

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
National Association of Broadcasters)	CS Docket No. 00-96
and Association of Local Television)	
Stations Seek Modification or Clarification)	
of Broadcast Carriage Rules for Satellite)	
Carriers)	CSR-5856-Z
)	
Implementation of the Satellite Home)	
Viewer Improvement Act of 1999)	
)	
Broadcast Signal Carriage Issues)	

To: The Commission

**APPLICATION FOR REVIEW OF THE ASSOCIATION OF PUBLIC
TELEVISION STATIONS AND THE PUBLIC BROADCASTING SERVICE**

Pursuant to Section 1.115 of the Commission’s rules,¹ the Association of Public
Television Stations (“APTS”)² and the Public Broadcasting Service (“PBS”)³

¹ 47 C.F.R. § 1.115.

² APTS is a nonprofit organization whose members comprise the licensees of nearly all of the nation’s 356 noncommercial educational television stations. APTS represents public television stations in legislative and policy matters before the Commission, Congress, and the Executive Branch, and engages in planning and research activities on behalf of its members.

³ PBS is a nonprofit membership organization that serves individual public television stations by distributing national programming and providing other program-related services to the nation’s public television stations.

(collectively “Public Television”) hereby petition the Commission for review of the Media Bureau’s Declaratory Ruling and Order in the above captioned proceeding.⁴

The Media Bureau correctly found that EchoStar’s placement of certain broadcast stations on wing satellites violates SHVIA and Commission rules, but as Commissioners Martin and Copps have cogently stated, the Bureau’s remedy for the harm done is inconsistent with the statute and Commission rules. Specifically, the option to allow EchoStar to better publicize its wing satellite carriage is not sufficient to address the discriminatory treatment of the local broadcasters carried on wing satellites.

Public Television believes that the Media Bureau’s action should be reviewed and modified by the full Commission because (a) the order directly conflicts with the law and the Commission’s own regulations concerning nondiscriminatory treatment of local broadcasters; and (b) the order involves a question of law or policy that has not previously been resolved by the Commission, namely that in some circumstances, use of a two-dish infrastructure can be nondiscriminatory. The Commission should therefore modify the Bureau’s decision to require EchoStar to carry all local broadcasters on its primary satellites. Alternatively, the Commission should make it clear that the only way a two-dish strategy can be nondiscriminatory is to require immediate and automatic

⁴ In the Matter of National Association of Broadcasters and Association of Local Television Stations Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers, Declaratory Ruling and Order, DA 02-765, CS Docket 00-96, CSR-5865-Z (April 4, 2002) (hereinafter “Declaratory Ruling”). It is noted that a Petition for Partial Reconsideration or Clarification of the Bureau’s action in this proceeding has been filed by another party. In such a case, pursuant to 47 C.F.R. § 1.104(c), the Commission normally withholds consideration of an application for review until the petition for reconsideration is decided. However, because some of the remedies proposed in the Declaratory Ruling fail to address direct violations of federal statute and involve novel issues of law that exceed the delegated authority of the Media Bureau to decide, and because compliance with federal statute was required over five months ago, the Commission should waive its normal procedures and immediately consider all applications for review and petitions for reconsideration in a single proceeding before the full Commission to resolve this issue as expeditiously as possible.

installation of a free second dish as well as nondiscriminatory treatment with regard to channel position, electronic program guide placement and picture quality.

I. The Commission Should Review and Modify the Bureau's Decision

The Media Bureau ruled that EchoStar's practice of segregating some but not all local programming on wing satellites, accessible only through the acquisition and installation of a secondary dish, violated the statutory requirement that satellite carriers offer access to all local television broadcast stations at a nondiscriminatory price.⁵ In explaining its decision, the Bureau stated that, although EchoStar had offered the secondary dish at no extra charge to subscribers, its implementation of the offer had been so poorly conducted as to discriminate against certain stations by actively discouraging subscribers from obtaining the additional free equipment necessary to receive those stations.⁶ The Bureau found that requiring installation of an additional dish to access some but not all stations was not inherently discriminatory—rather EchoStar's particular implementation of its second dish policy was discriminatory.⁷ Because EchoStar refused to widely publicize its offer, failed to adequately train its customer support staff, and did nothing to alleviate the “time, trouble and inconvenience” associated with installation of a second dish, it effectively imposed an opportunity cost on subscribers seeking to access stations carried on the second dish.⁸ The Media Bureau also held that EchoStar

⁵ Declaratory Ruling, ¶ 2.

