

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Application of DISH Network, LLC for Qualified) MB Docket No. 10-124
Carrier Certification)
)

ORDER

Adopted: September 1, 2010

Released: September 2, 2010

By the Commission:

I. INTRODUCTION

1. On June 30, 2010, DISH Network (“DISH”) filed an Application for Certification¹ (the “Application”) as a qualified carrier pursuant to the Satellite Television Extension and Localism Act of 2010 (“STELA” or the “Act”).² The Application describes the initiation of local broadcast television retransmission by satellite in all 210 television markets, 29 of which are receiving this service for the first time. Such service will provide all DISH subscribers with local programming, information, weather alerts, and other valuable services that many had previously been without. As required by STELA, DISH’s application was placed on public notice and one comment was filed.³ STELA states that the Commission “shall issue” a qualified carrier certification to any satellite carrier, upon making certain determinations regarding the service provided by that carrier.⁴ After review of DISH’s filing and consideration of the record, we have determined that Dish meets the statutory requirements for certification. Accordingly, we grant the certification, as described below.

II. BACKGROUND

2. STELA, which amends certain sections of the Copyright Act and the Communications Act, largely addresses the retransmission of distant, out-of-local-market television broadcast signals by satellite to eligible subscribers. Section 105 of STELA provides that a satellite carrier that provides local-into-local television broadcast signals to all 210 Designated Market Areas (“DMAs”) in the United States may be deemed a “qualified carrier.”⁵ A qualified carrier is entitled to a waiver of a previously issued court injunction that prohibits such carrier from using the compulsory copyright license to offer any

¹ Application for Qualified Carrier Certification of DISH Network, LLC (filed June 30, 2010) (“Application”).

² The Satellite Television Extension and Localism Act of 2010 (STELA) § 206, Pub. L. No. 111-175, 124 Stat 1218 (2010) (§ 206 codified as amended at 47 U.S.C. § 342, other STELA amendments codified in scattered sections of 17 and 47 U.S.C.); see also STELA § 105, amending 17 U.S.C. § 119(g). STELA was enacted on May 27, 2010 (S. 3333, 111th Cong.).

³ Commission Seeks Comment On Application by Dish Network for Certification as a Qualified Carrier Pursuant to the Satellite Television Extension And Localism Act Of 2010, MB Docket No. 10-124, Public Notice, DA 10-1036 (June 30, 2010) (“Public Notice”); 47 U.S.C. § 342(c).

⁴ STELA § 206, amending 47 U.S.C. §342(a).

⁵ STELA § 105, amending 17 U.S.C. § 119(g).

distant television broadcast signals to its subscribers.⁶ In 2006, Echostar Communications Corporation, DISH's former parent company, was permanently enjoined from offering distant signals.⁷ Waiver of this injunction would allow DISH to retransmit the signals of out-of-market television stations to eligible subscribers, and to provide subscribers in certain local markets with out-of-market network affiliates if there are no in-market affiliates of that network available.⁸

3. Pursuant to STELA, DISH obtained a temporary waiver of this injunction. The waiver allows DISH to retransmit distant signals in order to "fill in" network channels for subscribers in DMAs where there is not a full complement of local broadcast network signals. Relying on this capability, DISH has begun local service to all 210 DMAs, 29 of which did not receive local-into-local service from DISH prior to the grant of the waiver.⁹ This temporary waiver expires on September 29, 2010, and the Act permits the court to indefinitely extend that waiver only after the Commission issues an Order certifying that DISH has successfully begun local service to every DMA and has met the requirements for recognition as a qualified carrier.¹⁰ Section 206 of STELA amends the Communications Act and sets forth the criteria and procedures for the Commission to use to make the determination that DISH is entitled to certification as a qualified carrier.¹¹ In compliance with those procedures, DISH has filed its Application, and we have made the Application available to the public for comment.¹²

III. DISCUSSION

4. STELA instructs us to issue the requested certification upon making three determinations about an applicant for qualified carrier status. In this proceeding, we review the record to determine: (1) whether DISH is providing local service to every DMA; (2) whether it is predicted to provide a "good quality satellite signal" to 90% of the households in each of the 29 new DMAs; and (3) whether there is any evidence of a technical failure that would preclude DISH's continued compliance with the first two requirements.¹³ In order to allow us to make these determinations, STELA requires DISH to submit, at a minimum, certain specific data and affidavits. As discussed below, DISH has submitted all information required by STELA, and included supplemental information in their initial filing where appropriate. Based on our review of the record, we determine that DISH is eligible for qualified carrier certification.

A. Local Service

5. Section 342(a)(1) tasks us with determining whether the "satellite carrier is providing local service pursuant to the statutory license under section 122 ...in each designated market area."¹⁴ In order to demonstrate this, and as required by the Act,¹⁵ DISH has submitted an affidavit stating that it is currently providing local service in all 210 DMAs pursuant to the statutory license provided for in 17

⁶ STELA § 105, amending 17 U.S.C. § 119(g)(1).

