

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

**JOINT REPLY COMMENTS ON EMERGENCY
PETITION TO MODIFY OR CLARIFY RULE**

I. INTRODUCTION AND SUMMARY

These joint reply 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), Twenty-nine 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 reply to many of the initial comments – particularly those submitted by EchoStar

Communications Corporation ("EchoStar") and the Satellite Broadcasting and

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Communications Association (“SBCA”) – filed in response to the FCC’s *Public Notice* in the above-captioned proceeding.¹

The Commission’s *Public Notice* seeks 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 The two associations ask the Commission to state whether compliance with SHVIA may be obtained if a satellite carrier requires 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.

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 Act³ and implementing FCC Rules,⁴ has shifted some Stations entitled to carriage to satellites other than their main satellites serving the continental United States (the “CONUS” satellites). The CONUS satellites are the only EchoStar satellites

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.

²Pub. L. No. 106-113, 113 Stat. 1501.

³ 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.

⁴ See Section 76.66 (b) of the Commission’s Rules.

that its subscribers can view with the use of their existing DBS reception equipment. Although some 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 other local Stations – with subscribers now needing to have two dishes to view the full complement of local Stations.

Each of the above-listed Stations operated by the Joint Parties has requested mandatory carriage by EchoStar. However, all these Stations have been relegated by EchoStar to “second dish” status.

The Joint Parties' initial comments observed that the relegation of their Stations to “second dish” status is tantamount to not being carried at all, due to the sheer absence of consumer information (on the EchoStar website and otherwise) on how to obtain a dish and the unwillingness of -- and misinformation coming from -- EchoStar customer service representatives. Also emphasized by the Joint Parties is the blatant discrimination employed by EchoStar in exiling minority-oriented and nearly all non-major network affiliated Stations to second dish Siberia. Finally, the Joint Parties pointed out that if, indeed, there is any channel capacity issue raised by the need for the carrier to comply with the local-into-local provisions of the statute and the FCC's rules, EchoStar has ample choices among its non-broadcast channels – none of which are subject to any mandatory requirement for carriage – for non-carriage or second dish carriage in order to accommodate all local broadcast stations that *are* entitled to such carriage.

A wide variety of other broadcast parties also have filed comments that favor FCC grant of the NAB/ALTV petition. All these parties urge the Commission to act in a fashion that will prevent Echostar from relegating to a second dish any local Stations entitled to mandatory carriage on EchoStar's system.

On the other hand, EchoStar and the SBCA engage in coordinated, legalistic dodging of the plain fact that the practice in question result in some local Stations entitled to carriage to – in effect – not be carried. Moreover, and as detailed below, the record now being presented to the FCC shows that: (1) there is no channel capacity with the EchoStar CONUS satellites that prevents full carriage of all local Stations entitled to carriage; (2) EchoStar intends the second dish approach to be permanent, not temporary; and (3) EchoStar's behavior in devising the second dish system is discriminatory, disingenuous and amounts to continued evasion of the carrier's responsibilities.

II. ECHOSTAR AND THE SBCA ATTEMPT A LEGALISTIC DANCE AROUND THEIR CONTINUED EFFORTS TO HARM LOCAL STATIONS

In analyzing the comments being presented in response to the NAB/ALTV petition, and as elicited by the Cable Services Bureau *Public Notice*, we find a wide dichotomy of opinion as to what the statutory law and the FCC's rules truly mandate, in terms of carriage of local stations by satellite carriers.

Satellite carriers long had argued – before Congress⁵ and at the FCC – in favor of being able to carry local stations as a way of becoming a more viable competitor to cable television, which for many years was allowed to carry local stations under its compulsory license. In acceding to the wishes of the satellite industry to carry local stations, the Congress, in granting satellite carriers a compulsory license expressed its concern that there be no discrimination among local Stations and underscoring the importance of satellite carriage, stating that the satellite carriage rules are “intended to... promote widespread dissemination of information from a multiplicity of sources.”⁶ The “carry one/carry all” statute and implementing FCC rules were intended to condition the grant of such local carriage authority to satellite companies on non-discrimination in carriage of local Stations.

EchoStar and SBCA, in their comments, plainly admit that EchoStar has been discriminating among local stations.⁷ But, they then brazenly undertake a tortured legal exercise to suggest that the form of discrimination in which EchoStar is engaged is not specifically addressed by the federal statute or rules. But, the EchoStar and SBCA focus on the word “purchase” is misguided and fails to provide the carrier with any cover.

The statute prohibits a scheme under which a satellite subscriber would have to obtain a second dish, at his or her own “expense,” to receive all local signals entitled to carriage. The Joint Parties’ initial comments and the comments of myriad other

⁵ See “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).

⁶ 145 Cong. Re.c. H111792, 11795 (daily ed. Nov. 9, 1999).

broadcast parties point to the *real* expenses that a subscriber would have to expend – in terms of the subscriber’s time, aggravation, diminution of the aesthetic look of his or her residence with two dishes, and the certain personal and likely legal expense of convincing a homeowners association or zoning authority that it should approve a twin-dish use.

Moreover, even though the statute emphasizes that a carrier cannot impose a separate charge – for purchase of a second dish or make a supplementary payment for use of the second dish – it does not say that requiring the use of a second dish but not imposing a separate fee would also not be discriminatory. Regardless of monetary costs associated with the use of a second dish, the requirement that a second dish be used to receive some of the local Stations entitled to carriage clearly is discriminatory – within the meaning of the statute and the clear intent of the Congress.