⁶ *Id.* at ¶¶ 15-23.

⁷ *Id.* at ¶¶ 2, 5, 12, 30 and n.5.

⁸ *Id.* at ¶ 23.

had unlawfully failed to provide all local broadcast stations on contiguous channels⁹ and to provide nondiscriminatory access to all local broadcast stations on its electronic program guide.¹⁰

The Bureau set forth a menu of suggested remedies, some or all of which EchoStar was free to implement and three of which would allow EchoStar merely to publicize the second dish better. The remedies include:

- Directly and clearly notifying existing and new local-into-local subscribers that they are not receiving all the local stations for which they are paying unless EchoStar installs a second dish, which EchoStar will provide without charge for equipment or installation;
- Explaining on the EchoStar website that a second dish is needed to receive all local stations in any market in which EchoStar is unable to move all the stations onto a CONUS satellite; and
- Training customer service representatives, distributors and retailers on the need for and means to obtain the second dish.¹¹

In addition, the Bureau also stated that if EchoStar is unable to come into compliance in every market, it could seek a short-term waiver rather than terminate local service in a market.¹²

⁹ Id. at ¶¶ 24-25. In ruling that EchoStar had failed to place all local channels in contiguous blocks, the FCC explained that, when trying to access a station carried on a secondary dish, a consumer without a second dish could see neither the station nor any confirmation that the station even was available. Instead, the consumer's receiver automatically would skip to the next available channel. Id. at ¶ 25.

¹⁰ Id. at ¶¶ 26-28. In finding discrimination with regard to electronic program guide placement, the Bureau found that stations accessible through an uninstalled second dish would not appear on the electronic program guide and that the electronic program guide would not disclose the availability of such stations. Id. at ¶ 28.

¹¹ Id. at ¶¶ 31-33. Other suggested remedies include: (a) moving local stations off the wing satellites and onto satellites that serve the continental (CONUS) thus eliminating the need for a second dish or moving all stations in a market onto the wing satellite thus requiring a second dish for all local station; (b) automatically installing a second dish along with the first dish if the subscriber signs up for local-into-local service; (c) presenting all local stations together on the electronic program guide, and any electronic or hard copy menu, and including any information on how to obtain the second dish without charge. Id.

¹² Id. at ¶ 34.

The Commission should review and modify the Bureau's order, because the Bureau's suggested remedies conflict with SHVIA and the Commission's own regulations, and because the Bureau's order involved a novel question of law or policy not previously resolved by the Commission.¹³

A. The Declaratory Order Directly Conflicts with SHVIA and the Commission's Own Regulations

SHVIA and the Commission's own regulations prohibit discriminatory carriage with regard to price, channel contiguity and electronic program guide placement.¹⁴ The Commission specifically, has ruled that Congress did not intend to allow satellite carriers to require additional dishes – even if provided at no cost -- if the action caused discriminatory effects.¹⁵ Public Television agrees with Commissioners Martin and Copps, who stated, “We do not see how better notice of EchoStar's 2-dish plan remedies the findings of unlawfulness—price discrimination, non-contiguous channel placement,

¹³ The Commission will grant an application for review only if the applicant demonstrates that the staff's decision: (1) conflicts with statute, regulation, case precedent, or established Commission policy; (2) involves a question of law or policy that has not been previously resolved by the Commission; (3) involves precedent or policy that should be overturned or revised; (4) makes an erroneous finding as to an important or material question of fact; or (5) commits a prejudicial procedural error. 47 C.F.R. § 1.115(b)(2)(i)-(v). See also In the Matter of Texas Grace Communications; Request to Toll the Period to Construct Unbuilt Station KRZB(FM) Archer City, Texas, Memorandum Opinion and Order, 16 FCC Rcd 19167; 2001 FCC LEXIS 5843, FCC 01-317 (rel. October 26, 2001).

