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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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JAN 23 2002

Federal Communication Commission
-Bureau/Office

In the Matter of:)
)
Implementation of the Satellite Home)
Viewer Improvement Act of 1999)
)
Broadcast Signal Carriage Issues)
)

CS Docket No. 00-96

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

**JOINT COMMENTS IN SUPPORT OF EMERGENCY
PETITION TO MODIFY OR CLARIFY RULE**

Barry A. Friedman
Barry D. Umansky
Carolina Coll
Thompson Hine LLP
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 331-8800 - Telephone
(202) 331-8330 - Facsimile

Counsel for:

Rancho Palos Verdes Broadcasters, Inc.
Costa de Oro Television, Inc.
KVMD Acquisition Corporation
Entravision Holdings, LLC

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SUMMARY

The Joint Parties, operators of television broadcast stations entitled to carriage over the EchoStar system in particular television markets, support the Emergency Petition filed by the National Association of Broadcasters and the Association of Local Television Stations. Satellite subscribers wishing to view the Stations licensed to the Joint Parties now must acquire a second receive dish in order to receive these local signals.

The EchoStar practice of relegating some – but not all – local stations entitled to carriage (under the “carry one; carry all” provisions of the Satellite Home Viewer Improvement Act and implementing FCC rules) to a “second dish” is unlawful. Moreover, the methods by which EchoStar has chosen to demote some local stations to “second dish” status reflects the very kind of discrimination for which the statute and the rules were designed to prevent.

Furthermore, and even assuming *arguendo* that such a dual-satellite system might be acceptable over perhaps a very short term, EchoStar has failed to provide any meaningful information to subscribers who may seek to obtain and employ a second dish. Indeed, the reality in local markets is that consumers have little if any realistic opportunity to view – via satellite-delivered service – many of the local stations to which they are entitled.

The Commission should clarify its rules – in the form of a declaratory ruling or otherwise – in a fashion that will make it unmistakably clear that the “second dish” scheme being employed by EchoStar is unlawful and must be terminated.

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I. INTRODUCTION AND SUMMARY.

On January 8, 2002, the Commission's Cable Services Bureau issued a Public Notice¹ seeking comments on a January 4, 2002, "Emergency Petition" filed jointly by the National Association of Broadcasters ("NAB") and the Association of Local Television Stations ("ALTV"). The NAB/ALTV Petition urges the Commission to modify or clarify the FCC's rules applicable to the carriage of local television stations by satellite carriers -- rules adopted pursuant to the terms of the "Satellite Home Viewer Improvement Act of 1999" ("SHVIA" or "Act").² Petitioners ask the Commission to respond swiftly as to whether compliance with the SHVIA may be obtained if a satellite carrier requires

¹ "National Association of Broadcasters and Association of Local Television Stations Seek Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers," *Public Notice* (DA 02-31), released January 8, 2002.

² Pub. L. No. 106-113, 113 Stat. 1501.

subscribers to obtain a second satellite antenna in order to receive certain local television broadcast stations that, pursuant to the terms of the Act, are required to be carried.

These joint comments are filed by Rancho Palos Verdes Broadcasters, Inc. (“RPVB”), the licensee of Station KXLA(TV), Rancho Palos Verdes, CA, Costa de Oro Television, Inc. (“Costa”), the licensee of Station KJLA(TV), Ventura, CA, KVMD Acquisition Corporation “KVMD”), the licensee of Station KVMD(TV), Twentynine Palms, CA, and Entravision Holdings, LLC (“Entravision”), on behalf of the following of its licensed television stations: Station KCEC(TV), Denver, CO, KLUZ(TV), Albuquerque, NM, WVEN(TV), Orlando, FL and WUNI(TV), Boston, MA (hereinafter the “Joint Parties”). By and through their attorneys, the Joint Parties hereby file comments in support of the NAB/ALTV petition.

