

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

In the Matter of:)	
)	
National Association of Broadcasters and Association of Local Television Stations)	CSR-5865-Z ¹
)	
Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers)	
)	

DECLARATORY RULING AND ORDER

Adopted: April 4, 2002;

Released: April 4, 2002

By the Chief, Media Bureau:

I. INTRODUCTION

1. The Commission received a joint Emergency Petition from the National Association of Broadcasters (“NAB”) and the Association of Local Television Stations (“ALTV”) asking for modification or clarification of the Commission’s rules concerning carriage of local television broadcast stations by satellite carriers pursuant to the Satellite Home Viewer Improvement Act of 1999 (the “SHVIA”).² NAB and ALTV ask the Commission to take prompt emergency action to address satellite carriage of certain local television broadcast stations in a manner that requires subscribers to obtain a second satellite dish antenna. The Petition states that one of the satellite carriers subject to the “carry-one, carry-all” requirements, EchoStar Communications Corporation (“EchoStar”), which provides direct broadcast satellite (“DBS”) television products and services through its DISH Network, has placed some, but not all, local stations in particular markets on “wing slot” satellites located over the Atlantic (at 61.5° W.L.) or over the Pacific (at 148° W.L.).³ As a result, some EchoStar subscribers are required to obtain additional equipment (*e.g.*, a second satellite dish antenna) to receive and view these local stations, although the other local stations (such as network-affiliated stations) offered in the same markets are available on one dish antenna served by satellites that provide service over the continental United States (“CONUS” satellites). NAB and ALTV request that the Commission immediately clarify or amend the

¹ For administrative convenience and to ensure that interested parties are able to obtain copies of documents filed in this expedited proceeding, we initially required parties to submit their comments and replies referencing CS Docket No. 00-96. On the date on which this document is released, any future filings related to this proceeding should be filed referencing number “CSR-5865-Z” to ensure that we are able to track future filings in this proceeding.

² See Emergency Petition of National Association of Broadcasters and Association of Local Television Stations to Modify or Clarify Rule, CS Docket No. 00-96 (filed Jan. 4, 2002) (hereinafter “NAB/ALTV Emergency Petition”).

³ EchoStar is one of four companies licensed by the Commission to provide DBS service, which is a nationally distributed subscription video service that delivers programming via satellite to a small parabolic “dish” antenna located at the viewer’s home. Of the four companies, only three (*i.e.*, EchoStar, DirecTV, and Dominion) are actually providing service. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd 1244, 1271-73 (2002).

rules governing satellite carriage of local television stations (*i.e.*, 47 C.F.R. § 76.66) to specify that carriage of some local stations in a manner that requires subscribers to use a different dish antenna from the antenna used to receive other local stations is discriminatory and does not comport with the SHVIA or the Commission's orders and rules.

2. After reviewing the record in this proceeding, we do not believe that it is necessary to amend the satellite broadcast carriage rules at this time.⁴ There is, therefore, no need to initiate a rulemaking to address the issues raised in the Petition. Nor do we believe it is necessary to adopt an interpretation of the rules that would prohibit the use of a second dish in all cases.⁵ We agree with the majority of commenters that the issues raised in the Petition can be resolved by declaratory ruling, pursuant to our authority under Section 1.2.⁶ As set forth below, we conclude that EchoStar's "two-dish plan," as implemented, violates Section 338(d) of the Act and Section 76.66(i) of the Commission's rules.⁷ Based on numerous reports detailed in this record and referenced below, we find that EchoStar's offer of a "free" dish has not been implemented as such and, in these instances, constitutes a violation of the statutory and regulatory prohibition of providing access to certain stations at a discriminatory price. In addition, we find that EchoStar does not, as required, retransmit the signal of local television broadcast stations to subscribers on contiguous channels and provide access to local television broadcast station signals in a nondiscriminatory manner on its on-screen program guide or menu. In essence, although it may be possible to offer certain local stations by use of a second antenna without engaging in prohibited conduct, we find that EchoStar has not done so in this case.

II. BACKGROUND

A. Satellite Home Viewer Improvement Act of 1999

3. The SHVIA grants satellite carriers a royalty-free copyright license that enables satellite

⁴ In our preliminary review of the Petition, we found that the issues presented warranted speedy consideration and resolution to ensure proper implementation of the SHVIA requirements. Accordingly, we immediately issued a Public Notice regarding the Petition and established an expedited pleading cycle for the submission of comments and replies by interested parties on the substantive issues raised by NAB and ALTV. *See* Public Notice, "National Association of Broadcasters and Association of Local Television Stations Seek Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers," DA 02-31 (rel. Jan. 8, 2002). While we believe that the issues raised are narrowly focused and may be susceptible of resolution by means of a declaratory ruling without the need for further rulemaking, we nevertheless asked interested parties to comment on whether the issues raised are appropriate for resolution by declaratory ruling, other means of clarification, or initiation of a rulemaking proceeding.

⁵ We note that this ruling does not constrain the Commission from concluding in the future that rule revision is warranted if, for example, there are no means by which a satellite carrier could require subscribers to obtain additional equipment to access some but not all local stations in a market without a discriminatory effect as prohibited by the SHVIA.

⁶ *See* 47 C.F.R. § 1.2 ("The Commission may . . . on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."). There is broad support from the commenters on our authority to resolve the issues raised in this emergency proceeding by declaratory ruling or clarification. *See, e.g.*, State Broadcasters Association Comments at 9-10 (rulemaking is unnecessary; Commission should issue a declaratory ruling); Brunson Communications Comments at 1 (urges clarification of the rules); HCC Comments at 17 (issues presented may be resolved by declaratory ruling); Univision Comments at 1 n.2 (declaratory ruling ensures an expeditious resolution of the issues); WLNY-TV/Golden Orange Comments at 7 (further rulemaking is not needed to remedy EchoStar's "willful violations" of existing federal law). A list of commenting parties (and their abbreviated names) appears in Appendix A of this Order.

