market are segregated and carried on separate satellites.") (emphasis added).

[20] *See In the Matter of Minnesota PCS Limited Partnership (Assignor) K-25 Wireless, L.P. (Assignee)*, File No. 0000525838, DA 01-3024 (Wireless Telecommunications Bur. rel. Jan. 2, 2002), ¶ 11 & n.29 (noting that the petition constituted a collateral attack on prior rulemakings, "and to that extent we would not need to address the Petition's arguments"); *In the Matter of Motions for Declaratory Ruling Regarding Commission Rules and Policies for Frequency Coordination In the Private Land Mobile Radio Services*, 14 FCC Rcd. 12752, ¶ 11 (rel. July 2, 1999) ("[A]s the Commission has previously held, indirect challenges to Commission decisions that were adopted in proceedings in which the right to review has expired are considered impermissible collateral attacks and are properly denied.").

Second, the language of the regulation is clear and thus controlling. As the case law teaches, the Commission's intent is effectuated by the language of regulation, which is decisive if clear.[21] The broadcasters do not suggest that the regulation's text is unclear or ambiguous, and essentially concede that it is not by requesting a "modification" of the rule.

Instead, the broadcasters' contention is that, regardless of the regulation's text, the Commission intended that the rule would apply even though EchoStar subscribers will *not* obtain the additional equipment "at their own expense or for an additional carrier charge." The Petition tries to override this clear language by selectively citing to the Commission's Order on Reconsideration. However, the Commission is not permitted to rely on explanatory comments, including those in its reconsideration order, to cloud a regulatory text that is clear.[22] As the courts have explained, the industry and public rely on the text of the agency's regulations to make future decisions and thus the language of the regulation controls over any conflicting language in the agency's preamble or commentary.[23]

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[21] *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (no deference due to agency interpretation that is "inconsistent with the regulation") (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414-15 (1945)); *Albemarle Corp. v. Herman*, 221 F.3d 782, 785 (5th Cir. 2000) (same); *Fluor Constructors v. Occupational Safety and Health Review Comm'n*, 861 F.2d 936, 939 (6th Cir. 1988) ("An administrative agency's interpretation of a regulation is valid . . . only if that interpretation complies with the actual language of the regulation."); *see also OWCP v. Eastern Coal Corp.*, 54 F.3d 141, 147 (3d Cir. 1995) ("The test is not what [the agency] might possibly have intended, but what [it] said.") (quotations and citations omitted).

[22] *See Stinson v. United States*, 508 U.S. 36, 45 (1993) (agency's explanatory comments are authoritative so long as they are not inconsistent with the regulation); *Albemarle Corp. v. Herman*, 221 F.3d 782, 786 (5th Cir. 2000) (preamble is consulted "only when . . . the regulation's plain language is ambiguous"); *see also Director, OWCP v. Gardner*, 882 F.2d 67, 70 (3d Cir. 1989) (when a regulation is clear on its face, it is not subject to an alternative construction by the agency).

[23] *E.g., Diamond Roofing v. Occupational S. & H. Rev. Com'n*, 528 F.2d 645, 649 (5th Cir. 1976); *Albemarle Corp. v. Herman*, 221 F.3d at 786.

Third, even if resort to the Commission's Order on Reconsideration is appropriate here, that order does not support the broadcasters' contentions. The Petition relies on several statements in the Order on Reconsideration suggesting that the Commission intended that the subscriber not be forced to "acquire" or "obtain" additional equipment *under any circumstances*. The Petition, however, wrenches these statements entirely out of context.

In the first place, the Commission was not speaking directly to the issue raised here. Rather, the passages that the broadcasters cite relate to the Commission's finding that Section 338 applies when *the subscriber is required to purchase* the additional equipment.[24] For example, in the paragraph immediately preceding the language quoted in the Petition, the Commission states: "The Commission's rule on this issue is intended to prohibit satellite carriers from placing mandatory carriage television stations on a satellite if that would require a subscriber *to purchase* equipment additional to what is needed to receive other local stations in the same market . . . ."[25] Accordingly, the Commission's subsequent statements about

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[24] *See* Order on Reconsideration, 16 FCC Rcd. at 16563-566. The broadcasters are plainly wrong when they state, Petition at 3, that the Commission's Order addressed the "specific issue" raised in the emergency petition.

[25] Order on Reconsideration, 16 FCC Rcd. at 16566, ¶ 40 (emphasis added); *see also id.* at 16563, ¶ 37 ("In the Report and Order, the Commission interpreted the nondiscrimination provision of Section 338(d) of the Act to prohibit satellite carriers from requiring subscribers *to purchase* additional equipment to gain access only to some, but not all of the local signals in a market") (emphasis added); *id.* at 16564, ¶ 37 (finding that the "language of Section 338(d) covers the additional equipment concerns raised by the parties and bars satellite carriers from requiring subscribers *to purchase* additional equipment . . . .") (emphasis added, internal quotations and citation omitted); *id.* (explaining that its regulation was intended to address concerns "that a satellite carrier may place mandatory carriage stations on a satellite that would require a subscriber *to purchase* another dish and/or equipment . . . .") (emphasis added); *id.* at 16565, ¶ 40 ("Section 338(d)'s nondiscrimination provision bars satellite carriers from discriminating against some broadcast stations by requiring subscribers *to purchase* additional equipment in order to access some, but not all, local stations.") (emphasis added).

