

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

<b>In the Matter of:</b>	)	
	)	
<b>Implementation of the Satellite Home Viewer Improvement Act of 1999</b>	)	<b>CS Docket No. 00-96</b>
	)	
<b>Broadcast Signal Carriage Issues</b>	)	
	)	
<b>Emergency Petition of National Association of Broadcasters And Association of Local Television Stations</b>	)	

**To: The Commission**

**FURTHER SUPPLEMENTAL FILING BY NATIONAL  
ASSOCIATION OF BROADCASTERS CONCERNING THE  
URGENT NEED TO BLOCK ECHOSTAR'S TWO-DISH SCHEME**

The National Association of Broadcasters ("NAB")<sup>1/</sup> submits this further supplemental filing to make three additional points in response to EchoStar's *ex parte* filing of March 7, 2002.

1. **EchoStar has provided a "free" second dish to less than 1% of its local-to-local customers.** EchoStar offers local-to-local service in 36 markets, which collectively include more than half of all U.S. television households -- and presumably include more than half of EchoStar's seven million subscribers.<sup>2/</sup> Yet by its own admission, with more than two-thirds of

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<sup>1/</sup> NAB is a nonprofit incorporated association that serves and represents America's radio and television broadcast stations and networks.

<sup>2/</sup> Press Release, EchoStar, *EchoStar Reports Record Fourth Quarter Revenue, EBITDA; EchoStar's DISH Network Satellite TV Service Reaches 7 Million Customer Milestone* (Feb. 28, 2002), at <http://www.dishnetwork.com/content/aboutus/presskit/index.shtml>.

its three-month "free offer" to install second dishes already over, EchoStar had provided a dish to only "thousands" of subscribers.<sup>3/</sup>

This is a stunning confession: out of EchoStar's roughly 3.5 million subscribers in markets in which it offers local-to-local, it has installed *not* millions, *not* hundreds of thousands, *not* tens of thousands, but only "thousands" of second dishes for the purpose of receiving additional local stations that have been isolated on EchoStar's remote wing-slot satellites. If one generously assumes that "thousands" means *nineteen* thousand (just shy of "tens of thousands"), that would amount to *only one-half of one percent of EchoStar's subscribers* in markets in which it offers local-to-local.

This statistic starkly confirms what was clear in any event: that the carry-one-carry-all provisions of the SHVIA will be decimated if EchoStar is allowed to continue isolating some stations on wing-slot satellites requiring a second dish, while making other stations (including the four major network affiliates) instantly and conveniently available on EchoStar's main (CONUS) satellites. As NAB has laid out in detail in prior filings, there are two simple reasons why so few subscribers have obtained (or will obtain) second dishes to watch additional local stations. *First*, even if subscribers become aware of the possibility of having a second dish, and even if it is necessary to obtain *all* local stations, subscribers *do not want a second dish*. They do not want to look at a second dish on their homes; they do not want to risk damage to their homes

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<sup>3/</sup> Letter from Pantelis Michalopoulos to William Caton at 3-4 (Mar. 7, 2002). EchoStar attempts to confuse the matter by referring to "hundreds of thousands" of subscribers who previously acquired a second dish to obtain international or other specialty programming. *Id.* As EchoStar well knows, these subscribers -- who themselves make up only a tiny fraction of EchoStar's subscriber base -- have acquired second dishes to get programming (particularly foreign language programming) that is of exceptional interest to them. There is simply no comparison to the present situation, in which local stations that are fighting to make local viewers aware of their existence have no opportunity even to catch the eye of EchoStar

during the installation process; they do not want to spend hours on the phone with customer service representatives arranging an installation date; and they do not want to spend a day waiting for an installer (who may or may not show up).

EchoStar knows all of this from direct experience. Here is what EchoStar itself told the Commission about the dismal failure of a prior effort to persuade consumers to obtain second dishes even under *optimal* conditions -- namely, to obtain access to the most-heavily-viewed local stations (the four network affiliates):

EchoStar has had to offer a two-dish solution to complement its full-CONUS offering with services from its satellites at 61.5° W.L. and 148° W.L. . . .