⁷ *See* 47 U.S.C. § 338(d); 47 C.F.R. § 76.66(i).

carriers to make secondary transmissions of a broadcast station's signal into that station's local designated market area ("DMA") without obtaining the authorization of those holding copyrights in the individual programs broadcast by that station.⁸ In exchange, the law requires that, by January 1, 2002, if a satellite carrier carries one local broadcast station in a local market pursuant to this license, it must carry all qualified local broadcast stations in the market upon request.⁹ This requirement is also known as the "carry one, carry all" rule.¹⁰ Although broadcasters can choose between retransmission consent and mandatory carriage, the SHVIA's carry one, carry all rule recognizes the practical realities of the television marketplace. As the courts have observed,

[m]ajor network affiliates have bargaining power and will be carried voluntarily in most instances, so they will normally elect to proceed under the retransmission consent provision. In contrast, independent stations (affiliates of emerging networks, independent commercial stations, and noncommercial stations) may need the protection of the must-carry rules and will normally elect mandatory carriage.¹¹

Congress sought to ensure that the carry one, carry all rule would prevent satellite carriers from "cherry-picking" (for example, carrying only network affiliates in local markets), but would instead protect the ability of all local broadcasters to reach their audiences and thereby "preserve free television for those not served by satellite or cable systems and . . . promote widespread dissemination of information from a multiplicity of sources."¹² In a recent decision, the United States Court of Appeals for the Fourth Circuit upheld the constitutionality of the SHVIA and the Commission's implementing regulations.¹³

4. As directed by Congress, the Commission issued a *Report and Order* implementing the SHVIA's broadcast signal carriage requirements.¹⁴ The section of the *Report and Order* at issue here concerns the Commission's interpretation of the anti-discrimination language of Section 338(d) of the Act, which states:

No satellite carrier shall be required to provide the signal of a local television broadcast station to subscribers in that station's local market on any particular channel number or to provide the signals in any particular order, except that the satellite carrier shall retransmit the signal of the local television broadcast stations to subscribers in the stations' local

⁸ See 17 U.S.C. § 122(a).

⁹ Until January 1, 2002, satellite carriers were granted a royalty-free copyright license to retransmit television broadcast signals on a station-by-station basis, subject to obtaining a broadcaster's retransmission consent. See Joint Explanatory Statement of the Committee of Conference on H.R. 1554, 106th Cong., H.R. Conf. Rep. No. 106-464, at 100 (1999) (hereinafter "*Conference Report*").

¹⁰ The obligations imposed by the carry one, carry all rule are more limited than the name implies. Satellite carriers, for example, are not required to carry local commercial stations whose signals substantially duplicate those of another station in the same market. See 47 U.S.C. § 338(c)(1). Additionally, a broadcast station seeking mandatory carriage must deliver a "good quality signal" in order to be entitled to carriage. See *id.* § 338(b)(1).

¹¹ See *Satellite Broadcasting and Communications Ass'n v. FCC*, 275 F.3d 337, 350 (4th Cir. 2002) ("*SBCA*") (citations omitted).

¹² *Conference Report*, at 100.

¹³ See note 11, *supra*. On March 7, 2002, EchoStar and the Satellite Broadcasting and Communications Association filed a petition for a writ of certiorari with the United States Supreme Court to review the judgment of the Fourth Circuit in the *SBCA v. FCC* case.

¹⁴ See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, 16 FCC Rcd 1918, 1919 (2000) ("*Report and Order*").

market on contiguous channels and provide access to such station's signals at a nondiscriminatory price and in a nondiscriminatory manner on any navigational device, on-screen program guide, or menu.¹⁵

Specifically with regard to the issue of additional equipment (which several broadcasters raised in the *Report and Order*), the Commission concluded:

We find that the language of Section 338(d) covers the additional equipment concerns raised by the parties and bars satellite carriers from requiring subscribers to purchase additional equipment when television stations from one market are segregated and carried on separate satellites. However, we are not prohibiting a satellite carrier from requiring a subscriber to pay for an additional dish in order to receive all television stations from a single market. For example, DirecTV may require an additional dish to receive all television stations from the Baltimore market, but it may not require subscribers to purchase the same to receive some Baltimore stations where the others are available using existing equipment.¹⁶

Similarly, Section 76.66(i)(4) of the Commission's rules states:

Within a market, no satellite carrier shall provide local-into-local service in a manner that requires subscribers to obtain additional equipment at their own expense or for an additional carrier charge in order to obtain one or more local television broadcast signals if such equipment is not required for the receipt of other local television broadcast signals.¹⁷

5. The Commission also issued an *Order on Reconsideration*, which again addressed the issue concerning additional equipment in response to a petition for reconsideration of the *Report and Order* (filed by DirecTV), which the Commission denied.¹⁸ In the *Order on Reconsideration*, the Commission clarified that while Congress did not completely prohibit satellite carriers from requiring subscribers to obtain an additional satellite dish antenna, it was clear that Congress would not allow satellite carriers to require an additional dish to receive only some, but not all, local signals, "if such a requirement created discriminatory effects."¹⁹ The Commission added, "[w]e believe that a limited prohibition on requiring subscribers to obtain a separate dish to receive some local signals when other local signals are available without the separate dish is necessary to give full effect to local station carriage requirements."²⁰

B. EchoStar's "Two-Dish Plan"

6. EchoStar is currently providing DBS service that includes local television broadcast

¹⁵ 47 U.S.C. § 338(d).

¹⁶ 16 FCC Rcd at 1961.

¹⁷ 47 C.F.R. § 76.66(i)(4).

¹⁸ See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, Order on Reconsideration, 16 FCC Rcd 16544 (2001) ("*Order on Reconsideration*").

¹⁹ *Id.* at 16566.

²⁰ *Id.*

signals to 36 markets from six satellites located in four orbital slots.²¹ Specifically, EchoStar is authorized to provide DBS service from orbital slots located at 61.5°, 110°, 119°, and 148° West longitude.²² From the 110° and 119° slots, the satellites – referred to as “CONUS satellites” -- are able to provide service to the 48 contiguous United States. The CONUS satellites form the primary satellites in EchoStar’s fleet. The remaining orbital slots, located at 61.5° and 148°, are able effectively to cover only a portion of the United States and are therefore referred to as “partial-CONUS,” “secondary” slots, or “wing slots.”

7. Since January 1, 2002, EchoStar, with very few exceptions, has been using its CONUS satellites to deliver the signals of local broadcast stations affiliated with ABC, CBS, Fox, NBC, UPN, and WB, as well as some PBS and independent stations, to subscribers.²³ No additional equipment is necessary in order to receive these signals, which can be obtained in a package of local signals for \$5.99 per month.²⁴ In contrast, any remaining stations in a market not carried on CONUS satellites are carried on EchoStar’s secondary satellites, operating from 61.5° and 148° W.L. The local stations that EchoStar carries on its secondary satellites tend to be Spanish-language stations, certain noncommercial stations (including public television stations), and independent commercial stations.²⁵ In order for subscribers to receive these local stations (which EchoStar has characterized as “less popular” stations) from EchoStar’s secondary satellites, subscribers must obtain and install additional equipment, including a second satellite dish.²⁶ Although EchoStar claims to offer the additional equipment, including installation, to subscribers free of charge, broadcasters have presented evidence to dispute the extent of EchoStar’s efforts in this regard.