⁷ *CBS Broadcasting Inc. v Echostar Communications Corporation*, 472 F.Supp.2d 1367 (S.D. Fla. 2006).

⁸ See STELA § 105, amending 17 U.S.C. § 119 (g)(2).

⁹ 17 U.S.C. § 119(g)(2).

¹⁰ 17 U.S.C. § 119(g)(1), (3)(A)(v). See also 47 U.S.C. § 342(a)(1).

¹¹ STELA § 206, amending 47 U.S.C. § 342.

¹² *Public Notice*, *supra* note 3.

¹³ 47 U.S.C. § 342(a).

¹⁴ 47 U.S.C. § 342(a)(1).

¹⁵ 47 U.S.C. § 342(b)(1).

U.S.C. § 122. As required by STELA, this affidavit, provided by Senior Vice President of Programming David Shull, includes a list of those 181 markets in which DISH provided local service as of the date of the enactment of STELA.¹⁶ DISH's Application provides a list of the 29 markets that DISH began to serve on June 3, 2010.¹⁷

6. As required by STELA, we provided 30 days for public comment on the DISH filing.¹⁸ The only comment filed was a challenge to DISH's statement that it is providing local service in every DMA.¹⁹ Delmarva Broadcast Service, LLV is the operator of WMDT-TV, Salisbury, MD ("WMDT"). After being notified of DISH's intent to begin local service, WMDT elected retransmission consent for the current carriage cycle.²⁰ As a result, pursuant to the statutory license established in 17 U.S.C. § 122, DISH may not retransmit the signal of WMDT until it reaches an agreement with the station for carriage.²¹ WMDT has not reached a carriage agreement with DISH, and the station is not currently being delivered to DISH Network customers in the Salisbury DMA.²² WMDT argues that DISH should not be certified until it "has made satisfactory efforts to provide local broadcast services of commercial stations in Salisbury, and any other markets where such service is not yet being provided."²³ DISH responds to WMDT by arguing that it is providing "local service," as required under STELA, in the Salisbury market, and that STELA neither requires nor permits an applicant for qualified carrier status to retransmit the signal of a station that has elected retransmission consent but has not entered into a carriage agreement.²⁴ DISH further states that the issues raised by WMDT are not valid grounds for denying certification under STELA.²⁵

7. Because STELA requires that local service be delivered "pursuant to the statutory license under section 122," we agree with DISH that "local service" under the Act is no different than local service generally. Dish is neither required nor permitted to carry local commercial stations that have elected retransmission consent unless they grant their consent to be carried.²⁶ WMDT chose not to elect mandatory carriage, which would have assured it of immediate carriage in this market. Moreover, once WMDT and DISH reach agreement, the station will be available to Salisbury DMA DISH subscribers.

¹⁶ Application at Attachment A. The effective date of STELA, and its enactment date for most purposes, is February 27, 2010. See STELA § 307(a).

¹⁷ Application at 2-3.

¹⁸ 47 U.S.C. § 342(c)(1).

¹⁹ Comments of Delmarva Broadcast Service, LLV ("Comment").

²⁰ WMDT alleges that DISH provided it with insufficient notice prior to launching local service in the market, and that WMDT only learned of DISH's intent to launch local-into-local service on May 20, 2010. DISH has provided a declaration stating that this is not the case, and has submitted supporting documentation into the record, including a carriage election letter sent by WMDT to DISH that is dated March 11, 2010.

²¹ 17 U.S.C. § 122(a)(1)(B) permits secondary transmission only by a carrier which is in compliance with our carriage rules. The Commission's rules permit carriage of a "retransmission consent" station only with the explicit consent of that station. 47 C.F.R. § 76.64. See also 47 U.S.C. § 325(b)(1).

²² The only local signal currently being carried by DISH in the Salisbury DMA is that of a PBS affiliate. Application at Attachment E, page 3.

²³ Comment at 2.

²⁴ Reply of DISH at 2 ("Reply").

²⁵ Reply at 5.

²⁶ 47 C.F.R. § 76.66.

We therefore find that WMDT's objections are not relevant to our determination here.

8. The sworn affidavit of David Shull, stating that DISH is currently providing local service to all 210 markets, is not disputed by any filer other than WMDT, whose objections we have found irrelevant to our determination. Therefore, we find that DISH is providing local service pursuant to the statutory license under section 122 in each of the 210 DMAs.