¹⁴ See 47 U.S.C. § 338(d), 47 C.F.R. § 76.66(i)(3) (price); 47 U.S.C. § 338(d), 47 C.F.R. § 76.66(i)(1) (channel contiguity); and 47 U.S.C. § 338(d), and 47 C.F.R. § 76.66(i)(5) (electronic program guide placement). To implement SHVIA's prohibition against discrimination in the provision of local service, Commission regulations forbid satellite carriers from requiring consumers to purchase an additional dish in order to receive some local stations unless an additional dish is required to access all local stations in that market. See 47 C.F.R. § 76.66(i)(4) and Implementation of the Satellite Home Viewer Improvement Act of 1999; Broadcast Signal Carriage Issues; Retransmission Consent Issues, Report and Order, 16 FCC Rcd. 1918, 2000 FCC LEXIS 6336, FCC 00-417, ¶ 101 (November 29, 2000).

¹⁵ Implementation of the Satellite Home Viewer Improvement Act of 1999; Broadcast Signal Carriage Issues; Retransmission Consent Issues, Order on Reconsideration, FCC 01-249, ¶ 41 (September 5, 2001) (“Reconsideration Order”).

and lack of access to signals in a nondiscriminatory manner.”¹⁶

In particular, requiring increased publicity does not fully address all of the opportunity costs (including the “time, trouble and inconvenience” associated with installation of a second dish) that were identified as part of EchoStar’s discriminatory treatment of certain local broadcast stations. The Bureau clearly outlined the costs to satellite subscribers of obtaining a second dish to include the “time, trouble and inconvenience” to the subscriber (1) in obtaining the information that a second dish was needed, (2) in arranging to receive the second dish (including overcoming any misinformation), and (3) in waiting for the second dish to be installed.¹⁷ But, as Commissioners Martin and Copps rightly point out, enhanced publicity regarding EchoStar’s “free” offer might mitigate the first factor but “does nothing to rectify the remaining steps, which most subscribers might consider the more “costly aspects” since they likely require taking time off from work to wait for the dish to arrive and be installed.”¹⁸ For instance, better publicity does nothing to remedy the intentionally poor training EchoStar customer service representatives have received in order to discourage

¹⁶ Statement of Commissioner Kevin J. Martin and Commissioner Michael J. Copps, (April 10, 2002), p. 5 (available at: <http://www.fcc.gov/Speeches/Copps/Statement/2002/stmjc216.html>) (hereinafter “Martin/ Copps Statement”). Public Television agrees with Commissioners Martin and Copps that “We find it implausible that EchoStar’s two-dish policy would be permissible, and the above violations remedied, if EchoStar merely provides consumer with better notice of its discriminatory actions and the steps the consumer must take to alleviate the differential treatment.” Martin/ Copps Statement, p. 1. Indeed, Public Television agrees with Commissioners Martin and Copps that “we see no caveat in the statute that indicates that satellite carries must provide access to broadcast station’s signals at a nondiscriminatory price ... unless customers know the prices are discriminatory.” Martin/ Copps Statement, p. 5.

¹⁷ Declaratory Order, ¶ 23.

¹⁸ Martin/ Copps Statement, p. 5.

installation of a second dish.¹⁹ Nor does it adequately address the documented problems and costs associated with installation.²⁰

In addition, the Bureau's decision does not remedy the direct discrimination that the Bureau cited with regard to channel contiguity²¹ and electronic program guide placement,²² discrimination that made it impossible for consumers who channel surf or use an electronic program guide to get information about and access broadcast channels carried on wing satellites. As Commissioner Martin and Copps noted, better publicity of EchoStar's discriminatory treatment in this regard does not mitigate the fact that