***EchoStar has encountered substantial consumer resistance to the perceived difficulties of installing and maintaining second dishes.*** . . . [citation omitted]

("As a 'second-best' solution to this problem of orbital scarcity, EchoStar has been offering limited local-into-local service through the use of half-CONUS satellite capacity. *This requires the use of multiple dishes, and will thereby be more difficult to market as a convenient alternative to cable.*"); [citation omitted]

("EchoStar currently offers local programming through its satellites at 61.5° W.L. and 148° W.L. *This arrangement **unfortunately**, requires customers to install a second dish in order to receive local programming.* While some customers have embraced the two-dish system, *others have found it to be cumbersome and difficult, despite EchoStar's offer to install the second dish free of charge. To date, the two dish solution **has not proven to be a particularly attractive alternative to cable.***") (citations omitted.)

[EchoStar] Petition to Deny, *In Re Tempo Satellite, Inc.*, File No. SAT-ASB-19990127-00014 at 3 n.4 (filed March 5, 1999) (emphasis added).

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subscribers, and little hope of persuading them to endure the hassles and inconvenience of obtaining a second dish.

The second reason behind EchoStar's failure to provide "free" dishes to more than one in 200 of its subscribers in local-to-local markets is that EchoStar *does not want to give its subscribers a "free" second dish*. Because EchoStar has no economic incentive to implement a "free" offer to install second dishes, EchoStar has carefully concealed the supposed "offer" -- burying it in an obscure footnote in a letter discussing other matters, for example -- and has put a short time-limit on the offer (March 31, 2002, which has now past). Given EchoStar's lack of economic incentive to spend money to offer "free" dishes on which it will *always* lose money, there would be no possible way for the Commission to monitor the innumerable ways in which EchoStar would dodge any nominal obligation to provide second dishes without cost to consumers. The Commission therefore needs to *ban* the second-dish scheme in its permanent regulations.

2. **The Commission has authority to prevent this evasion of the Act.** In its March 7, 2002 *ex parte* filing, EchoStar claims, based on *Ethyl Corp. v. E.P.A.*, 51 F.3d 1053, 1060 (D.C. Cir. 1995), that the Commission supposedly lacks the statutory authority to block EchoStar's statute-destroying two-dish scheme.

EchoStar is wrong, and its reliance on *Ethyl Corp.* is misplaced. In that case, the Environmental Protection Agency, determining whether to grant a waiver under 42 U.S.C. § 7545(f)(4) with respect to certain fuel additives, denied the waiver on the basis of a factor -- "effects on public health" -- different than the statutory factor set forth in the statute. *Id.* at 1054-57 (internal quotations and citation omitted). But in *Ethyl*, the statute at issue *did not delegate* to the EPA the authority "to adopt implementing regulations." *Id.* at 1060. In sharp contrast here, the Satellite Home Viewer Improvement Act ("SHVIA") contains a broad, plenary grant of

rulemaking authority to the Commission. *See* 47 U.S.C. § 338(g) ("[T]he Commission shall issue regulations implementing this section [338].").

In *Ethyl*, the D.C. Circuit *specifically acknowledged* that plenary grants of rule-making authority (such as Section 338) *do* delegate to the pertinent agency broad authority to fill in gaps in the statutory scheme. Specifically, the D.C. Circuit acknowledged that a "delegation of discretionary authority," such as Congress' delegation to the Commission under SHVIA, occurs whenever Congress "leaves gaps" to be filled, including "by *authorizing the agency to adopt implementing regulations*." 51 F.3d at 1060 (emphasis added) (internal quotations and citation omitted). And here, Congress *has* explicitly delegated broad rulemaking authority to the FCC by directing it to "issue regulations implementing this section." *See* 47 U.S.C. § 338(g); *compare Ethyl Corp.*, 51 F.3d at 1060 (noting that the statute at issue in that case "does not direct the Agency to adopt implementing regulations").<sup>4/</sup> The FCC thus clearly has authority to bar EchoStar's two-dish scheme -- which, if not promptly stopped, will eviscerate the carry-one-carry-all principle that is at the heart of SHVIA.