Entravision is the licensee of full-service and low-power television stations, most of which broadcast in Spanish language and are affiliated with the Univision Network, the principal Spanish-language television network. Entravision disseminates, through the full-service stations participating in these Joint Comments, Spanish-language programming that serves the needs of Hispanic individuals who rely on these stations. Such reliance is not only for entertainment; it also is for news and public affairs programming of importance to the local Hispanic audience.

KVMD Acquisition Corporation became the licensee of Station KVMD(TV), Twentynine Palms, California, on October 3, 2001. The Station offers a mix of entertainment and informational programming to its audience.

Station KJLA(TV), licensed to Costa, provides service to the Los Angeles, California television market. It was the Los Angeles market's first bilingual television station and now offers a variety of programming to Spanish and English language audiences in that market.

RPVB's Station KXLA is an authorized, full-power UHF television station, the broadcast services of which include programming directed to the minority and foreign-language speaking populations in the Los Angeles DMA, with specific focus on the Asian-American community.

The Joint Parties urge the Commission to take the steps recommended by NAB and ALTV at the earliest practicable time. Absent such prompt and effective action, television viewers in the markets served by the Joint Parties' stations, and other similarly-situated stations, will be deprived of service guaranteed them by the terms of the Act and the rules³ adopted by the Commission to implement the terms of the Act.

The NAB/ALTV Emergency Petition contends that EchoStar Communications Corporation ("EchoStar"), one of the satellite carriers subject to the "carry-one-carry-all" provisions of the Act⁴ and implementing FCC Rules,⁵ has embarked on a program of shifting some Stations entitled to carriage to satellites other than their main satellites serving the continental United States ("CONUS" satellites). The CONUS satellites are

³ See Section 76.66 of the Commission's Rules.

⁴ 47 U.S.C. § 338. This statutory provision requires satellite carriers such as EchoStar to carry, as of January 1, 2002, all local television signals in a local television market if the carrier offers at least one of the television stations in that market pursuant to the provisions of the Act.

⁵ See Section 76.66 (b) of the Commission's Rules.

the only EchoStar satellites that its subscribers can view with the use of their existing DBS reception equipment. Although other Stations providing local service to the same market are available for viewing via the dish antenna served by EchoStar's CONUS satellites, EchoStar subscribers are being required to obtain additional reception equipment to receive and view many local Stations.

Each of the above-listed Stations operated by the Joint Parties has requested mandatory carriage by EchoStar. Moreover, the Stations licensed to the Joint Parties all have been relegated by EchoStar to "second dish" status.

II. THE EMERGENCY PETITION SHOULD BE GRANTED.

The NAB/ALTV petition urges the FCC to clarify or amend the rules governing satellite carriage of local Stations to make certain that carriage of some local Stations is not effectuated such that a second dish antenna is required to receive these local Stations. The Commission should conclude that such a practice is discriminatory and not in compliance with the Act or the Commission's implementing rules and regulations.

The Joint Parties join Petitioners in the view that relegation to "second dish" status is tantamount to being denied satellite carriage altogether. Thus, and as explained below, the action of EchoStar in shifting Stations such as those operated by the Joint Parties is unlawful in that it is discriminatory under the terms of the Act and as

determined by the Commission in, *inter alia*, its *Order on Reconsideration*⁶ in the above-referenced rulemaking proceeding.

The Joint Parties are confident that the Commission will reach the incontrovertible conclusion that this practice of EchoStar is forbidden by the Act and the language of the Commission's implementing orders. That determination may be based on the simple evidence that EchoStar has chosen to use the "second dish" approach for some but not all local Stations.

Moreover, the reason offered by EchoStar to justify its plan – alleged channel capacity limitations due to delayed launch of "spot beam" satellites – is no reason at all. As explained below, and to the extent that any genuine channel capacity problem truly has been created by the current unavailability of such "spot beam" satellites, EchoStar has plenty of choices, among its non-local and non-broadcast channels, for shifting from CONUS satellites to other satellites.