8. EchoStar claims that its “must carry compliance plan” hinged on the deployment of two spot-beam satellites supplied by two different manufacturers, Lockheed Martin and Loral Space.²⁷ It asserts that the manufacturers failed to meet delivery deadlines, which precluded EchoStar from meeting the January 1, 2002, statutory deadline “to carry over 200 additional qualified local broadcast signals.”²⁸ EchoStar states that its CONUS satellites were “too capacity constrained to carry all qualified local signals,” and that it could not move “existing programming on central satellites to eastern or western

²¹ See EchoStar Opposition at 1-2; NAB/ALTV Emergency Petition, Attachment (“EchoStar Subs Will Need Second Dish for Some New Local Stations,” *Satellite Business News*, Fax Update, Vol. 7 No. 139, December 17, 2001). See also EchoStar’s website at www.dishnetwork.com.

²² See *EchoStar Satellite Corporation, Application for Minor Modification of Direct Broadcast Satellite Authorization Launch and Operating Authority for EchoStar 7*, DA 02-118, Order and Authorization (IB Sat. & Radiocomm. Div. rel. Jan. 16, 2002) (The Commission granted EchoStar authority to launch and operate EchoStar 7, and co-locate it with EchoStar’s existing satellites at 119° W.L.). EchoStar publicly announced the successful launch of EchoStar 7 on February 21, 2002.

²³ See NAB/ALTV Emergency Petition, Attachment (“Ergen Tries to Clear Air with NAB on New Local Plan,” *Satellite Business News*, Fax Update, Vol. 7 No. 146, January 4, 2002). See also APTS/PBS Comments at 4 & Appendix A (of the 64 public television stations carried, 27 are relegated to “wing” satellites).

²⁴ See EchoStar’s website at www.dishnetwork.com.

²⁵ Calculations based upon EchoStar’s website show that a total of 112 local stations require a second dish. See <http://www.dishnetwork.com/content/programming/locals/index.shtml>.

²⁶ See NAB/ALTV Emergency Petition, Attachment (“EchoStar Subs Will Need Dish for Some New Local Stations,” *Satellite Business News*, Fax Update, Vol. 7 No. 139, December 17, 2001) (quoting EchoStar Executive Vice President Jim DeFranco as saying: “If the customer wants the less popular channels, they will need a second dish.”).

²⁷ EchoStar Opposition at 1.

²⁸ *Id.*

satellites without significantly disrupting customer expectations and violating contractual obligations to programmers.”²⁹ It states that it proceeded to carry “roughly half of the additional local must carry station signals on its central satellites,” and placed the remaining local signals on its wing satellites.³⁰ According to EchoStar, its plan complies with the law because it provides the additional equipment required to receive the signals, including installation, free of charge to any subscriber who requests it.³¹

9. NAB/ALTV, on the other hand, interpret the Commission’s Orders as “preven[ting] satellite carriers from forcing customers to acquire a second dish solely to obtain some local stations, without regard to who pays the out-of-pocket costs of doing so.”³² Further, NAB/ALTV state that the Commission intended “to permit carriers to require customers to pay for a second dish ‘at their own expense’ if all of the stations in the market were available only through a second dish.”³³ It is NAB/ALTV’s position that “any scheme that forces customers to undertake the burden of acquiring additional equipment to receive some – but not all – local stations is inherently and inevitably discriminatory.”³⁴ Numerous broadcast stations, programmers, and associations filed comments in support of NAB/ALTV’s petition.³⁵ Broadcast commenters concur with NAB/ALTV that EchoStar’s practice of placing some – but not all – local stations entitled to carriage on wing satellites is unlawful.³⁶ Further, several commenters argue that, independent of the alleged violations, EchoStar’s actions are inexcusable given the time it had to prepare to meet its must carry obligations.³⁷

²⁹ *Id.* at 2.

³⁰ *See id.*

³¹ *Id.*

³² NAB/ALTV Emergency Petition at 4.

³³ *Id.* at 5-6 (emphasis in original omitted).

³⁴ NAB/ALTV Comments at 2.

³⁵ *See* Appendix A (all the commenting parties on this list support the Petition, except for EchoStar, SBCA, and individual commenters William Cummins and Mark Holtz). Some of the commenters in the pending EchoStar/DirecTV merger proceeding, in CS Docket No. 01-348, also discussed this issue. *See* Comments of the following parties in CS Docket No. 01-348: APTS/PBS; Brunson Communications; Joint Comments of Carolina Christian Television, Inc. and LeSea Broadcasting Corp.; Eagle III Broadcasting, LLC; Joint Comments of Family Stations, Inc. and North Pacific International Television, Inc.; Johnson Broadcasting, Inc.; Pappas Telecasting Companies; Paxson Communications Corp.; and Univision Communications, Inc.

³⁶ *E.g.*, Rancho Palos Verdes Broadcasters Comments at i; Roberts Broadcasting Company Comments at 1 (“Placing ‘disfavored’ local stations on a satellite that cannot be seamlessly received by subscribers of the ‘favored’ local stations . . . constitutes blatant discrimination against the ‘disfavored’ local stations.”); KSLs, Inc. Comments at 1 (“EchoStar’s conduct [is] discriminatory.”); APTS/PBS Comments at 6 (EchoStar’s “practice is fundamentally discriminatory and violates SHVIA”); Maranatha Comments at 4-11 (EchoStar has discriminated against independent local stations and in favor of network-affiliated stations by isolating the local stations on a separate satellite and erecting barriers to access to those signals by EchoStar customers); Long Island Educational Television Council Comments at 1-2 (EchoStar has “put a grossly disproportionate number of public television must-carry signals in a secondary service.”).

³⁷ *E.g.*, Arizona State University Comments at 3 (EchoStar disclosed its two-dish arrangement only a couple of weeks before the SHVIA carriage requirements became effective, even though EchoStar “knew months before that its channel capacity could not accommodate all of the stations it would need to carry.”); Telemundo Comments at 6 (EchoStar could have and should have remedied the problem by shifting to its “wingbirds” programming channels that do not have statutory carriage rights, such as pay-per-view channels.); Rancho Palos Verdes Broadcasters Comments at 9 (“EchoStar conveniently ignores the fact that it can resolve any legitimate channel capacity problem by shifting any of a number of programming channels that are not at all required to be carried by the Act.”).