**3. The Commission has authority to issue clarified regulations now.** As NAB has demonstrated in previous filings, the Commission has ample authority to promulgate clarifying regulations *now*. In particular, the Commission can issue interim regulations that are effective immediately, and then allow a short period for additional comments before issuing a final rule.

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<sup>4/</sup> In addition, as NAB and other commenters have shown in previous filings, the statutory clauses "nondiscriminatory price" and "nondiscriminatory manner on any navigational device" are ambiguous and can easily be read to include a prohibition on any two-dish scheme. This provides an additional grounds under *Ethyl* for issuance of regulations to prohibit that scheme. *See Ethyl*, 51 F.3d at 1060 (observing that Congress can grant rulemaking power implicitly "by enacting an *ambiguously worded provision that the agency must interpret*." ) (emphasis added, internal quotations and citation omitted).

EchoStar's March 7, 2002 filing simply ignores the substance of NAB's procedural suggestion: that while interim rules would be effective immediately, they would be subject -- out of an abundance of caution -- to a formal notice-and-comment period. And EchoStar's contention that only an "an impending crisis to public health or safety" can justify making interim rules effective before completion of formal notice-and-comment procedures is nonsense. The Copyright Office, for example, recently issued new rules that were effective immediately -- subject to a formal notice-and-comment process -- with no claim whatsoever that to fail to do so would jeopardize public health or safety. *See* Disruption or Suspension of Postal or Other Transportation or Communications Services, 66 Fed. Reg. 62942 (Dec. 4, 2001). And other agencies routinely issue rules in those circumstances.<sup>5/</sup>

Finally, EchoStar does not and could not dispute that there is an urgent need to settle this issue *now*, before DBS firms began to make plans for their satellite fleets based on the assumption that they can flout the carry-one-carry-all principle by banishing some stations to a second dish that few consumers will ever obtain. And unlike in most instances in which agencies issue rules effective immediately before the formal notice-and-comment procedure is

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<sup>5/</sup> *See, e.g.*, Telecommunications Act of 1996, 61 Fed. Reg. 18968 (Apr. 30, 1996) (adopting interim rules effective immediately upon publication in the Federal Register without notice and comment, and concurrent NPRM invited comments on whether and how the interim rules should be modified); Effective Date of Approval of an Abbreviated New Drug Application, 63 Fed. Reg. 59710 (Nov. 5, 1998) (implementing interim rule without notice and comment, prior to expiration of standard 30-day period, and providing a post-promulgation opportunity to comment on whether the interim rule should be "modified or revoked"); Adding Colombia to the List of Countries Whose Citizens or Nationals Are Ineligible for Transit Without Visa (TWOV) Privileges to the United States Under the TWOV Program, 66 Fed. Reg. 17321 (Mar. 30, 2001) (interim rule effective prior to expiration of standard 30-day period, although INS provided a 60-day, post-promulgation period for public comments); Licenses for Certain Worsted Wool Fabrics Subject to Tariff-Rate Quota, 66 Fed. Reg. 21664 (May 1, 2001) (interim rule made effective immediately without notice or public comment, and inviting additional written comments before the interim rule was to be adopted as a final rule).

finished, here all affected parties have already had *multiple* opportunities -- dating back nearly two years -- to comment on the two-dish issue. There would therefore be absolutely no substantive prejudice to EchoStar (or any other party) from this procedure.

**Conclusion**

For these reasons, and the reasons set forth in NAB's prior filings, the Commission should immediately confirm that satellite carriers may not force their subscribers to acquire new equipment to receive some -- but not all -- local stations.

Respectfully submitted,

NATIONAL ASSOCIATION OF  
BROADCASTERS

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**CERTIFICATE OF SERVICE**

I hereby certify that I today caused a copy of the foregoing National Association of Broadcaster's Supplemental Filing to be served by U.S. Mail, first class postage prepaid to the following:

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April 3, 2002

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