Also, the Joint Parties further wish to present the FCC with additional evidence – evidence showing that EchoStar's offer of a "free-of-charge" second dish is, in fact, illusory and not borne out by actual EchoStar practice. Furthermore, and even assuming that EchoStar might indeed "provide" such dishes with no charge, it is abundantly clear that other attendant costs are involved and that, in many cases, there are other practical and legal constraints that will work against consumers' efforts to take EchoStar up on its offer.

⁶ See *Order on Reconsideration* in CS Docket No. 00-96, FCC 01-249, released September 5, 2001.

III. THE ECHOSTAR “SECOND DISH” PLAN IS UNLAWFUL AND NEEDLESSLY DISCRIMINATORY.

The Commission already has determined that the practice now being employed by EchoStar simply is not to be allowed. In the *Order on Reconsideration*, the Commission addressed the “dual dish” carriage question and provided an answer that is completely applicable to the factual situation now created by EchoStar’s “second dish” plan. In its *Order*, the Commission stated:

We agree...that DIRECTV, in any event, misinterprets the legislative history of SHVIA in arguing that it should be permitted to require subscribers to use two separate dishes to receive the full package of local channels. When Congress adopted the SHVIA, it rejected language that said subscribers could not be required to install an additional dish to receive any local signals. The legislative drafting change cited by DIRECTV involved a deletion of a much broader limitation on satellite carriers than what the Commission adopted under the general anti-discrimination language that survived. 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...satellite carriers could structure local station packages and separate dish requirements to

discourage consumers from subscribing to certain local stations, including local noncommercial stations. For the foregoing reasons, we affirm our rule prohibiting 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.⁷

Clearly, the EchoStar plan discriminates among local television stations that are entitled – equally – to carriage on EchoStar’s service in particular markets. Thus, the EchoStar plan is unlawful. Moreover, the nature of EchoStar’s discrimination is precisely that for which the Congress and the FCC had to take preventative action.

In a December 27, 2001, letter sent by the EchoStar Chairman and Chief Executive Officer to NAB’s President,⁸ EchoStar describes the criteria used for the selection of certain Stations for relegation to the second dish. Basically, the most popular Stations (those carried pursuant to “retransmission consent” arrangements) are still to be delivered via the main dish. However, for those stations that sought and obtained carriage by invoking their “must carry” rights, unless they are affiliated with WB, UPN or PBS, they can expect to be shifted to the second dish.

The practical effect of EchoStar’s practice is to create the very insidious form of discrimination that the Congress and the FCC sought to protect against. Indeed, this discrimination will result in minority and other special-interest audiences being shut off

⁷ *Order on Reconsideration*, *supra* note 6, at ¶ 41.

⁸ A copy of this letter was appended to the NAB/ALTV petition.

from the local stations that best can provide them service. A compelling example is that of KXLA(TV).

As a new station in the Los Angeles market, KXLA began broadcasting on December 19, 2000. On June 19, 2001, the Station elected “must carry” carriage on EchoStar’s system, in accordance with the terms of the SHVIA and the Commission’s implementing rules.

EchoStar has approximately 175,000 subscribers in the Los Angeles market. The Los Angeles DMA is a racially diverse market. In Los Angeles County alone, approximately 11.8% of the population is Asian-American, while 44.6% of the population is Hispanic or Latino. Although it is unclear what percentage of EchoStar’s subscribers are Asian or Hispanic, given the diversity of the market it is likely that the EchoStar subscriber population generally mirrors the racial makeup of Los Angeles County. For KXLA, a new station attempting to reach and serve the Asian-American community in the Los Angeles DMA, satellite carriage is critical.