¹⁹ "Broadcasters . . . documented numerous consumer calls to EchoStar's CSRs that suggest that either the CSRs are extraordinarily misinformed or are deliberately discouraging consumers from obtaining a free second dish." Declaratory Order, at ¶ 20. For instance, According to NAB/ALTV, "Customers calling EchoStar and seeking information about additional dishes are being put on hold interminably. When subscribers do get through, many consumer service representatives do not know about the supposed "plan." When subscribers call local installers, many of the installers have likewise never heard of the plan. When installers do agree to put in a second dish, they sometimes schedule the appointment many weeks in the future, with a threat to charge the customer a large fee if the customer is not present when the installer comes. And some subscribers are being told that EchoStar will provide only one receiver capable of processing signals from the new dish even though the household has multiple receivers." *Id.* at ¶ 20. Similarly, Univision states: "[S]ubscribers are falsely told that particular stations are not carried in the market. When asking why a particular local station is not available, an alarming number of consumers are being told outright falsehoods, such as the stations asked not to be carried, or that a local Spanish-language station 'is broadcast from Mexico' and therefore cannot be local." *Id.* Maranatha adds that EchoStar CSRs have told interested viewers to contact the local station to obtain information on how to obtain the station's signal. *Id.* Further, a potential viewer informed Maranatha that "he called DISH Network on January 1, 2002, and was told that WFMZ-TV was on 'satellite 129' and was not available to DISH Network subscribers." *Id.*

²⁰ "Indeed, even if an appointment for free installation is successfully arranged, the record demonstrates significant problems associated with obtaining successful installation, as broadcasters allege." *Id.* at ¶ 21, citing APTS/PBS Reply at 8-9; HCC Comments at 13-14 (describing problems associated with actual installation, including multiple installation visits and erroneous billing). "Once installation is arranged, the consumer will face numerous other obstacles that make obtaining a second dish inconvenient and practically inaccessible. For instance, consumers likely will be required to wait hours for installers to arrive at their homes, may be subject to cancellations or postponements, and may be subject to monetary penalties for failing to be at home when installers arrive. Other consumers may be reluctant to have a second dish installed on their premises or may face physical or legal impediments (e.g., homeowner association restrictions) to the installation of a second dish." APTS/PBS Comments, Docket No. 00-96 (January 23, 2002) at 7.

²¹ Declaratory Order at ¶ 25.

²² *Id.* at ¶ 28.

consumers simply cannot get information about or locate local channels carried on wing satellites when consumers channel surf or consult the electronic program guide.²³

Moreover, Public Television agrees with Commissioners Martin and Copps, who stated that it is inappropriate for the Bureau on delegated authority to consider granting waivers from direct violations of SHVIA. Commissioners Martin and Copps stated the problem well when they said:

“[T]he *Bureau Order* states that “EchoStar may seek a short-term waiver rather than terminate service in a market it is currently serving with local-into-local service.” A waiver of what? Of the nondiscriminatory pricing requirement? No, because, as the *Bureau Order* notes, it “cannot consider or grant a waiver insofar as EchoStar’s actions directly violate the statute.” Of the nondiscriminatory program guide treatment requirement? No, because, again, that is in the statute. Of the preceding remedy “options”? No, because the *Bureau Order* notes that EchoStar could remedy its violations by choosing “some or all of these approaches.” That leaves only our one rule on point: § 76.66 (i)(4). Yet how could we waive this prohibition on “requir[ing] subscribers to obtain additional equipment at their own expense . . . in order to obtain one or more local television broadcast signals” without *also* waiving the statutory obligation to “provide access to such station’s signals at a nondiscriminatory price?”²⁴

For these reasons, the Bureau’s remedy does not adequately address the harm caused by the discriminatory carriage of certain local broadcasters on wing satellites and directly violates SHVIA and the Commission’s regulations by leaving such discriminatory conduct in place.

B. The Declaratory Order Involved a Question of Law or Policy That Has Not Previously Been Resolved by the Commission

The Declaratory Order should also be reviewed by the Commission because it passed judgment on issues of law or policy that had not been previously resolved by the

²³ Martin/ Copps Statement, p. 5.

²⁴ Martin/ Copps Statement, p. 6 (citations omitted).