"obtaining" and "acquiring" an additional dish, when read in context, clearly relate to whether the rule applies when subscribers are forced to obtain or acquire the additional equipment *at their own expense*. At most, the Order on Reconsideration, with its repeated statements tying the regulation to the subscriber's purchase of the second dish, shows only that the Commission has interpreted its regulation in a manner consistent with the text.

Fourth, as the regulation is textually clear on its face, the broadcasters' "emergency petition" is inappropriate. The Commission is not permitted to effect a change in the regulation's text unless it first proceeds through the notice and comment rulemaking procedures set forth in the Administrative Procedure Act ("APA"). *See Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 100 (1995) (noting that an APA rulemaking would be required if a rule "adopt[s] a new position inconsistent with any of the Secretary's existing regulations.").[26] As the Seventh Circuit explained, "When an agency gets out the Dictionary of Newspeak and pronounces that for purposes of its regulation war is peace, it has made a substantive change for which the APA may require procedures."[27] Similar reasoning governs here. The instant petition

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[26] *See also Fluor Constructors v. Occupational Safety and Health Review Comm'n*, 861 F.2d 936, 939 (6th Cir. 1988) ("An agency is bound by the regulations it promulgates and may not attempt to circumvent the amendment process through changes in interpretation unsupported by the language of the regulation."); *Marshall v. Western Union Tel. Co.*, 621 F.2d 1246, 1250 (3d Cir. 1980) ("We believe that the district court erred in deferring to the Secretary's position because the workweek standard is in reality not an 'interpretation' of the governing statute but rather a substantive amendment of the regulations. As such, we believe the Secretary must engage in a rulemaking procedure conforming with the notice and comment provisions of [§ 553]."); *Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979) ("The fact that a regulation as written does not provide FERC a quick way to reach a desired result does not authorize it to ignore the regulation or label it 'inappropriate.'"), *cert. denied*, 449 U.S. 889 (1980).

[27] *Homemakers North Shore, Inc. v. Bowen,* 832 F.2d 408, 412 (7th Cir. 1987), quoted with approval in *National Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992).

urges the Commission to pronounce that for purposes of this regulation the terms "at their own expense" and "for an additional carrier charge" also mean "not at their own expense" and "not for an additional carrier charge."[28]

Finally, the broadcasters' proposed modification to the regulation would frustrate EchoStar's legitimate reliance interests.[29] EchoStar made its business decision to adopt its free second dish plan in reliance on the language of the regulation. The broadcasters have pointed to nothing in the regulation or the accompanying orders that would allow the Commission to sweep away these settled expectations and alter the consequences of EchoStar's prior actions. Under established precedent, the Commission "must always provide 'fair notice' of its regulatory interpretations to the regulated public," including a reasonably clear warning of the conduct that is prohibited or required.[30] But here the Commission has given no warning that the prohibition

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[28] Even assuming the meaning of the regulation cannot be discerned through traditional statutory tools of interpretation, including giving effect to the language's natural and plain meaning, the Commission should resolve any ambiguity in favor of the carriers required to comply with the prohibition. *See, e.g., Diamond Roofing*, 528 F.2d at 649.

[29] *See New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1110 (D.C. Cir. 1987) (recognizing that "under certain circumstances an agency may be prevented from applying a new policy retroactively to parties who detrimentally relied on the previous policy"), *cert. denied*, 490 U.S. 1039 (1989); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988); *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001) (a regulation is retroactive when it alters the consequences of past legal actions).

[30] *General Elec. Co. v. United States EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995); *Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir.) ("elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected"), *cert. denied*, 429 U.S. 895 (1976); *see also Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1558 (D.C. Cir. 1987) (describing FCC's legal duty to provide adequate notice of requirements); *Radio Athens, Inc. v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968); *accord Reuters Ltd. v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986) ("Ad hoc departures from [the Commission's] rules, even to achieve laudable aims, cannot be sanctioned, . . . for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action.") (citation omitted).

could be re-interpreted to apply when the subscriber is not required to incur the costs of the additional equipment. In light of the strong reliance interests of EchoStar, it would be especially inequitable to require EchoStar to change course and withdraw its free second dish plan after the regulations are already in effect and EchoStar has acted in reliance on them. The loss of local service that many EchoStar subscribers would suffer if the Commission adopts the interpretation advanced by the broadcasters is likewise inequitable. The result of an outright ban -- dropping all local stations from a number of markets that currently receive them -- would be both contrary to the public interest and wholly inconsistent with the goal of SHVIA.