10. Broadcast commenters also contend that, even if EchoStar follows through on its commitment to offer the additional equipment free of charge to subscribers, the hassles, inconvenience, and aesthetic costs to consumers of a second dish as they currently are being provided by EchoStar act as a strong deterrent for obtaining one.³⁸ Among other things, they point out that a consumer must become sufficiently educated to be aware that certain stations are missing and that the option of obtaining a second dish is available. Once a consumer is aware of the missing station, he or she must contact the satellite carrier (and a local installer) to arrange for an installation. In doing so, the consumer must be persistent enough to overcome initial misinformation concerning charges for the dish,³⁹ installation,⁴⁰ or the duration of the offer.⁴¹ Additionally, broadcasters state that there is also the possibility of being required to wait at home for an indefinite period for an installer to show up, of long waits on hold, or of multiple postponements of installer visits, and even of monetary penalties for failing to be home when the installer arrives. Further, a consumer must be willing to accept the aesthetic impact of a second dish, and for many apartment dwellers physical or legal impediments may make a second dish impractical.⁴²

11. NAB/ALTV recommend that the Commission “establish a minimum objective criteria for any satellite carrier that purports to justify a two-dish approach by ostensibly offering to pay for a second dish.”⁴³ They state:

Among other things, the Commission should communicate to the DBS industry that to comply even with EchoStar’s reading of the current FCC rules, (1) the offer of a free second dish must be prominently communicated both to existing customers and to new customers via the carrier’s web site and otherwise, (2) any such offer must include all out-of-pocket costs of purchasing, installing, and hooking up the second dish and any other necessary equipment, (3) the installation must be prompt, and (4) there can be no

³⁸ See, e.g., NAB/ALTV Emergency Petition at 7.

³⁹ See, e.g., Pappas Telecasting Comments at 4.

⁴⁰ See, e.g., KSLN, Inc. Comments at 2-3; Univision Comments at 3.

⁴¹ See, e.g., APTS/PBS Reply Comments at 6.

⁴² See NAB/ALTV Emergency Petition at 8. See also Rancho Palos Verdes Broadcasters Comments at 5; APTS/PBS Comments at 6 (“It appears, for example, that EchoStar has not widely publicized its ‘offer’ to give consumers a second dish for free. Moreover, even if a consumer is somehow made aware of the ‘offer,’ obtaining the promised services is likely to be extremely inconvenient and difficult.”). Regarding, physical impediments to obtaining a station’s signal, Univision notes:

According to the program provided on EchoStar’s website for calculating the azimuth and angle of elevation for the installation of a new dish, the angle of elevation to secondary satellites is almost always significantly lower than the angle of elevation to the primary satellites. For example, in the Dallas, Texas market, where Univision station KUVN(TV) is carried on a secondary satellite, the angle of elevation above horizontal for the primary satellite is 49 degrees, whereas the angle of elevation for the secondary satellite is a meager 24 degrees. As a result, even subscribers willing to install a second dish to receive signals from a secondary satellite 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.

Univision Comments at 11. See also Cornerstone Television Comments at 2 (“Some viewers have stated that they simply do not wish to have another dish installed on their homes for aesthetic reasons or because of the inconvenience involved. In at least one case, a viewer complained that a technician dispatched by EchoStar to his single family home was unable to effect service at the angle required to receive signals from the secondary satellite due to physical obstructions.”).

⁴³ NAB/ALTV Emergency Petition at 12. See Maranatha Comments at 15-16 (proposing similar measures).

preconditions for the offer.⁴⁴

NAB/ALTV also request that the Commission establish an early deadline for compliance, and if the carrier claims to be unable to meet that deadline because of circumstances beyond its control (*e.g.*, if a satellite is damaged while being launched), it should be required to seek a formal, temporary waiver from the Commission for good cause shown.⁴⁵ NAB/ALTV, in addition to other commenters, express concern that if the Commission does not promptly clarify its rules, then the two-dish approach using the wing slots “may well prove to be a permanent strategy for both DirecTV and EchoStar, whether or not the merger is approved.”⁴⁶ Univision and WLNY-TV/Golden Orange, on the other hand, do not completely agree with NAB/ALTV’s recommendation, asking the Commission to reject any suggestion that requiring EchoStar to better publicize the facts surrounding its local station package is an adequate solution to the problems that broadcasters on secondary satellites are facing.⁴⁷ Finally, APTS/PBS propose that the second antenna must be installed automatically to any subscriber who signs up for local-into-local service.⁴⁸ They add that subscribers who do not want the second antenna could refuse to accept it, provided they are aware that they are paying for more stations than they will receive.

III. DISCUSSION

12. In the factual context we are presented, the record demonstrates that EchoStar’s “two-dish” plan, as implemented, violates both the Act and the Commission’s rules. We note that satellite carriers have long argued for the ability to carry local stations as a way of becoming a more viable competitor to cable television. In acceding to the wishes of the satellite industry for the ability to carry local stations, the Congress, in granting satellite carriers a compulsory license, also sought to ensure that satellite carriers did not discriminate among local stations. Although it may be possible to offer certain local stations by use of a second antenna without engaging in prohibited discriminatory conduct, we find that EchoStar has not done so in this case.

13. In its Opposition, EchoStar begins by arguing that the Commission is barred from dealing with allegations of discrimination relating to acquisition of new equipment altogether, because of certain language in an early draft of the SHVIA.⁴⁹ EchoStar states that Congress had considered an outright prohibition on second dishes, but because it was later rejected, Congress must have intended not to limit the use of second dishes in any way. The same legislative history argument has been raised previously and twice rejected by the Commission.⁵⁰ We again reject EchoStar’s repeated legislative history argument here. As the Commission explained in the *Order on Reconsideration*:

The legislative drafting change cited . . . involved a deletion of a much broader limitation on satellite carriers than what the Commission adopted under the general anti-discrimination language that survived. The legislative drafting change, at most, indicated that Congress did not want to prohibit satellite carriers from requiring additional dishes generally, but the change does not imply that Congress wanted to allow satellite carriers to require additional dishes if such a requirement created discriminatory effects.

⁴⁴ NAB/ALTV Emergency Petition at 12.

⁴⁵ *See id.* at 14 & n.15.

⁴⁶ *Id.* at 13-14.

⁴⁷ *See* Univision Comments at 12-13; WLNY-TV/Golden Orange Reply at 4

⁴⁸ *See* APTS/PBS Comments at 9-10.

⁴⁹ *See* EchoStar Opposition at 6-7.

⁵⁰ *See Report and Order*, 16 FCC Rcd at 1959-61; *Order on Reconsideration*, 16 FCC Rcd at 16563-64.

