

FEDERAL COMMUNICATIONS COMMISSION

In the Matter of: )
Implementation of the Satellite Home Viewer Improvement Act of 1999 ) CS Docket No. 00-96
Broadcast Signal Carriage Issues )
Emergency Petition of National Association of Broadcasters and Association of Local Television Stations to Modify or Clarify Rule )

To: The Commission

JOINT REPLY COMMENTS OF WLNY-TV INC. AND GOLDEN ORANGE BROADCASTING CO.

WLNY-TV Inc. ("WLNY") and Golden Orange Broadcasting Co. ("Golden Orange"), by counsel and pursuant to the Cable Services' Bureau's January 8, 2002 Public Notice, DA 02-31 ("Public Notice"), hereby submit their joint reply comments regarding the Emergency Petition filed by the National Association of Broadcasters ("NAB") and the Association of Local Television Stations ("ALTV") in the captioned matter.1

In opposition to the NAB/ALTV petition, Echostar argues at length that its discriminatory carriage scheme does not violate SHVIA's ban on "price discrimination."2 Echostar conveniently ignores, however, SHVIA's prohibition of discrimination with respect to

1 WLNY is the licensee of New York DMA independent station WLNY-TV, Channel 55, Riverhead, New York. Golden Orange is the licensee of Los Angeles DMA independent station KDOC-TV, Channel 56, Anaheim, California. WLNY-TV and KDOC-TV have both been relegated by Echostar Communications Corporation ("Echostar") to carriage on only Echostar's so-called "wing slot" satellites in their respective markets. WLNY and Golden Orange filed joint initial comments in this proceeding on January 23, 2002.

2 Echostar Opposition at 3-20.

access on navigational devices and its requirement that local signals be presented on contiguous channels. 47 U.S.C. §338(d). Echostar's bare assertion (Opposition at 4-5) that its discriminatory carriage scheme "is clearly not related" to these SHVIA prohibitions is simply false. As WLNY and Golden Orange demonstrated in their initial comments, Echostar's discriminatory carriage scheme directly violates both of these unambiguous statutory provisions. Satellite receive dishes are clearly "navigational devices" within the meaning of 47 U.S.C. §338(d), and Echostar's unequal carriage scheme undeniably discriminates against Echostar's "disfavored" local stations with regard to signal access on satellite receive dishes. Echostar's provision of its "favored" local signals on channels that are not contiguous with those Echostar has assigned to its "disfavored" local signals is an equally clear violation of SHVIA's requirement that local broadcast signals shall be provided only on contiguous channels.

The comments filed by many other stations which, like WLNY-TV and KDOC-TV, are currently being injured by Echostar's invidious discrimination have uniformly urged that Echostar is in clear violation of the anti-discrimination provisions of SHVIA. Indeed, some commenting stations have identified *additional* Echostar violations, over and above those specified in WLNY and Golden Orange's initial comments. Some stations have pointed out, for example, that Echostar's discriminatory carriage scheme requires subscribers to obtain not only a second receive dish, but also one or more new satellite receiver devices capable of accessing the "wing slot" satellite transmissions of Echostar's "disfavored" local signals. This is yet another violation of SHVIA's prohibition of discrimination with respect to access on navigation devices.<sup>3</sup>

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<sup>3</sup> See Telemundo Group, Inc. ("Telemundo") Comments at 2 & n.3; Joint Broadcasters Comments at 6-7; Association of Public Television Stations and Public Broadcasting Service ("APTS/PBS") Comments at 5; see also NAB/ALTV Emergency Petition at 10-11. Based on the comments, a subscriber with multiple television receivers apparently needs more than one new satellite receiver device to access the "wing slot" satellite transmissions on all television (Continued...)

Other commenting stations have indicated that, due to the less favorable (closer to the horizon) orbital positions of Echostar’s “wing slot” satellites, those Echostar subscribers who actually seek a second dish to receive Echostar’s “disfavored” local broadcast signals will often find that such signals *are impossible to access even with a second receive dish*, due to line-of-sight obstructions. For these subscribers, Echostar’s discrimination regarding access on navigational devices becomes in practice *a denial of access altogether*.<sup>4</sup>

