

**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

Last year, Congress directed large satellite carriers including DIRECTV Inc. (“DIRECTV”) to retransmit analog and digital local broadcast signals in “State[s] that [are] not part of the contiguous United States.”¹ Several months ago, the Commission concluded that, by use of this term, Congress meant to impose requirements with respect to the states of Alaska and Hawaii, and did not intend to require carriage in the territories and possessions.² As the Commission put it, moreover, “no one dispute[d]” that imposing carriage obligations in areas as far away as Guam “would be absurd.”³

International Broadcasting Corporation, RyF Broadcasting, Inc., Encuentro Christian Network, and Eastern Television Corporation (the “Puerto Rico Broadcasters”) now ask the Commission to reconsider its position, and to mandate carriage throughout

¹ 47 U.S.C. § 338(a)(4); Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447 § 210, 118 Stat. 2809, 3428-29 (2004) (“SHVERA”).

² *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, FCC 05-159, MB Docket No. 05-181 ¶ 8 (rel. Aug. 23, 2005) (“*Order*”).

³ *Id.*, ¶ 10.

the possessions and territories.⁴ To the Commission’s explicit finding that such a requirement would be technically impossible, the Puerto Rico Broadcasters respond, essentially: “Who cares?” Impossibility, we are told, is “irrelevant” because “[t]he statutory language may mandate the technically impossible.”⁵ This, to use the Commission’s phrase, is indeed “absurd.” DIRECTV urges the Commission to reject the Puerto Rico Broadcasters’ petition.

I. THE COMMISSION CORRECTLY FOUND THAT NEW SECTION 338(A)(4) DOES NOT REQUIRE CARRIAGE IN THE TERRITORIES AND POSSESSIONS

All parties to this proceeding acknowledged that Section 3 of the Communications Act (the “Act”) defines “State” to include “the territories and possessions” of the United States.⁶ Under the cramped and mechanical reading championed by the Puerto Rico Broadcasters, this means that the “noncontiguous states” referenced in new Section 338(a)(4) of the Act must include the territories and possessions.⁷ Yet, as the Commission observed, the definitions set forth in Section 3 apply throughout the Act *only* “unless the context otherwise requires.”⁸

Here, the Commission had an overwhelming set of reasons to conclude that the context does indeed require otherwise. The Commission itself discussed most of these reasons at some length, so DIRECTV outlines them here only briefly:

⁴ International Broadcasting Corporation *et. al*, Petition for Reconsideration, MB Docket No. 05-181 at 4 (filed Sept. 22, 2005) (“Petition”) (“A plain statutory interpretation of the meaning of ‘State’ includes all Territories and Possessions.”).

⁵ Petition at 2.

⁶ 47 U.S.C. § 153(40).

⁷ Petition at 3.

⁸ 47 U.S.C. § 153; *Order*, ¶ 9.

- Congress provided no indication whatsoever that new section 338(a)(4) was intended to extend to the territories and possessions.⁹
- Neither DIRECTV nor EchoStar can serve all of the territories and possessions as a technical matter.¹⁰ Modifying CONUS beams to include Puerto Rico and the U.S. Virgin Islands could divert power from other regions and degrade service in other countries. Moreover, “no one disputes . . . that service to Guam and other islands in the far Pacific would be outside the range of [DIRECTV and EchoStar] and that requiring service to islands without television stations and without permanent populations would be absurd.”¹¹
- Nor can they serve the territories and possessions as a legal matter, because the statutory copyright license to retransmit local signals extends only to DMAs (other than in Alaska), and the territories and possessions do not have DMAs.¹²
- Satellites operating in ITU region 2 cannot serve areas in ITU region 3.¹³
- Satellite operators are not required to serve the territories and possessions, and “have never before served any subscribers in much of these areas.”¹⁴

DIRECTV agrees with these conclusions, and would add one additional consideration. New section 338(a)(4), even if interpreted in every way most favorable to satellite carriers, restricts satellite carriers’ editorial control over their programming, and

⁹ See *Order*, ¶ 9 (“We recognize that the phrase ‘a State that is not part of the contiguous United States’ is susceptible to different interpretations.”).

¹⁰ *Id.*.

¹¹ *Id.*, ¶ 10.

¹² *Id.* ¶ 9. The Puerto Rico Broadcasters respond that Puerto Rico actually *does* have a DMA – one created by the Commission in other contexts. See Petition at 3 (citing Multichannel Video Distribution and Data Service (“MVDDS”) and cable-ownership rules). But Puerto Rico is an “FCC-defined” DMA in those contexts. See, e.g., 47 C.F.R. § 101.1401 (MVDDS rules). The statutory copyright license, by contrast, applies in DMAs assigned by *Nielsen* (and, now, Alaska). See 17 U.S.C. § 122(j)(2) (generally defining local market as “the designated market area in which a station is located” and further defining “designated market area” by reference to determinations by “Nielsen Media Research and published in the 1999-2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates or any successor publication.”); 47 U.S.C. § 338(k)(3). It does not apply to “FCC-defined” DMAs such as Puerto Rico. The fact that the Commission has decided to deem Puerto Rico to be a DMA for certain limited purposes does not mean that the Copyright Act’s statutory license applies there.