Commission.²⁵ On reconsideration, the Commission ruled that Congress did not intend to allow satellite carriers to require additional dishes – even at no cost – if the action caused discriminatory effects.²⁶ As Commissioners Martin and Copps stated, the Bureau addressed the “novel issue” of whether it is at all possible for EchoStar’s use of wing satellites to be nondiscriminatory. As such, “The Bureau Order’s discussion of the specific circumstances under which such a 2-dish policy would be permissible . . . is without precedent and thus beyond the scope of the Bureau’s authority.”²⁷ Indeed, the comments of Public Television and others in the record specifically argued that requiring the use of a second dish is always discriminatory regardless of any enhanced publicity.

First, Public Television believes, as discussed above, that the extensive opportunity costs associated with obtaining and installing the second dish – namely the “time, trouble and inconvenience” amply documented by the record and recognized by the Bureau – are surely not mitigated by any better publicity. Therefore, it is arguable that carriage on wing satellites and required access through a second dish always imposes additional opportunity costs and is therefore always discriminatory.

Second, Public Television and others presented substantial evidence that in some locations, the satellite positions of the wing satellites, where many must-carry stations (including public television stations) are relegated, are naturally more difficult to access and thus inferior to main satellites, which largely carry retransmission consent stations.²⁸

²⁵ 47 C.F.R. § 1.115(b)(2)(ii).

²⁶ Reconsideration Order at ¶ 41.

²⁷ Martin/ Copps Statement, p. 6.

²⁸ “Because EchoStar’s secondary satellites operate from orbital slots that are located either Southeast or Southwest of the continental U.S., they are unable to cover the entire United States and are generally very low on the horizon compared to EchoStar’s primary satellites. . . . For example, in the Dallas, Texas market

Under these circumstances, the second dish carriage is a direct violation of the statutory prohibition against discrimination with regard to signal quality,²⁹ and no amount of publicity can mitigate the discriminatory impact caused by the limitations of the technology.

Lastly, it is arguable that requiring a second dish to access some disfavored stations constitutes prohibited discrimination with regard to navigation devices.³⁰ Satellite dish equipment, used by consumers to access multichannel video programming, is a navigational device.³¹ Clearly, EchoStar's practice of requiring a second dish to access some local broadcasters discriminates against those local stations. First,

... the angle of elevation above horizontal for the primary satellites is 49 degrees, whereas the angle of elevation for the secondary dish is a meager 24 degrees. As a result ... subscribers ... will often discover that trees, buildings, or other obstacles that do not block a subscriber's line of sight to the primary satellites will absolutely block line of sight to the far-lower-in-the-sky secondary satellites. ... Moreover, because the secondary satellites are necessarily located at different azimuths than the primary satellites, a subscriber with a line of sight to the primary satellite ... may not have a clear line of sight along the azimuth on which the secondary satellite is located." Comments of Univision Communications, Inc, p. 11 (Jan. 23, 2002). Other commenters also agreed that the signal quality of stations relegated to "wing" satellites was noticeably worse than with stations carried on the primary satellites. See Joint Comments of WLNY-TV and Golden Orange Broadcasting, pp. 6 ("The signal quality of those local broadcast signals available with a second dish via EchoStar's secondary "wing slot" satellites periodically appears observably worse than that of EchoStar's "favored" local signals"). This is "apparently due to Echostar's use of less favorable digital compression techniques for its "wing slot" satellite signals." *Id.*

²⁹ Section 338(g) of the Communications Act as amended requires that public television stations be carried with the bandwidth and technical capacity equivalent to that provided to commercial stations and without material degradation. 47 U.S.C. § 338(g). To implement this provision, the Commission's regulations forbid satellite carriers from providing one degree of signal quality for retransmission consent stations while providing a worse degree of signal quality for must-carry stations. 47 CFR 76.66(k). In explaining its regulations, the Commission has stated that the purpose of the regulation was to comport with the "non-discriminatory thrust" implicit in Section 338 of SHVIA. Implementation of the Satellite Home Viewer Improvement Act of 1999; Broadcast Signal Carriage Issues; Retransmission Consent Issues, Report and Order, 16 FCC Rcd. 1918, 2000 FCC LEXIS 6336, FCC 00-417, ¶ 118 (November 29, 2000).