B. 90% Coverage

9. STELA directs the Commission to determine with greater specificity the level of service being provided in the 29 DMAs that were not served by DISH as of the enactment of STELA.²⁷ Specifically, we must determine whether DISH's "satellite beams are designed, and predicted by the satellite manufacturer's pre-launch test data, to provide a good quality satellite signal to at least 90 percent of the households in each such designated market area based on the most recent data released by the United States Census Bureau."²⁸ In order for us to make the coverage determination, STELA requires DISH to submit, for each of the 29 new markets, the location of the local receive facility, as well as maps and data showing the predicted coverage area of its satellites relative to the distribution of households in each DMA.²⁹

10. In compliance with this requirement, DISH submitted three attachments for each of the 29 new DMAs. The first, a narrative providing the location of the local receive facility and the number of households in the DMA, also describes and explains the second two attachments. One is a map showing the geographic distribution of households in the DMA, and the second is the same map, but overlaid with the specifically identified satellite beam (spot or CONUS) that is used to provide local service to that DMA. The maps also note the percentage of households in the DMA that are covered by the satellite

²⁷ 47 U.S.C. § 342(a)(2).

²⁸ 47 U.S.C. § 342(a)(2)(A). The term "good quality satellite signal" is defined, for the purposes of the Act, as:

"(i) a satellite signal whose power level as designed shall achieve reception and demodulation of the signal at an availability level of at least 99.7 percent using—

(I) models of satellite antennas normally used by the satellite carrier's subscribers; and

(II) the same calculation methodology used by the satellite carrier to determine predicted signal availability in the top 100 designated market areas; and

(ii) taking into account whether a signal is in standard definition format or high definition format, compression methodology, modulation, error correction, power level, and utilization of advances in technology that do not circumvent the intent of this section to provide for non-discriminatory treatment with respect to any comparable television broadcast station signal, a video signal transmitted by a satellite carrier such that—

(I) the satellite carrier treats all television broadcast stations' signals the same with respect to statistical multiplexer prioritization; and

(II) the number of video signals in the relevant satellite transponder is not more than the then current greatest number of video signals carried on any equivalent transponder serving the top 100 designated market areas."

47 U.S.C. § 342(e)(2)(A).

²⁹ 47 U.S.C. § 342(b)(2)(A) ("Identification of each such market and the location of its local receive facility"); § 342(b)(2)(B) ("Data showing the number of households, and maps showing the geographic distribution thereof, in each such designated market area based on the most recent census data released by the United States Census Bureau"); § 342(b)(2)(C) ("Maps, with superimposed effective isotropically radiated power predictions obtained in the satellite manufacturer's pre-launch tests, showing that the contours of the carrier's satellite beams as designed and the geographic area that the carrier's satellite beams are designed to cover are predicted to provide a good quality satellite signal to at least 90 percent of the households in such designated market area based on the most recent census data released by the United States Census Bureau").

beam that is providing local service, which is in each case greater than the required 90%.³⁰ We received no comments addressing this issue. Commission staff have reviewed the maps for each of the 29 new DMAs, and find that the predicted coverage areas do not conflict with other available information regarding the strength, location, and service areas of the specific beams identified by DISH.

11. DISH has also provided affidavits that demonstrate that these covered areas receive a “good quality satellite signal.” David Bair submitted an affidavit as the Senior Vice President of Space Programs and Operations for Echostar Satellite Services L.L.C., which monitors and controls satellite operations for DISH. In demonstrating compliance with Subsection (i) of the “good quality satellite signal” standard, he explains that

[u]tilizing the same calculation methodology used by DISH to determine predicted signal availability in the top 100 DMAs and models of satellite antennas normally used by DISH subscribers, the power levels (as designed, and as plotted on the maps included in Attachment D) of the satellite signals used to provide local service in each of the 29 [new] DMAs... are predicted to achieve reception and demodulation of the signals at availability levels of at least 99.7 percent.³¹

Mr. Bair’s affidavit also provides a list of the principal parameters that DISH considers when calculating signal availability in the Top 100 DMAs and that were used in calculating the signal availability in the 29 new DMAs. We received no comments addressing this issue. Commission staff have reviewed these parameters, and find that they include the information necessary to make a signal availability prediction in accordance with a methodology recommended by the International Telecommunication Union.³²

12. To demonstrate compliance with Subsection (ii) of the “good quality satellite signal” standard, DISH offers the affidavit of Vice President, Corporate Initiatives, Rex Povenmire. Mr. Povenmire states that

[t]aking into account the statutory factors set forth in 47 U.S.C. § 342(e)(2)(A)(ii), DISH treats all television broadcast stations’ signals the same with respect to statistical multiplexer prioritization; and the number of video signals carried in each of the satellite transponders being used to provide local service in the 29 [new DMAs]... is not more than the current greatest number of video signals carried on any equivalent transponder serving the top 100 DMAs.³³

Mr. Povenmire provides extensive detail about the methodology DISH used to compare

³⁰ 26 of the new DMAs are fully covered by the relevant Spot beam or CONUS beam, thereby covering 100% of households within those DMAs. In the three markets where the beam did not fully cover the DMA, DISH made a very conservative estimate of the number of households covered, by assuming that any household in a census block not entirely covered by the spot beam would not have the local service available. Even using this conservative approach, DISH beams cover more than 90% of households in each of the three markets: Eureka, CA, 94% covered; Glendive, MT, 94% covered; and Wheeling, WV, 92% covered.