14. Because EchoStar's implementation of its second dish plan falls so far short of what is required to prevent unlawful discrimination, we do not need to reach the question of whether carrying some local stations such that additional equipment (e.g., a second dish) is needed should be prohibited in all cases. As explained below, EchoStar's "two-dish plan" violates the anti-discrimination provision of Section 338(d) in at least three respects: (1) EchoStar does not, as required, provide access to all local television broadcast signals at a nondiscriminatory price; (2) EchoStar does not, as required, retransmit the signal of local television broadcast stations to subscribers on contiguous channels; and (3) EchoStar does not, as required, provide access to local television broadcast station signals in a nondiscriminatory manner on its on-screen program guide or menu.⁵¹ Further, we find that EchoStar's two-dish plan violates similar requirements found in Section 76.66(i) of the Commission's rules.⁵²

A. Nondiscriminatory Price

15. The following facts support broadcasters' contention that EchoStar's "two dish" plan, as implemented, violates Section 338(d)'s requirement that satellite carriers "provide access to [local television broadcast] station's signals at a nondiscriminatory price."⁵³ EchoStar's "two dish" plan does not necessarily constitute discriminatory pricing per se, but, as implemented, the plan is unlawful because it discriminates against the local stations not carried on the first dish, in violation of the nondiscriminatory price requirement of Section 338(d) of the Act and of Section 76.66(i) of the Commission's rules.⁵⁴ When some channels are available only via a second dish, and subscribers must incur significant effort to obtain the second dish, we believe that the cost associated with this effort should be imputed as a component of the "price" of obtaining these channels.⁵⁵ As described below, we conclude that, in fact, the "price," properly defined, of obtaining channels via a second dish under EchoStar's two-dish plan is higher than the price of obtaining channels via a single dish.⁵⁶

16. EchoStar is offering all local stations in a market for \$5.99 to its subscribers, but fails to disclose up-front, clearly and conspicuously, the need for a second dish in order to have access to stations that have been placed on the "wing" satellites. The unrefuted record in this proceeding demonstrates that EchoStar is neither affirmatively providing the second satellite dish antenna nor taking the steps necessary to ensure that subscribers are fully aware that, by refusing a second dish, they are paying for a package of stations, some of which they may not receive. Therefore, under EchoStar's pricing scheme, consumers are paying a monthly fee for an incomplete service. As a further consequence, local stations are adversely affected, because the scope of their potential viewing audience is limited as a result of EchoStar's actions.⁵⁷ The fact that EchoStar is claiming to offer the second dish to subscribers free of charge does

⁵¹ 47 U.S.C. § 338(d). *See, e.g.*, Univision Reply Comments at 5-6; Rancho Palos Verdes Broadcasters Comments at 11.

⁵² *See* 47 C.F.R. § 76.66(i).

⁵³ 47 U.S.C. § 338(d).

⁵⁴ *See* 47 C.F.R. § 76.66(i).

⁵⁵ *See Order on Reconsideration*, 16 FCC Rcd at 16568 ("The pricing should be based on relevant economic factors applied in a nondiscriminatory fashion that does not result in discriminatory treatment of any station or stations.").

⁵⁶ EchoStar charges \$5.99 per month for a local station package, so the relevant prices to compare would be as follows. For channels accessed via the subscriber's original dish, the price would be \$5.99 divided by the number of channels available via the original dish. For channels accessed via the new second dish, the price would be \$5.99 plus the amortized monthly cost of obtaining the second dish, divided by the total number of local channels offered.

⁵⁷ North Pacific International Television, Inc. (NPIT), licensee of Station KHCV(TV), Seattle, Washington, for example, explains that KHCV carries a significant amount of commercial matter for which it is compensated based on the number of cable television and direct broadcast satellite subscribers who are able to receive the station's signal, without regard to actual audience ratings. *See* NPIT Comments at 2. *See also* Long Island Educational

(continued...)

not shield it from the anti-discrimination requirement if, as in this case, subscribers are not directly offered and promptly provided with the additional equipment needed to receive the entire package of local stations.⁵⁸

17. Confirming the record evidence, a recent review of EchoStar's Internet website shows that in eight markets, as of March 26, 2002, the web listing of local stations did not disclose that any "additional local channels are available." Careful examination of the web page displaying the television station logos for each of these eight markets revealed that one additional station in each market could be available on a wing satellite were the subscriber so informed and provided with a second dish.⁵⁹ In five markets, all the local-into-local stations are carried on a CONUS satellite and thus are available using one dish.⁶⁰ In the remaining 23 DMAs in which EchoStar offers local-into-local service, between two and thirteen local stations are available only with a second dish.⁶¹ The website description of the local stations available in these markets lists these stations on a second "additional local channels available" page, which notes that a second dish is needed, but provides no information on how to obtain a second dish. To date, there is no information on the EchoStar website disclosing that the second dish needed to access all local stations is available without charge.

18. Broadcast commenters present unrefuted evidence of misinformation and obfuscation with respect to the manner in which EchoStar has publicized and implemented its second-dish offer. EchoStar's asserted "good faith" publication of its offer to subscribers consists of a single letter (that was sent after the January 1, 2002 statutory carriage deadline) announcing the second dish offer only in a footnote.⁶² The primary purpose of the letter was to announce "changes in the packaging and pricing of . . . DISH network programming," such as premium movie services and pay-per-view offerings.⁶³ While the

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Television Council Comments at 2 (The relegation of Station WLIW "to a decidedly inferior tier of carriage obviously hurts the station, which exists to provide service to the community and which relies in large part on memberships for financial support.").

Many broadcasters also point out that EchoStar surely knows that its discriminatory carriage decision will harm the "disfavored" stations, given EchoStar's own experience regarding stations on "wing slots." *See, e.g.*, Paxson Comments at 6; Telemundo Comments at 4. In this regard, NAB/ALTV note that EchoStar, in 1998 and 1999, offered local stations (including the most heavily-watched stations) in several markets, but on its "wing slot" satellites requiring a second dish, and that EchoStar found very few takers, because the two-dish solution was so unattractive to consumers. *See* NAB/ALTV Emergency Petition at 7 (citing EchoStar Satellite Corporation, Statement of Account for Secondary Transmissions by Satellite Carriers for Private Home Viewing (filed with U.S. Copyright Office on July 27, 1999)).

⁵⁸ In Los Angeles, New York, Philadelphia, and San Francisco, roughly half of the local stations are accessible only if a second dish is installed. Thus, subscribers paying \$5.99 a month for 18 stations in San Francisco, in fact receive only 8 local stations unless they actively pursue EchoStar for information and installation of a second dish.

⁵⁹ *See* <http://www.dishnetwork.com/content/programming/locals/index.shtml> (March 26, 2002). The markets in which the possible availability of an additional station was not disclosed are: Atlanta, GA; Cleveland, OH; Detroit, MI; Kansas City; Minneapolis/St. Paul; Pittsburgh, PA; Raleigh/Durham; and Sacramento, CA. As of March 31, 2002, it appears that EchoStar has added the reference to "additional local stations available" in these markets.

⁶⁰ *See id.* (*i.e.*, Austin, TX; Birmingham, AL; Cincinnati, OH; Portland, OR; and San Diego, CA).

⁶¹ Fifteen of the markets list two, three, or four stations available only with a second dish; Los Angeles and San Francisco have ten or more on the second dish, which outnumber the stations available on the first dish. *See id.*

⁶² *See* APTS/PBS Reply at 5-7. *See also* WLNY-TV/Golden Orange Comments, Attachment B (providing copy of EchoStar letter to subscribers ("EchoStar Subscriber Letter")).