Significantly, the only Stations offered on the Echostar main dish in the Los Angeles market are: KABC-TV (ABC affiliate), KCBS-TV (CBS affiliate), KNBC-TV (NBC affiliate), KCAL(TV) (independent), KCET-TV (PBS affiliate), KMEX(TV) (Univision affiliate), KCOP-TV (UPN affiliate), KTLA-TV (WB affiliate) and KTTV-TV (Fox affiliate). With the exception of KMEX, all other stations only offer English-language, mainstream network programming. In turn, EchoStar’s main dish versus second dish distinction creates multi-tiered discriminatory effects. For subscribers wishing to view KXLA’s Asian-language programming in a fashion other than by

terrestrial, off-air reception, their only alternative is cable. Ironically, EchoStar is, therefore, unlikely to be a competitive multi-channel video provider option for the Asian-American community in the Los Angeles DMA.

For local businesses wishing to advertise their products or services, it is unlikely that they will seek to advertise on second dish Stations, such as KXLA, since they are not guaranteed full coverage of the market. To the extent that main dish Stations in the Los Angeles market see the second dish distinction as an opportunity to increase advertising rates, this will disproportionately impact the smaller minority-owned businesses in the local market and effectively restrict the advertising revenue, otherwise available, of the local, second dish Stations. In the end, minority subscribers, local minority businesses and local minority-oriented Stations will be relegated to second class positions, contrary to the purpose and intent of the Act.

IV. ECHOSTAR IS NOT “FORCED” TO DISCRIMINATE AMONG LOCAL STATIONS ENTITLED TO CARRIAGE.

EchoStar argues, first, that it now has a channel capacity problem on its CONUS satellites and, second, that the solution to this problem must be the discriminatory demotion of some but not all local broadcast Stations to second dish status. But, EchoStar conveniently ignores the fact that it can resolve any legitimate channel capacity problem by shifting any of a number of programming channels that are not at all required to be carried by the Act. EchoStar easily could “demote” non-broadcast services, such as the Information Channel, MTV2, Pay-Per-View Previews, multiple Pay-Per-View channels, Fox Sports Rocky Mountain, and any of the multiple Home Box Office, Encore, Showtime and Starz! Channels available on the main dish, in order to accommodate the mandatory carriage of *all* local Stations entitled to “local-into-local”

carriage via the main dish. The only conclusion that can be reached is that EchoStar is unwilling to replace non-broadcast services that it has heretofore chosen to carry, based upon its own commercial or other reasons, in order to carry all local Stations entitled to satellite carriage, including those Stations operated by the Joint Parties. In effect, EchoStar seeks to serve as the arbiter of how local stations will be carried on its service. The Act, the Commission's Rules and the *Order* simply do not afford EchoStar such absolute discretion.

V. ECHOSTAR'S OFFER OF "FREE-OF-CHARGE" SECOND DISHES IS ILLUSORY.

EchoStar contends that it avoids any discrimination among stations by offering the second dish "free-of-charge" to subscribers. However, several of the Joint Parties have been able to determine that, in their local markets, EchoStar's promise has little resemblance to reality. Indeed, the entire EchoStar second dish plan is suspect and further reason exists for the FCC to require that it be terminated.

As one example, KXLA did not become aware of the fact that it would only be available to subscribers who opted for a second dish, until KXLA management read a news report describing the NAB/ALTV Petition. EchoStar never notified the Station of the requirement of a second dish. In discussing the issue with the Station's vendors and various EchoStar subscribers, KXLA management also discovered that subscribers have not been notified of the second dish requirement. Or, if they had been notified, many encountered significant administrative hurdles in the request for and installation of the second dish, which ultimately has led them to conclude that a second dish is too

burdensome to request, install and maintain. Indeed, as of today, the EchoStar website⁹ provides no consumer information whatsoever as to how second dishes may be obtained.

Of particular consequence for a station serving the Asian-American community, EchoStar only offers customer service support in English and Spanish. Thus, the language barrier for the Asian-American community in the Los Angeles DMA is an added disincentive for Asian-American consumers attempting to cope with this process. The second dish requirement has effectively barred the carriage of KXLA, contrary to the letter and spirit of the Act and the FCC *Orders*.

