

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

In the Matter of:

Implementation of Section 210 of the
Satellite Home Viewer Extension
and Reauthorization Act of 2004 to Amend
Section 338 of the Communications Act

MB Docket No. 05-181

**OPPOSITION TO PETITION FOR RECONSIDERATION OF
INTERNATIONAL BROADCASTING CORP., et al.**

Pursuant to Section 1.429(f) of the Commission's rules, 47 C.F.R.

§1.429(f), EchoStar Satellite L.L.C. ("EchoStar") submits this Opposition to the Petition for Reconsideration filed by International Broadcasting Corporation, R y F Broadcasting, Inc., Encuentro Christian Network, and Eastern Television Corporation ("Joint Petitioners").¹ EchoStar respectfully requests that the Commission affirm its interpretation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act ("SHVERA")² to require satellite television operators to retransmit local broadcast stations to consumers only in Alaska and Hawaii.³ The Joint Petitioners'

¹ Petition for Reconsideration by International Broadcasting Corp., R y F Broadcasting, Inc., Encuentro Christian Network, and Eastern Television, *filed in* MB Docket No. 05-181 (filed Sept. 22, 2005) ("Joint Petition").

² The Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, § 210, 118 Stat 2809 (2004), *amending* 47 U.S.C. § 338(a)(4).

³ *Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, Report and Order, 20 FCC Rcd 14242, at ¶¶ 8-10 (2005) ("Report and Order").

assertion that this mandatory carriage requirement extends to all U.S. territories and possessions, including Puerto Rico, is plainly contrary to the intent of Congress.

Section 210 of SHVERA amends Section 338(a) of the Communications Act to require satellite carriers with a minimum subscriber base in the United States of 5,000,000 to retransmit the analog and digital signal “of each television broadcast station located in any local market within a State that is not part of the contiguous United States.”⁴ Joint Petitioners argue that the word “State” in Section 210 must bear the meaning given by Section 3(40) of the Communications Act,⁵ which defines that term to “include[] the District of Columbia and the Territories and possessions.” However, as the Commission correctly notes, all of the terms defined by Section 3 only apply “unless the context otherwise requires.”⁶

In the case of Section 210, the context clearly requires a different interpretation of the term “State.” As the Commission found, adherence to the Section 3 definition of “State,” as urged by the Joint Petitioners, would lead to absurd results. First, it would require a satellite carrier to provide service to territories that it could not presently serve and to territories that have neither television stations nor permanent populations -- a patently absurd result.⁷

⁴ SHVERA § 210.

⁵ 47 U.S.C. § 153(40).

⁶ Report and Order at ¶ 9.

⁷ Report and Order at ¶ 10 (“No one disputes, however, that service to Guam and other islands in the far Pacific would be outside the range of these companies and that requiring service to islands without television stations and without permanent populations would be absurd.”).

Second, the Joint Petitioners' interpretation would require satellite carriers to retransmit local television stations where they do not have a statutory copyright license to do so.⁸ The Commission found that "were we to apply 'State' to the noncontiguous territories and possessions, satellite carriers would not have a statutory copyright license to retransmit the stations in these markets because they would not fall within the definition of 'local market' in Section 122(j)." "Local market" is defined by reference to "designated market areas" ("DMAs"), which in turn is defined to mean the DMAs "as determined by Nielsen Media Research" ⁹ The Commission found that "none of the noncontiguous territories and possessions are included in a DMA."¹⁰

Joint Petitioners attempt to argue that the Commission's interpretation is wrong, at least with regard to Puerto Rico, because the Commission has previously determined Puerto Rico to be a DMA in other Commission regulations.¹¹ This is both inaccurate and irrelevant. The multiple ownership rules cited by Joint Petitioners do not define Puerto Rico as a DMA. Instead, those rules define Puerto Rico, Guam and the U.S. Virgin Islands as each being "a single market" *in addition to* Nielsen-defined DMAs.¹² Similarly, Puerto Rico is not a Nielsen-defined DMA under the Multichannel

⁸ 17 U.S.C. § 122.

⁹ 17 U.S.C. § 122(j)(2)(C).

¹⁰ Report and Order at ¶ 9.

¹¹ Joint Petition at 3.

¹² See 47 C.F.R. § 73.3555(b)(1) (defining television markets by reference to Nielsen DMAs and adding that "Puerto Rico, Guam, and the U.S. Virgin Islands each will be considered a single market"); § 76.55(e)(1) (defining "television market" for the period prior to January 1, 2000 by reference to ADIs and DMAs and adding that "Puerto Rico, the U.S. Virgin Islands, and Guam will each be considered a single market."). In any event, the definition in § 76.55(e)(1) is no longer applicable as the post-January 1,

Video and Data Distribution Service rules,¹³ but is instead a “FCC-defined DMA-like service area.”¹⁴ Because DMA is defined in Section 122 solely by reference to the areas “as determined by Nielsen,” the Commission simply has no power to “create” additional DMAs for the purposes of the Section 122 license.

Finally, as EchoStar has previously submitted,¹⁵ a narrow construction of the scope of Section 210’s “must carry” requirement is necessary to avoid unduly burdening satellite carriers’ First Amendment rights. As the Supreme Court and the Commission have recognized, mandatory carriage requirements impinge upon the free speech rights of multichannel video programming distributors (“MVPDs”),¹⁶ and can only be justified if the requirement furthers an important or substantial government interest and the burden is “congruent to the benefits obtained.”¹⁷ The burdens of complying with a rule requiring mandatory carriage in the noncontiguous territories and

2000 definitions of “television market” no longer refer to Puerto Rico or any other noncontiguous U.S. territory or possession.

¹³ Joint Petition at 3.

¹⁴ 47 C.F.R. § 101.1401(c) (“The 214 DMA service areas are based on the 210 Designated Market Areas delineated by Nielsen Media, *plus four FCC-defined DMA-like service areas*. . . . (c) Puerto Rico and the United States Virgin Islands.”) (emphasis added).

¹⁵ See Comments of EchoStar Satellite L.L.C., *filed in* MB 05-181, at 1-5 (filed June 6, 2005) (“EchoStar Comments”).

¹⁶ *In the Matter of Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, Second Report and Order and First Order on Reconsideration, CS Docket No. 98-120, FCC 05-27 (rel. Feb. 23, 2005) (“*Digital Signal Carriage Order*”) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (“*Turner I*”) and *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (“*Turner II*”), which upheld the cable must-carry statute)).

¹⁷ *Digital Signal Carriage Order* at ¶¶ 14-15.

possessions, from a technical perspective, for example, would far exceed any governmental interest or benefit to the public.¹⁸ Thus, in order to avoid a blatantly unconstitutional interpretation, the Commission should uphold its original assessment to limit application of Section 210 to Alaska and Hawaii.¹⁹

For the foregoing reasons, EchoStar respectfully urges the Commission to reject the Joint Petitioners' request to expand application of Section 210 of SHVERA beyond Alaska and Hawaii.

Respectfully Submitted,

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¹⁸ See EchoStar Comments at 4; see also Reply Comments of EchoStar Satellite L.L.C., filed in MB 05-181, at 4 (filed June 20, 2005).

¹⁹ See, e.g., *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (“a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.”) (citation omitted); *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (it must be assumed that Congress “legislates in light of constitutional limitations”); *Edward J. DeBarolo Corp. v. Florida Coast Bldg. & Construction Trades Council*, 485 U.S. 568, 575 (1988); *Alemendarez-Torres v. U.S.*, 523 U.S. 224, 237-38 (1998).

CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of December, 2005, a true and correct copy of the foregoing pleading was served via U.S. mail to the following:

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