⁶³ WLNY-TV/Golden Orange Comments, Attachment B (EchoStar Subscriber Letter).

letter provides subscribers with explicit instructions on how to obtain a free pay-per-view coupon, similar instructions are lacking regarding the second dish offer.⁶⁴ The footnote containing the “free offer” reads simply:

Channels vary by market. Some channels may require the installation of additional hardware; installation available at no cost until 3/31/02.⁶⁵

While the footnote states that the installation is free until March 31, 2002, we agree with commenters that it does not make clear that the “additional hardware” also is free.⁶⁶ Further, the offer does not specify what kinds of additional equipment may be required. Given the text and format of the letter, we agree with APTS/PBS that “[t]he effect and purpose of EchoStar’s letter is clear: to encourage the purchase of premium services by making them convenient and easily accessible while, at the same time, discouraging the purchase of additional local channels by making access to these channels inconvenient and practically impossible.”⁶⁷

19. Since sending the letter to subscribers, EchoStar has not made any additional, serious efforts of which we are aware to publicize its free second dish offer. As many commenters point out, and as discussed above, EchoStar’s website is strikingly devoid of any information about the second dish offer.⁶⁸ Although EchoStar claims that EchoStar Chairman Charlie Ergen has gone to great lengths to publicize this offer in his weekly “Charlie Chat” show,⁶⁹ EchoStar is unable to confirm the number of subscribers that have seen this program. Indeed, based on the evidence in the record describing the problems that consumers continue to encounter in obtaining accurate information from EchoStar representatives,⁷⁰ this minimal effort cannot be regarded as providing adequate and effective information

⁶⁴ *See id.*

⁶⁵ *Id.*

⁶⁶ EchoStar has not publicly announced the terms for installation of the second dish after March 31, 2002. In an ex parte meeting with Commission staff on February 8, 2002, EchoStar explained that this deadline was intended as a “marketing device.”

⁶⁷ APTS/PBS Reply at 6.

⁶⁸ NAB/ALTV, in its reply (at 5-6), also contend:

[EchoStar’s] web site now reveals less than it did a few weeks ago about the status of the stations that it has relegated to a second dish. When one clicks on “Washington, D.C.,” for example, a page appears that lists only the stations that are carried on EchoStar’s CONUS satellites. At the bottom of that page appears the phrase “Additional Local Channels Available.” Only by clicking on that link can one learn that there are additional stations that have been placed in EchoStar’s second-dish quarantine. And even there is no mention whatsoever of the supposed “free offer” to purchase and install dishes.

⁶⁹ EchoStar Opposition at 11.

⁷⁰ *See* Arizona State University Comments at 4-7 (Subscribers have reported that EchoStar’s CSRs are not knowledgeable about the offer, that installations often are not scheduled in a timely manner, and that EchoStar will provide only one set-top box capable of processing signals from the second dish, even if the consumer requires more than one.); WLNY-TV/Golden Orange Comments at 7 (“[F]ewer than one percent of EchoStar’s customers currently have, have sought or even know about the second receive dish that is necessary to receive the ‘wing slot’ satellite transmissions of EchoStar’s ‘disfavored’ local broadcast signals.”); Brunson Comments at 9-10 (“untold numbers” of Philadelphia residents experienced problems in obtaining its signal through the EchoStar system); Maranatha Comments at i (Although EchoStar has stated that the additional dish will be provided to its customers “free of charge,” in fact, in many cases, EchoStar does not disclose its “free” offer to its customers or advise them of EchoStar’s responsibility for the installation of the additional dish or replacement of existing equipment.); State Broadcasters Associations Comments at 7 (“[W]hatever incentive may minimally exist under EchoStar’s scheme is

(continued...)

to subscribers about the status of their local stations and EchoStar's second dish offer.

20. EchoStar claims, despite the evidence presented by other commenters to the contrary, that its customer service representatives ("CSRs") "have been trained to help customers receive the second dish."⁷¹ Broadcasters, however, 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. For example, APTS/PBS state, "[e]ach time, our researchers had to raise the issue of the free second dish first with EchoStar customer service representatives, and even then, the researchers had to be aggressive in asserting their right to free equipment and installation."⁷² According to NAB/ALTV, they have received reports from stations indicating that EchoStar's two-dish plan is "dysfunctional and in chaos." They state:

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.⁷³

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."⁷⁴ 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.⁷⁵ Further, a potential viewer informed Maranatha that "he called DISH

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essentially eliminated where, as here, EchoStar raises administrative hurdles frustrating subscribers' attempts to obtain additional equipment.").

⁷¹ EchoStar Opposition at 11.

⁷² APTS/PBS Comments at 6. *See* Brunson Comments at 8-9 (describing EchoStar's failure to advertise and the difficulties experienced by consumers in obtaining service).

⁷³ NAB/ALTV Emergency Petition at 10-11. *See id.* at 11 n.12 (quoting Internet chat discussions complaining about EchoStar CSRs). Rancho Palos Verdes Broadcasters Communications (Comments at 11) add:

As another example, management at KLUZ, Albuquerque, NM, reports that EchoStar customer service representatives tell callers that subscribers will need to pay an additional Six Dollars per month to be able to receive the KLUZ signal via the second dish, with the rest of the local Stations in the Albuquerque DMA already carried on the main dish. Thus, while EchoStar may (or may not) pay for the second dish -- as it has pledged -- it appears that in at least one market EchoStar plans to charge an additional monthly fee for use of the second dish.

⁷⁴ Univision Reply at 10.

⁷⁵ *See* Maranatha Comments at 6 ("Marie' in Easton, PA, called WFMZ-TV at the suggestion of an EchoStar customer service representative. She says she was told that, to watch WFMZ-TV, she would need new equipment, including a new special receiver, but that the CSR 'hasn't seen one yet.' Marie was told to contact WFMZ-TV; as of January 9, 2002, more than 70 people had telephoned [Maranatha] asking how to view WFMZ-TV on the EchoStar satellite.").