As another example, management at KLUZ, Albuquerque, NM, reports that EchoStar customer service representatives tell callers that subscribers will need to pay an additional Six Dollars per month to be able to receive the KLUZ signal via the second dish, with the rest of the local Stations in the Albuquerque DMA already carried on the main dish. Thus, while EchoStar may (or may not) pay for the second dish – as it has pledged – it appears that in at least one market EchoStar plans to charge an additional monthly fee for *use* of the second dish.

Furthermore, consumers who might actually be able to wade through the EchoStar customer service process to obtain a dish, may find that local government and/or private restrictions prevent installation and/or use of the second dish. Section 1.4000 of the Commission's Rules, implementing Section 207 (the "over-the-air reception device" provision) of the Telecommunications Act of 1996¹⁰ provides certain protections for

⁹ <http://www.dishnetwork.com/content/aboutus/index.shtml>.

¹⁰ Pub. L. No. 104-104, 110 Stat. 110.

consumers wishing to install, among other antennas, those used for reception of DBS signals such as those offered by EchoStar.

For purposes of DBS dishes, the 1996 Act and the Commission's implementing rules sought to confer rights on viewers seeking to employ outdoor DBS dishes in a variety of housing situations, ranging from single family homes to multiple dwelling units ("MDUs"). Because of the vast numbers of local ordinances, zoning laws and private homeowners and MDU restrictions on DBS antenna use, and the cumbersome process of seeking FCC intervention where unlawful restrictions on DBS antenna use exist, viewers generally have not availed themselves of the protections found in the Act and the Rules.

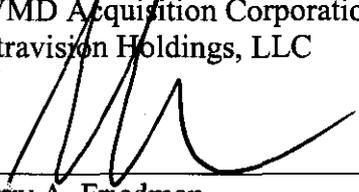
On the other hand, local governmental and private homeowners associations, when confronted with requests for use of not one but two DBS dishes per household, are much more likely to craft and enforce restrictions – however unlawful they may be – in order to limit what they might fear would be a panoply of side-by-side dishes. As such, there is an even greater likelihood of local government and private restrictions on viewers attempting to employ not one but two DBS dishes in order to receive signals to which they are entitled under the SHVIA.

VI. CONCLUSION.

For the reasons stated herein and as advanced in the NAB/ALTV Petition, the Joint Parties respectfully urge the Commission to clarify its rules – in the form of a declaratory ruling or otherwise – in a fashion that will make it unmistakably clear that the “second dish” scheme being employed by EchoStar is unlawful and must be terminated.

Respectfully submitted,

Rancho Palos Verdes Broadcasters, Inc.
Costa de Oro Television, Inc.
KVMD Acquisition Corporation
Entravision Holdings, LLC



Barry A. Friedman
Barry D. Umansky
Carolina Coll
Thompson Hine LLP
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 331-8800 - Telephone
(202) 331-8330 - Facsimile

Counsels for the Joint Parties

January 23, 2002

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 23rd day of January, 2002, I caused a copy of the foregoing “Joint Comments In Support of Emergency Petition To Modify Or Clarify Rule” to be served by United States mail on the following:

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

Robert E. Branson, Esq.
Association of Local Television Stations
1320 19th Street, N.W.. Suite 300
Washington, D.C. 20036

David Moskowitz, Esq.
Senior Vice President and General Counsel
EchoStar Communications Corporation
5701 S. Santa Fe Drive
Littleton, Colorado 80120

David R. Goodfriend, Esq.
EchoStar Communications Corp.
1233 20th Street, N.W.
Suite 701
Washington, DC 20036-2376

Qualex International
Portals II
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554

Eloise Gore, Esq.
Cable Services Bureau
445 12th Street, S.W.
4-A726
Washington, D.C. 20554

Ben Bartolome, Esq.
Cable Services Bureau
445 12th Street, S.W.
4-A820
Washington, D.C. 20554


Pamela D. Plummer

#130505 v1