

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

In the Matter of)	
)	
American Distance Education Consortium)	
Request for an Expedited Declaratory Ruling)	File No. SAT-PDR-19990803-00077
and Informal Complaint)	
)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: May 15, 2000

Released: May 16, 2000

By the Chief, International Bureau:

1. By this Order, we dismiss as moot an Informal Complaint filed by the American Distance Education Consortium (“ADEC”). ADEC asks the Commission to direct EchoStar Satellite Corporation (“EchoStar”) to reduce the monthly access fee EchoStar proposed to charge ADEC, a public interest programmer seeking carriage on EchoStar’s direct broadcast satellite system (“DBS”). Because EchoStar has not selected ADEC as one of several public interest programmers to access its public interest set-aside channels, there is no reason to consider further the fees that EchoStar would have charged to ADEC. None of the public interest programmers using the EchoStar system have filed complaints raising this issue.

Background

2. Pursuant to Section 335 of the Communications Act, as amended, the Commission adopted DBS public interest obligation rules requiring DBS providers to set aside four percent of their DBS systems’ total channel capacity exclusively for programming of an educational or informational nature.¹ The Act also requires DBS providers to make their public interest channel capacity available to national educational programming suppliers upon reasonable prices, terms and conditions. The *DBS Public Interest Obligations Order* required DBS providers to make this satellite capacity available for public interest programming on June 15, 1999, and to commence offering programming by December 15, 1999.²

¹ 47 C.F.R. § 100.5(c).

² Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations, *Report and Order*, 13 FCC Rcd 23254, 23309 (1998) (“*DBS Public Interest Obligations Order*”). On December 10, 1999, EchoStar requested additional time to commence its public interest programming. This request was denied. However, due to Year 2000 compliance concerns, the Commission stated that EchoStar would not be subject to penalties for failure to comply with these obligations between December 16, 1999 and January 7, 2000. EchoStar Satellite Corporation, Petition for Waiver of Direct Broadcast Satellite Public Interest Obligation Implementation Date, *Memorandum Opinion and Order*, FCC 99-394 (rel. Dec. 17, 1999). EchoStar began offering its public interest programming on January 7, 2000.

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3. ADEC, a consortium of colleges and universities that pools resources for public interest programming, sought access to EchoStar's public interest set-aside channels. ADEC states that EchoStar advised that its proposed monthly access fee for ADEC would be \$10,000.³ ADEC also claimed that, although EchoStar refused to provide itemized cost information about the charges, ADEC's own analysis indicated a monthly access fee of \$1,970 was more accurate and reasonable.⁴ Thus, in August 1999, ADEC asked the Commission to order EchoStar to charge ADEC no more than \$1,970 per month for use of its satellite facilities until EchoStar justifies a higher rate.⁵

4. In November 1999, the Commission released a *Declaratory Ruling and Order* stating, among other things, that there was not enough information in the record to determine the reasonableness of EchoStar's proposed fees.⁶ The Commission found, however, that ADEC was entitled to review and respond to EchoStar's cost statement. Thus, EchoStar provided its cost information to ADEC subject to the Commission's standard protective order. EchoStar filed a response to which ADEC replied.

5. While the cost dispute was pending, EchoStar selected public interest programmers for carriage on its DBS system. ADEC was not among the applicants chosen. As a result, EchoStar asserts that the conflict over the monthly access charge has been rendered moot. EchoStar states that it serves no purpose to proceed further with adjudicating a disagreement over the charge to be paid by ADEC when ADEC has not been selected for carriage.⁷ EchoStar further states that the Commission's role in reviewing a DBS provider's charges for carriage is confined to a "concrete dispute" and that the *DBS Public Interest Obligations Order* indicates that the Commission will not resolve rate disputes except in the case of disagreement between the DBS provider and the programmer. According to EchoStar, it has reached agreements on charges with the qualified programmers it has selected and a review by the Commission of rates in this context would be inconsistent with its role as a "last resort" arbiter.⁸ In its reply, ADEC states, among other things, that the doctrine of mootness has no application to an informal complaint, which is at issue here. ADEC also states that EchoStar's own action caused the alleged "mootness" and to

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³ ADEC Request for an Expedited Declaratory Ruling and Informal Complaint filed August 3, 1999 at 6 ("*ADEC Request*").