In addition, numerous commenting stations have pointed out that Echostar’s unlawful discrimination is not confined to unequal access on navigation devices and discriminatory non-contiguous channel positioning. Echostar’s on-screen electronic program guide and menus also unlawfully discriminate against Echostar’s “disfavored” local signals by providing to subscribers who have only a single receive dish *no indication whatever* that Echostar’s “disfavored” local signals *even exist as a part of Echostar’s local broadcast service offering*. For such subscribers – which is to say, for *virtually all* Echostar subscribers – Echostar’s on-screen electronic program guide and menus list only Echostar’s “favored” local stations; they make no mention of the “disfavored” stations. Echostar is thus in direct violation not only of SHVIA’s prohibition of discrimination regarding access on navigational devices, but also of SHVIA’s unambiguous requirement that “the satellite carrier shall retransmit the signal of the local television broadcast stations to subscribers in the stations’ local market . . . and provide access to such station’s

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receivers. To the extent that Echostar is not providing such additional satellite receiver devices at no charge (as some commenting parties allege), a clear violation of SHVIA’s ban on “price discrimination” also exists.

<sup>4</sup> See Univision Communications Inc. (“Univision”) Comments at 11-12; Marantha Broadcasting Company, Inc. (“Marantha”) Comments at 11; Cornerstone Television, Inc. Comments at 2.

signals . . . in a nondiscriminatory manner on any . . . on-screen program guide, or menu.” 47  
U.S.C. §338(d).<sup>5</sup>

The commenting parties urge, with near unanimity, that the Commission should respond to Echostar’s willful violations by declaring that Echostar’s discriminatory carriage scheme is in direct violation of SHVIA’s anti-discrimination provisions and by ordering Echostar to come into prompt compliance with SHVIA’s requirements. WLNY and Golden Orange agree entirely with Univision: The FCC should reject “any suggestion that requiring EchoStar to better publicize the facts surrounding its local station packages is an adequate solution to the problems . . . broadcasters on the secondary satellites are facing.”<sup>6</sup> To mire the Commission’s staff and resources in the possibly endless and probably hopeless task of trying to police proper conduct by Echostar’s army of installers and customer service representatives is neither wise nor an appropriate response to Echostar’s actions. Such a “remedy” would never produce what SHVIA unambiguously requires – nondiscriminatory access to all local signals on contiguous channels. The only appropriate response to Echostar’s flagrantly discriminatory actions is to order that Echostar’s illegal conduct cease immediately.<sup>7</sup>

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<sup>5</sup> See Marantha Comments at 9-11; Telemundo Comments at 3; Roberts Broadcasting Company Comments at 2; Jovon Broadcasting Corporation Comments at 2; Paxson Communications Corporation (“Paxson”) Comments at 5. As several comments also point out, any effort to tune directly to a channel assigned to a “disfavored” local signal produces only a message stating that the channel selected is not available.

<sup>6</sup> Univision Comments at 12-13.

<sup>7</sup> Echostar has threatened to terminate carriage of all local broadcast signals in an unspecified number of markets if it is ordered to retransmit local broadcast signals in the contiguous and nondiscriminatory manner required by SHVIA. The Commission should ignore Echostar’s threats. SHVIA provides satellite carriers with a clear choice: Carry *all* local stations in a market in the required contiguous and nondiscriminatory fashion, or carry none at all. Mandatory requirements of federal statute law are neither a starting point for negotiations nor susceptible to administrative waiver. If Echostar wishes to add additional markets to the many in which it currently provides no “local-into-local” service, so be it. The result will be that, in those (Continued...)

For the foregoing reasons, the Commission should promptly issue an order declaring Echostar's discriminatory carriage scheme to be in violation of 47 U.S.C. §338(d) and directing Echostar to come into immediate compliance with SHVIA's nondiscrimination requirements *within one week* of the release date of the FCC's order. No stay or other extension of time should be granted to Echostar, and any failure of compliance should be met with swift enforcement action, including appropriate monetary penalties.<sup>8</sup>

Respectfully submitted

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Dated: February 4, 2002

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markets, consumers will be unlikely to choose Echostar's service over that of Direct TV or the local cable operator. This fact provides incentive enough for Echostar to seek to maximize its "local-into-local" service *in a manner which complies with federal law*.

<sup>8</sup> See Named State Broadcasting Associations Joint Comments at 2 & 9; see also Paxson Comments at 8; APTS/PBS Comments at 9 & n.22.

## CERTIFICATE OF SERVICE

I, Barbara J. McKeever, hereby certify that, on this 4<sup>th</sup> day of February, 2002, I have sent a copy of the foregoing "Joint Reply Comments Of WLNY-TV Inc. And Golden Orange Broadcasting Co." by first class mail, postage prepaid, to the following:

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