³¹ Application at Attachment C.

³² The International Telecommunication Union (ITU) is a specialized agency of the United Nations whose goal is to promote international cooperation in the efficient use of telecommunications, including the use of the radio frequency spectrum. The ITU publishes technical recommendations concerning various aspects of radiocommunication technology. These recommendations are subject to an international peer review and approval process in which the FCC participates, and include a methodology for calculating satellite signal availability. The Commission accepts this ITU-recommended methodology as a valid way of calculating DBS satellite signal availability.

³³ Application at Attachment B.

transponders. Specifically, DISH focused on two transponder characteristics to determine what would constitute an “equivalent” transponder, and applied a uniform set of conversion ratios to determine the maximum number of signals carried on these transponders. We received no comments addressing this issue. Commission staff have reviewed DISH’s methodology, and finds that it is an appropriate method for identifying equivalent transponders and comparing the number of signals they carry.

13. Based on our review of the record, therefore, we find that DISH is providing a “good quality satellite signal” to at least 90% of the households in each of the 29 new DMAs.

C. System Integrity

14. Finally, STELA requires us to determine whether there is any “material evidence that there has been a satellite or sub-system failure subsequent to the satellite’s launch that precludes the ability of the satellite carrier to satisfy” these requirements.³⁴ In furtherance of this determination, DISH was required to submit an affidavit swearing that there have been no technical problems that would prevent its satellite beams from achieving their predicted coverage.³⁵

15. Mr. Bair’s affidavit, discussed above, also addresses this requirement. The affidavit lists the four satellites that are being used to provide local service in the 29 new DMAs: EchoStar 14 at 118.9° W.L.; EchoStar 10 at 110.2° W.L.; Ciel-2 at 128.85° W.L.; and EchoStar 8 at 77° W.L. Regarding these four satellites, Mr. Bair states that

[a]s of the date of this affidavit, there have been no satellite or sub-system failures subsequent to the launch of these satellites that would degrade their design performance to such a degree that a satellite transponder used to provide local service to those 29 [new] DMAs is precluded from delivering a good quality satellite signal to at least 90 percent of the households in each such DMA based on the most recent census data released by the United States Census Bureau.³⁶

The record also does not contain material evidence reflecting any technical failure since the signing of the Bair affidavit, and we received no comments addressing this issue.

16. The Commission is not aware of any evidence, material or otherwise, indicating a satellite or sub-system failure subsequent to the launch of these four satellites that would preclude DISH from continuing to offer a “good quality satellite signal” to at least 90% of the households in each of the 29 new DMAs. We therefore determine and are satisfied that there is no material evidence of such a failure.

IV. CONCLUSION

17. As discussed above, our analysis of the record supports certification of DISH’s qualified carrier status. The lack of any relevant objection to the certification, and the absence of any evidence that DISH has failed to provide local service, as defined by STELA, in all 210 markets, supports DISH’s extensive filing. STELA states that, if the Commission makes the three determinations listed in Sections 342(a)(1), 342(a)(2)(A), and 342 (a)(2)(B) of title 47, United States Code, it “shall issue a certification for

³⁴ 47 U.S.C. § 342(a)(2)(B).

³⁵ 47 U.S.C. § 342(b)(2)(D) (“For any satellite relied upon for certification under this section, an affidavit stating that there have been no satellite or sub-system failures subsequent to the satellite’s launch that would degrade the design performance to such a degree that a satellite transponder used to provide local service to any such designated market area is precluded from delivering a good quality satellite signal to at least 90 percent of the households in such designated market area based on the most recent census data released by the United States Census Bureau”).

³⁶ Application at Attachment C.

the purposes of section 119(g)(3)(A)(iii) of title 17.”³⁷ It also requires that we finalize our determination, and grant or deny the certification, within 90 days of the date on which the request for certification was filed.³⁸ Pursuant to these obligations, we timely issue the certification of qualified carrier status that DISH has requested.

V. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that, pursuant to Section 342 of the Communications Act of 1934, 47 U.S.C. § 342, a certification for the purposes of section 119(g)(3)(A)(iii) of title 17 **IS ISSUED** to DISH Network, LLC.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁷ 47 U.S.C. § 342(a).

³⁸ 47 U.S.C. § 342(c)(2).