Thus, by its own terms, the regulation does not apply here, and the Commission's Order on Reconsideration simply confirms the plain language of the regulation. Both EchoStar and its subscribers will be prejudiced by any change of position by the Commission. This means that, if the Commission were to adopt the broadcasters' suggestion, it would have to do so by rulemaking.[31] As shown below, however, the statute precludes the broadcasters' proposed scheme, even if implemented by rule.

IV. THE REQUESTED CHANGE IN THE RULES WOULD CAUSE SUBSCRIBERS TO LOSE LOCAL SERVICE, CONTRARY TO CONGRESSIONAL INTENT

It is important not to lose sight of the consequence of granting the broadcasters' request here: as many as one million EchoStar subscribers would lose their local broadcast

[31] In its Public Notice, the Cable Services Bureau asks whether implementing the broadcasters' suggestion would require a rulemaking. *See* Public Notice, National Association of Broadcasters and Association of Local Television Stations Seek Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers, CS Docket No. 00-96, DA 02-31 (Cable Services Bur. rel. Jan. 8, 2002), at 2. The authorities cited above clearly answer that question in the affirmative.

service,[32] an absurd result and the antithesis of Congress's intent in enacting the SHVIA. Congress could not have explained its goal to promote offerings of local stations more clearly, stating that SHVIA "allows satellite carriers for the first time to provide their subscribers with the television signals they want most: their local stations." SHVIA Conference Report at 93. As the Commission has repeatedly observed, the purpose of SHVIA was to promote competition to local cable monopolies and consumer choice by "plac[ing] satellite carriers on an equal footing with local cable operators when it comes to the availability of broadcast programming, and thus give consumers more and better choices in selecting a multichannel video program distributor."[33] The effort by Congress to promote competition has already met with some success; the Commission has observed a trend of increasing DBS subscribership that it attributes at least partly to the availability of local broadcast stations to satellite subscribers as a result of SHVIA.[34] The rule change proposed by the broadcasters would cause contraction, rather than continued expansion of the availability of local channels to consumers. This would be a decidedly wrong-headed result, leading competition in the opposite direction from what Congress intended when it enacted SHVIA. Accordingly, the suggested ban on use of second dishes should be rejected.

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[32] *See supra*, Section I.

[33] *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd. 5445, 5446, ¶ 1 (2000), *clarified*, 16 FCC Rcd. 15599 (2001).

[34] *See In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd. 6005, 6039 (2001) ("This year's significant increase in DBS subscribership has been attributed in part to the authority granted to DBS providers in late 1999 to offer "local-into-local" service."); *see also In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Eighth Annual Report, CS Docket No. 01-129 (rel. Jan. 14, 2002), at ¶¶ 59-60.

The broadcasters have also expressed concern about how long EchoStar's "interim" plan would last. EchoStar's merger with Hughes Electronics, if approved, will result in a one-dish solution for local station subscribers in all of the 100 or more markets that the new EchoStar plans to serve.[35] Nevertheless, the law is clear. Under SHVIA and the must carry rule, EchoStar has the flexibility to use eastern and western slots to comply with must carry obligations, and this flexibility is and will continue to remain essential to EchoStar's ability to carry all qualified stations upon request.

V. CONCLUSION

For the foregoing reasons, EchoStar respectfully requests the Commission to deny the broadcasters' request for modification or clarification of the Commission's must carry rule.

Respectfully submitted,

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January 23, 2002

[35] Mr. Ergen. confirmed this statement in his recent "Charlie Chat" appearance.

ATTACHMENT A

LOCKHEED MARTIN

Lockheed Martin Commercial Space Systems
1272 Borregas Avenue
Sunnyvale, California 94089

December 10, 2001

ECHOSTAR ORBITAL CORPORATION
5701 Santa Fe Drive
Littleton, CO 80120-1838

Attention: Mr. Charlie Ergen

Subject: EchoStar VII Contract – Satellite Shipment Delay

Dear Mr. Ergen,

Lockheed Martin hereby provides notice that the Delivery date for the EchoStar-VII satellite is being rescheduled to a month-end December to early-January time frame. Technical issues have arisen during the final assembly and testing of the satellite which have resulted in this scheduling change.

We will require additional time for the investigation, rework and retest of the satellite as necessary to assure the mission performance of the satellite. We will keep you completely updated as to our findings and proposed course of action. We will also provide an updated ready-to-ship date as soon as we finalize our schedule.

Thank you for your cooperation and understanding.

Very truly yours,

for

Sandra McMahan
EchoStar VII Contracts Manager

Cc Mr. R. Stanton Dodge
Mr. Rohan Zaveri

DECLARATION

I, David K. Moskowitz, hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

David K. Moskowitz
Senior Vice President and
General Counsel
EchoStar Satellite Corporation
5701 South Santa Fe
Littleton, CO 80120
(303) 723-1000

Dated: January 23, 2002

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on January 23, 2002, via hand delivery (indicated by *) or via email (indicated by **), upon the following:

Henry L. Baumann*
Benjamin F.P. Ivins
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036

Robert E. Branson*
Association of Local Television Stations
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Magalie Roman Salas**
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Federal Communications Commission
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