¹³ *Order*, ¶ 8 n.28.

¹⁴ *Id.*, ¶ 10.

thus rests on untested constitutional ground.¹⁵ The Commission has already exacerbated these concerns by interpreting the provision to require multicast and high-definition (“HD”) carriage, despite a recognized “duty” to construe the statute so as to minimize constitutional concerns.¹⁶ For the Commission to conclude, as the Puerto Rico Broadcasters suggest, that the provision now requires carriage where such carriage is technically impossible would, of course, exacerbate these concerns still further. DIRECTV cannot imagine a government purpose for which carriage in Guam might be sufficiently tailored.

In light of these considerations, the Puerto Rico Broadcasters’ “ignore-the-consequences” approach to statutory interpretation must fail. The Puerto Rico Broadcasters claim that “[i]t is misplaced for the Commission to make a statutory interpretation that relies on arguments that are extrinsic to the plain statutory language and the legislative record.”¹⁷ But such an argument makes no sense where, as here, there *is* no legislative record, and where the “plain statutory language” directs the Commission

¹⁵ All carriage requirements, by their very nature, interfere with carriers’ editorial judgment as to the programming they will and will not carry. As such, they always raise First Amendment concerns. In *Turner I*, the Supreme Court began its analysis of the cable must-carry requirements by stating: “There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. Through ‘original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,’ cable programmers and operators ‘seek to communicate messages on a wide variety of topics and in a wide variety of formats.’” *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“*Turner I*”) (citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991), and *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986)).

¹⁶ *In re Telephone Company – Cable Television Cross-Ownership Rule*, Third Report and Order 10 FCC Rcd. 7887, 7888 (1995); *Solid Waste Agency v. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001) (“Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.”).

¹⁷ Petition at 2.

to examine the relevant context. Every single consideration that could possibly constitute “context” in this case argues for Commission restraint. By exercising restraint, therefore, the Commission has thus followed – not violated – the letter of the law.

II. THE COMMISSION SHOULD REJECT THE PUERTO RICO BROADCASTERS’ “SUBSET OF TERRITORIES” ARGUMENT

Doubtless aware that the Commission could not possibly require service to *all* the territories and possessions, the Puerto Rico Broadcasters present a fallback position, although not explicitly. Perhaps new Section 338(a)(4), the Puerto Rico Broadcasters hint, applies to *a subset* of the territories and possessions – namely, Puerto Rico itself.¹⁸

The Puerto Rico broadcasters never actually argue that Section 338(a)(4) means “Alaska, Hawaii, and Puerto Rico,”¹⁹ and for good reason. As the Commission found:

It is unclear from the statutory text whether the intended application of the term “State” means the definition of “State” as it appears in the Communications Act, which includes all territories and possessions, or whether it refers to the literal or colloquial use of the word “State,” meaning one of the fifty more or less internally autonomous territorial and political units composing the United States of America.²⁰

In other words, the term “State” can be read in a literal sense (to exclude territories and possessions) or in conjunction with the Section 3 definition (to include territories and possessions). In no way, however, can it be read to include some territories and

¹⁸ Petition at 2-3.

¹⁹ The Puerto Rico Broadcasters limit themselves to arguing that “[i]f the Commission intends to take into consideration the technical problems with providing service as a reason to interpret the meaning of ‘State’ narrowly, this argument fails for Puerto Rico.” Petition at 2. They continue: “If the DBS providers’ arguments are accepted, then the congressional intent of the definition of ‘State’ only included those noncontiguous States including Territories and Possessions that the DBS providers could serve, which includes Puerto Rico and excludes all other Territories and Possession[s] that DBS providers cannot serve.” *Id.* at 3.

²⁰ *Order*, ¶ 9.

possessions but not others. If, as the Commission found, Section 338(a)(4) does not apply to Guam, it cannot apply to Puerto Rico either.²¹

* * *

The Commission defined the scope of Section 338(a)(4) correctly to include Alaska and Hawaii only. It should therefore reject the Puerto Rico Broadcasters' attempts to claim carriage benefits that do not – and were never meant to – apply to them.

²¹ DIRECTV must also note that the premise of the Puerto Rico Broadcasters' argument – that DIRECTV and EchoStar have “acknowledge[d]” that they provide service in Puerto Rico – is demonstrably incorrect. Petition at 3. DIRECTV acknowledged no such thing, and, indeed, specifically denied as much. DIRECTV Comments at 10 (“Alaska and Hawaii are the only noncontiguous states in which DIRECTV had subscribers as of passage of SHVERA, and are the only noncontiguous states in which it has subscribers today.”). While DIRECTV’s affiliate, DIRECTV Latin America (“DTVLA”), provides such service, DIRECTV itself – the only DIRECTV-related entity that falls within section 338(a)(4)’s scope – does not. *See id.*, n. 23. (noting that section 338(a)(4) expressly applies to a “satellite carrier that offers multichannel video programming distribution service in the United States to more than 5,000,000 subscribers,” not to “a satellite carrier and its affiliates”).

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CERTIFICATE OF SERVICE

I, Michael Nilsson, do hereby certify that on this eighth day of December, 2005, I have caused a copy of this Opposition to be delivered by electronic mail to

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