Network on January 1, 2002, and was told that WFMZ-TV was on ‘satellite 129’ and was not available to DISH Network subscribers.”⁷⁶

21. Broadcasters also provide evidence to show that this problem extends beyond EchoStar’s toll free number to the installers and retailers serving their customers. According to Univision, in many markets those attempting to sign up for all local stations were told by EchoStar sales personnel and dealers that there would be additional costs associated with the second dish ranging from \$99.00 to \$289.00.⁷⁷ KSLs, Inc., the licensee of station KSCI(TV), Long Beach, California, detailed viewer complaints regarding EchoStar’s statements that a second dish would cost \$70, or that a dish was free to new subscribers but that current subscribers would need to call and discuss their accounts.⁷⁸ Pappas Telecasting indicates that its representatives were told that a second dish would cost “\$100 for equipment and \$69 for installation” and “\$185 for the equipment with installation included.”⁷⁹ HCC also details a consumer’s experience in obtaining, and actually being billed \$200 for, the installation of a “free” second dish.⁸⁰ Pappas Telecasting asserts,

far from making a concerted effort to educate its subscribers about EchoStar’s second dish “offer” and to encourage subscribers to take advantage of it, the evidence seems to suggest that EchoStar may actually be inclined to deter its customers from exercising their option to have an additional dish installed, thereby impeding its customers’ right to receive all local stations. In so doing, EchoStar seeks to avoid its statutory obligation to “carry one, carry all.”⁸¹

Indeed, even if an appointment for free installation is successfully arranged, the record demonstrates significant problems associated with obtaining successful installation, as broadcasters allege.⁸² EchoStar has implemented a program that has made access to a second dish inconvenient and, in some instances, impossible because consumers are unaware or misinformed about the free second dish offer.

22. EchoStar claims, however, that “after a few weeks, thousands of subscribers have taken advantage of EchoStar’s offer of a free dish,” and in a later submission notes, “it was reported that almost 7,000 subscribers have taken advantage of EchoStar’s offer by requesting installation of a second dish to receive additional local channels.”⁸³ EchoStar attempts to characterize that result as a testament to its asserted success in advertising the free dish offer. The facts, however, do not support that inference. EchoStar is reportedly providing service to more than 6 million subscribers as of June 2001, 2 million of whom subscribe to local-into-local service. The fact that such a small percentage of subscribers have taken advantage of the offer seems to support, if anything, NAB/ALTV’s and other commenters’ contention that many subscribers remain unaware of the free dish offer or, if they are aware, have been reluctant to request one, given the misinformation provided by EchoStar and the difficulties associated

⁷⁶ *Id.*

⁷⁷ See Univision Comments at 14 and associated Declarations.

⁷⁸ See KSLs, Inc. Comments at 3.

⁷⁹ Pappas Telecasting Comments at 4.

⁸⁰ See HCC Comments at 14.

⁸¹ Pappas Telecasting Comments at 5.

⁸² See, e.g., APTS/PBS Reply at 8-9; HCC Comments at 13-14 (describing problems associated with actual installation, including multiple installation visits and erroneous billing).

⁸³ EchoStar Ex Parte Letter, CS Docket No. 00-96 (filed Feb. 12, 2002), at 2.

with having another dish installed.⁸⁴

23. As the Commission has found, “Section 338’s anti-discrimination language prohibits satellite carriers from implementing pricing schemes that effectively deter subscribers from purchasing some, but not all, local television signals.”⁸⁵ From the subscriber’s point of view, the costs of obtaining the “free” dish under EchoStar’s implementation of its two-dish plan include the time, trouble, and inconvenience to the subscriber to obtain the information concerning the need for the second dish, the procedures for arranging to get the second dish (including overcoming any misinformation), plus the time spent waiting for the second dish to be installed.⁸⁶ If all local stations were offered automatically upon payment of the \$5.99 monthly fee, along with prompt and voluntary installation of the “free” additional equipment, the mere requirement for a second dish would not necessarily violate the statute, the Commission’s Orders or the rules. In this case, based upon the record in this proceeding, EchoStar’s two-dish plan imposes real and significant additional costs upon those subscribers who would access the stations on the wing slot satellites. As such, EchoStar’s two-dish plan results in discrimination based on price of the type Congress and the Commission intended to prohibit.

B. Placement of Local Stations on Contiguous Channels

24. Broadcasters contend that EchoStar violated Section 338(d)’s requirement that satellite carriers “retransmit the signal of the local television broadcast stations to subscribers in the stations’ local market on contiguous channels”⁸⁷ Similarly, we note that Section 76.66(i)(1) of the Commission’s rules states: “No satellite carrier shall be required to provide the signal of a local television broadcast station to subscribers in that station’s local market on any particular channel number or to provide the signals in any particular order, except that the satellite carrier shall retransmit the signal of the local television broadcast stations to subscribers in the stations’ local market on contiguous channels.”⁸⁸ WLNY-TV/Golden Orange assert that EchoStar is transmitting from its CONUS satellites the signals of its “favored” local stations -- which are largely VHF major network affiliates -- on channels that are not contiguous with the channels EchoStar has assigned to its “disfavored” local independent stations.⁸⁹ They argue that “EchoStar’s CONUS satellite channel offering plainly is not in compliance with Section 338(d), because it includes only EchoStar’s ‘favored’ select local signals and not all local signals on

⁸⁴ See NAB/ALTV Emergency Petition at 8. See also Rancho Palos Verdes Broadcasters Comments at 5; APTS/PBS Comments at 6; Univision Comments at 11.

⁸⁵ *Report and Order*, 16 FCC Rcd at 1960.

⁸⁶ That cost could be calculated by estimating the additional amount of time the average subscriber is required to expend to obtain the second dish, value it in dollars, with reference to an average hourly wage or salary, and convert it into a monthly “surcharge” on the subscription price. The value of time is usually measured by economists in terms of the “opportunity cost,” namely what else one might have been doing with the time. One possible opportunity cost is to spend more time working. This opportunity cost is often approximated by the person’s wage rate. See F. Thomas Juster & Frank Stafford, *The Allocation of Time: Empirical Findings, Behavioral Models, and Problems of Measurement*, XXIX *Journal of Economic Literature* 471, 504-507 (June 1991) (recognizing the value of time based on the production of market goods and services, household (non-market) goods and services, leisure, personal care, and biological maintenance and determined jointly by market wage rates, household production technology, and the preferences of household members in the way their time is used, taking into account “the value of the foregone alternative”). See also Gary S. Becker, *A Theory of the Allocation of Time*, *Economic Journal*, at 493-517 (Sept. 1965).

⁸⁷ 47 U.S.C. § 338(d).

⁸⁸ 47 C.F.R. § 77.66(i)(1). See *Report and Order*, 16 FCC Rcd at 1957-58.