**III. THE CONSENSUS OF OTHER COMMENTERS IS CLEAR:
ECHOSTAR’S SECOND DISH SYSTEM IS UNLAWFUL AND AGAINST
ALL NOTIONS OF RATIONAL COMMUNICATIONS POLICY**

EchoStar’s comments suggest that subscribers have a realistic option of Obtaining a free second dish. However, such a suggestion is disingenuous at best. For subscribers not willing to engage the extraordinary exercises necessary to ferret out the nature of any such second dish offer, there really is no viable option here.

The profoundly half-hearted efforts of EchoStar to give its subscribers a realistic opportunity to obtain a second dish are clear from the choices it has made for publicizing such theoretical availability. In an era of unprecedented use of the Internet to obtain

⁷ See Comments of SBCA, filed January 23, 2002, at 2-3; Comments of EchoStar, filed January 23, 2002, at 3-12.

information, the EchoStar website still includes absolutely no mention of how to obtain a second dish. As admitted by EchoStar in its comments, its mailings to its subscribers have relegated to just a footnote its cryptic reference to the need for the installation of “additional hardware” to receive “some” channels.⁸ There is no mention of “which” channels and no mention of what the hardware – another outdoor dish – is required. However, there is the notation that the offer is for a limited time: until the end of March 2002. Thus, EchoStar is hiding the ball now and intends to take the ball home at the end of next month.

There also is the suggestion that subscribers have received a wealth of information from the “Charlie Chat” program, featuring EchoStar’s Chairman. However, with the variety of other programming choices available to its subscribers, it is highly unlikely that more than the most agile channel surfers would ever have chosen to view that program.⁹

Even if the second dish system might be considered acceptable on an “interim” basis, this approach, for all practical matter, is one that had been hidden from subscribers who currently do not have access to the range of local Stations to which they are entitled to receive under law. Moreover, it now appears that EchoStar has misrepresented the “interim” nature of the plan. The NAB/ALTV petition¹⁰ and comments of several

⁸ Comment of EchoStar, *supra*, at 11.

⁹ Another testimonial to the effectiveness of that program for conveying information to subscribers is that only a handful of subscribers, obviously urged on that program to file comments at the FCC, actually have done so.

¹⁰ NAB/ALTV Petition at 13.

broadcastparties¹¹ point to compelling evidence that EchoStar would continue this second dish approach on a permanent basis – thus continuing a clear violation of law and rational communication policy.

IV. ECHOSTAR DOES NOT SUFFER FROM ANY CHANNEL CAPACITY PROBLEM THAT PREVENTS IT FROM CARRYING ALL LOCAL STATIONS ON THE CONUS SATELLITES

In the initial comments of the Joint Parties, it was pointed out that EchoStar has ample opportunity to afford carriage to all local Stations entitled to carriage simply by ceasing carriage – or relegating to second dish status – any of dozens of non-broadcast channels not required to be carried by law. Several other broadcast parties have made the same, obvious observation.

However, EchoStar and the SCBA still adhere to the incredible position that there is some capacity problem. They even suggest that any enforcement of the mandate that they carry all local broadcast signals somehow would justify their decision to curtail local signal carriage. SBCA opines, with no logical basis, that “...imposing a “one-dish” rule...would be to cause the curtailment of satellite distribution of *all* local-into-local signals in multiple major markets, since satellite channel capacity is simply not available at this time to provide “one-dish” access in all local markets.”¹² As the record reflects, EchoStar easily can carry all local signals. There is no either/or issue here.

¹¹ See, e.g., Comments of the Association of Public Television Stations and the Public Broadcasting Service, filed January 23, 2002, at 7.

¹² Comments of SBCA, *supra* note 7, at 3

EchoStar goes on to suggest that its “central satellites are too capacity constrained to carry all qualified local signals. EchoStar cannot move existing programming on central satellites to eastern or western satellites without significantly disrupting customer expectations and violating contractual obligations to programmers.”¹³ In other words, EchoStar confirms that it feels it may flout federal law in favor of maintaining its programming status quo.

But, the reality – contrary to the positions taken by EchoStar and its trade association, the SBCA – is that EchoStar could carry *all* local Stations on its CONUS satellites even with no change in its carriage of non-broadcast channels. This uncontrovertible fact is revealed in the Joint Engineering Statement that EchoStar and Hughes Electronics Corporation submitted as Attachment B to the application for transfer of control to combine EchoStar and DirecTV.¹⁴

Thus, with no real channel capacity problem being a factor, is it clear that the EchoStar second dish strategy has been employed solely for purpose of evading the satellite carrier’s responsibilities. Indeed, this behavior is remarkably similar to its short-lived effort to avoid compliance with satellite carriers’ public interest programming requirement by putting such programming on a non-CONUS satellite. That behavior resulted in an FCC fine and cessation of the practice.¹⁵ That is the least that should be imposed here by the FCC.

¹³Comments of EchoStar, *supra* note 7, at 1-2.

¹⁴See Consolidated Application for Authority to Transfer Control, filed December 3, 2001. SAT-T/C-20011204-00104, *et seq.*

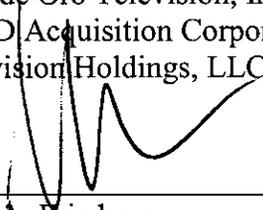
¹⁵ 14 FCC Rcd 19976 (November 24, 1999).

V. CONCLUSION

For the reasons stated herein, and as advanced in the NAB/ALTV Petition, the Joint Parties' initial comments and the initial comments filed by a variety of other broadcast parties, the Joint Parties respectfully urge the Commission to issue a ruling stating that the "second dish" scheme being employed by EchoStar is unlawful and must be terminated.

Respectfully submitted,

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February 4, 2002

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 4th day of February, 2002, I caused a copy of the foregoing “Joint Reply Comments on Emergency Petition To Modify Or Clarify Rule” to be served by United States mail on the following:

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