⁴ *ADEC Request* at 6.

⁵ *ADEC Request* at 7.

⁶ American Distance Education Consortium, Request for an Expedited Declaratory Ruling and Informal Complaint, *Declaratory Ruling and Order*, 14 FCC Rcd 19976, 19982 (1996). In this Order, the Commission also found that EchoStar's proposal to place all of its public interest programming at the 61.5° W.L. orbit location does not meet its statutory or regulatory obligations. Instead, the Commission issued a Declaratory Ruling clarifying the set-aside rule and directing EchoStar to reserve four percent of the channels at each of its full-CONUS (continental U.S.) orbit locations exclusively for public interest programming. *Declaratory Ruling and Order*, 14 FCC Rcd at 19983. EchoStar's petition for reconsideration of this issue is pending. In addition, the Commission concluded that EchoStar may use a third party agent to select qualified public interest programmers. No petition for review of this issue was filed.

⁷ Response of EchoStar Satellite Corporation, filed January 18, 2000, at 2.

⁸ *Id.* at 3.

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allow such a result would encourage companies to take actions that are not in the public interest.⁹

Discussion

6. We find that ADEC's complaint is moot. An order directing EchoStar to charge ADEC no more than \$1,970 per month for access to its system, as ADEC seeks, would be meaningless because ADEC does not have access to the EchoStar system. For the reasons that follow, we disagree with ADEC's claim that EchoStar cannot avoid review because its own action – failure to select ADEC – resulted in the alleged mootness.¹⁰ The *DBS Public Interest Obligations Order* authorizes DBS providers to *select* among programmers when demand exceeds capacity of their reserved channels.¹¹ Here, EchoStar states that the total demand for channel capacity on the EchoStar system by qualified noncommercial programmers exceeded the number of channels that it was required to set-aside for public interest programming.¹² Thus, EchoStar was entitled to select among the qualified programmers for carriage on its system. Further, we have no basis on which to compel EchoStar to make any capacity on its public interest set-aside channels available to ADEC. We cannot now require EchoStar to choose ADEC to the exclusion of any of the other qualified public interest programmers it has selected. We also disagree with ADEC's unsupported assertion that the doctrine of mootness has no application to an informal complaint. The Commission is under no obligation to resolve an issue for which no relief can be granted simply because it is in the context of an informal complaint.

7. Further, the *DBS Public Interest Obligations Order* notes that the Commission will not be involved in setting rates for noncommercial programmers because it does not set rates for satellite capacity in other contexts.¹³ Rather, the Commission stated that it would let DBS providers and noncommercial programmers negotiate rates that comply with our rules. Any disputes would be resolved in the context of a complaint proceeding between the DBS provider and the programmer selected to provide public interest programming.

Conclusion

8. We find that ADEC's request that EchoStar be ordered to charge ADEC no more than \$1,970 per month for carriage on its DBS system is moot. Accordingly, the informal complaint filed by the American Distance Education Consortium on August 3, 1999 is DISMISSED.

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Donald Abelson, Chief
International Bureau

⁹ ADEC Reply to the Response of EchoStar Satellite Corporation, filed January 24, 2000, at 4 (“ADEC Reply”).

¹⁰ ADEC Reply at 4.

¹¹ *DBS Public Interest Obligations Order*, 13 FCC Rcd at 23301 (emphasis added).

¹² Response of EchoStar Satellite Corporation, at 2.

¹³ *DBS Public Interest Obligations Order*, 13 FCC Rcd at 23308.