³⁰ Reply Comments of the Association of Public Television Stations and the Public Broadcasting Service, Docket No. 00-96, pp. 11-12 (February 4, 2002). See also Joint Comments of WLNY-TV and Golden Orange Broadcasting, p. 2-3 (Jan. 23, 2002).

³¹ The Commission defines a "navigation device" to include: "Devices such as converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems." 47 C.F.R. § 76.1200(c). See also 47 U.S.C. § 549.

disfavored local stations are simply not available on the main navigation device provided to EchoStar subscribers. Second, EchoStar requires consumers who wish to view disfavored local programming to have two navigation devices rather than one. This is a clear and direct violation of federal statute that cannot be remedied through better publicity.³² Yet the Bureau held that in some circumstances where consumers are better informed, discrimination with regard to navigation devices is in fact not discrimination.

Even though there was evidence in the record that requiring a second dish always creates discriminatory effects unrelated to adequate publicity—either through the imposition of certain opportunity costs or through direct violations of statute—the Bureau chose to rely on the novel proposition that there could be some circumstances in which requiring use of a second dish would not be discriminatory if consumers are simply better informed. This is an issue that the Commission has yet to decide. For this reason, the Commission should review and modify the Bureau’s order.

II. The Commission Should Order EchoStar To Immediately Cease Using Wing Satellites to Provide Local Service, or Alternatively Require EchoStar to Automatically Provide Free Acquisition and Installation of a Second Dish to All Local Subscribers

Commission rules state that if the Commission grants an application for review, it may simultaneously reverse or modify the order from which review is sought.³³ As demonstrated, above, there are number of reasons why the Commission should review and modify the Media Bureau’s Declaratory Order in this proceeding. The Bureau’s

³² 47 U.S.C. § 338(d).

³³ 47 C.F.R. § 1.115(h)(1).

proposed menu of remedies is plainly inadequate to address the harm done and should be modified.

The Commission should find that EchoStar can comply with the nondiscriminatory provision in SHVIA by carrying all qualified television stations, including public television stations, on its primary satellites immediately. Given the delay in the launching of EchoStar's spot beam satellites, the Commission can recognize that as a practical matter, EchoStar cannot, without cutting back on existing local-into-local markets, fully implement this requirement until the date upon which its spot-beam satellites – EchoStar 8 and EchoStar 9-- are in service. During the interim period, EchoStar should be required to pay forfeitures as the Commission deems appropriate. In either case, it should be made clear that compliance should not be contingent on approval of the EchoStar-Hughes merger.

In the alternative, the Commission can only find that a second-dish strategy can be implemented in a manner consistent with SHVIA and the Commission's own regulations if the second-dish strategy caused no discriminatory effects.³⁴ Public Television submits that this can only be possible if (1) EchoStar immediately and automatically provides a free second dish, as well as installation, to all consumers who currently and in the future subscribe to its local-into-local service; and (2) in those markets in which the wing satellite is technically inferior, carriage on the primary satellite is required.

The second dish must be offered in accordance with the following principles:

- The installation must be automatic and not subject to any other conditions or limitations whatsoever.

³⁴ See Reconsideration Order at ¶ 41.

- EchoStar must pay all out-of-pocket costs of purchasing, installing, and hooking up the second dish and any other necessary equipment.
- The installation must be prompt and available at the subscriber's convenience (including evening and weekend hours).
- Access to local channels provided over a second dish should be contiguous with other local channels, fully integrated into a single receiver, and allow easy and seamless navigation among local channels.
- Stations carried on "wing" satellites must be displayed on electronic program guides in the same manner and with the same prominence as stations carried on EchoStar's primary satellites.
- Stations carried on "wing" satellites should be treated in the same manner with regard to picture quality as other stations; the signal processing, compression and encoding techniques used to carry retransmission consent stations should be identical to those used for mandatory carriage stations.
- The Commission should make it clear that this ruling applies not only to EchoStar but also prospectively to any current or future licensee of DBS service that may choose to implement a two-dish plan.

Conclusion

For the reasons stated and in accordance with the recommendations stated above, Public Television requests that the Commission review and modify the Media Bureau's order.

Respectfully submitted,

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