⁸⁹ See WLNY-TV/Golden Orange Comments at 4.

contiguous channels.”⁹⁰ EchoStar responds that it has not violated the contiguous channel requirement. It states that “the contiguous channel requirement relates to placement and presentation of channels on consumer’s program receiver, and not to placement of channels on satellites.”⁹¹ EchoStar argues that the presentation of all local stations to consumers in a block on the channel line-up satisfies the contiguous channel requirement, regardless of whether some stations are carried on different satellites.⁹²

25. We agree with the broadcasters that EchoStar’s “two dish” plan, as implemented, does not satisfy the contiguous channel requirement. The Conference Report to the SHVIA states that “[t]he obligation to carry local stations on contiguous channels is . . . to ensure that satellite carriers position local stations in a way that is convenient and practically accessible for consumers.”⁹³ The Commission has previously stated that “the statutory directive for channel positioning confirms that satellite carriers are required to present local broadcast channels to satellite subscribers in an uninterrupted series.”⁹⁴ The Commission further held that “a satellite carrier is obligated to carry both retransmission consent stations and mandatory carriage stations in a block on the satellite carrier’s channel line-up.”⁹⁵ EchoStar’s “two-dish” plan violates the contiguous channel placement requirement of the statute and our rule in this respect because subscribers cannot find or tune to the local stations relegated to “wing slot” satellites unless and until the subscriber gets a second dish. As described above, the way in which EchoStar has implemented its plan makes it highly unlikely that its subscribers will even know a second dish is necessary much less obtain one. As some broadcast commenters explain, if a subscriber learned about and wanted to watch a particular program broadcast by a local station carried on a wing slot satellite, and that subscriber typed in the appropriate station’s channel number on the remote, he or she would not be able to view the desired program or even get confirmation that the station exists because nothing would appear on the screen.⁹⁶ In fact, EchoStar confirms that selecting the channel number assigned to one of the affected local stations results in nothing but skipping to the next channel that is carried on a CONUS satellite, unless the subscriber has had the necessary additional equipment installed.⁹⁷ As such, EchoStar has failed to position these local stations “in a way that is convenient and practically accessible for consumers” and has failed to ensure that the local broadcast channels are presented in an uninterrupted series to its subscribers, thus violating the contiguous channel requirement.

C. On-Screen Program Guide and Menu Treatment

26. Broadcasters also contend that EchoStar violated Section 338(d)’s requirement that satellite carriers offering local-into-local service provide access to local television broadcast stations’ signals “in a nondiscriminatory manner on any . . . on-screen program guide[] or menu.”⁹⁸ They point out that while EchoStar’s on-screen program guide provides the means for subscribers to access local

⁹⁰ *Id.* at 4-5.

⁹¹ EchoStar Reply at 5.

⁹² *Id.* at 6.

⁹³ *Conference Report*, at 100.

⁹⁴ *Report and Order*, 16 FCC Rcd at 1957.

⁹⁵ *Id.* at 1958.

⁹⁶ *See, e.g.*, Roberts Broadcasting Company Comments at 2; Jovon Broadcasting Comments at 2; WLNY-TV/Golden Orange Comments at 4-5.

⁹⁷ During an ex parte meeting on February 8, 2002, with Commission staff, EchoStar acknowledged that selecting the channel number assigned to one of these stations results in nothing but skipping to the next channel that is carried on a CONUS satellite.

⁹⁸ 47 U.S.C. § 338(d).

television station signals, it does not inform viewers of the availability of stations that are on “wing slot” satellites.⁹⁹ They assert that, as a result, there is simply no way that EchoStar’s local-into-local subscribers would know about the programming offered by affected television stations.¹⁰⁰ According to the broadcasters, because of EchoStar’s two-dish plan, the offerings of the “favored” local stations carried on CONUS satellites will be readily available to subscribers merely through routine channel-surfing; in contrast, the consumer must know enough about the programming offered on the missing stations – which he or she has not had available – to be motivated to obtain the second dish.¹⁰¹

27. EchoStar disagrees, asserting that subscribers with a second satellite dish have the same access to all available local stations on the electronic program guide.¹⁰² Access to local stations, however, is predicated on whether subscribers have the required additional equipment. As EchoStar’s own facts indicate, only 7,000 of the 2 million subscribers who paid for a package of local stations have “request[ed] installation” of the second dish antenna.¹⁰³ We agree with broadcast commenters that EchoStar’s manner of carriage for certain local stations is discriminatory in terms of access to such stations on the on-screen program guide and menu.¹⁰⁴

28. The SHVIA and the Commission’s rules prohibit satellite carriers from discriminating against local stations with regard to their placement on on-screen program guides and menus.¹⁰⁵ If certain stations are to be relegated to “wing” satellites, those stations must be displayed on electronic program guides and listed on program menus in the same manner and with the same prominence and accessibility as stations carried on the main satellites. EchoStar’s on-screen electronic program guide unlawfully discriminates against “disfavored” local signals because those stations do not appear on the program

⁹⁹ See, e.g., Maranatha Comments at 9-10; HCC Comments at 4; Paxson Comments at 5.

¹⁰⁰ See Roberts Broadcasting Company at 2. See also Jovon Broadcasting Comments at 2; Telemundo Comments at 3 (“Few subscribers will know that the Spanish-language stations are available because [EchoStar’s] on-screen programming guide do not include those stations.”).

¹⁰¹ See NAB/ALTV Emergency Petition at 7-8.

¹⁰² See EchoStar February 12, 2002 Ex Parte Letter, at Attachment A.

¹⁰³ *Id.* at 2. EchoStar did not describe how many installations it had completed for the 7,000 subscribers who had requested installation of a second dish. EchoStar’s Ex Parte submission also indicates that 400,000 of EchoStar’s six million subscribers have a second dish “in order to access foreign language and high-definition programming” that are available on its wing satellites. Such subscribers would be able to receive any local-into-local stations that are also, coincidentally, available through use of that second dish, but EchoStar did not indicate how many (if any) of those customers were, in fact, local-into-local subscribers. See *id.*

¹⁰⁴ Some commenters, such as WLNY-TV/Golden Orange, further contend that EchoStar’s relegation of some local stations to carriage on wing satellites from which signal reception is possible only by means of a second receive dish also violates Section 338(d)’s prohibition of discriminatory treatment with respect to signal availability on navigation devices. See, e.g., WLNY-TV/Golden Orange Comments at 2-3. They argue that because a satellite dish antenna is equipment used by consumers to access multichannel video programming, it can be said to function as a navigation device, particularly when considered in conjunction with the receiver, which must also be adjusted to accommodate those stations relegated to the second dish. We need not reach the question of whether a satellite dish used in this context is a navigational device, since we find that EchoStar has violated the nondiscrimination provision of Section 338(d) in other respects. For the same reason, we need not pass on some broadcasters’ argument that EchoStar’s two-dish plan discriminates against some local stations in other respects (e.g., signal quality). See, e.g., APTS/PBS Reply at 13; Univision Comments at 11; WLNY-TV/Golden Orange Comments at 6.

¹⁰⁵ See 47 U.S.C. § 338(d); 47 C.F.R. § 76.66(i)(5) (“All television stations carried under mandatory carriage, in a particular market, shall be presented to subscribers in the same manner as television stations that elected retransmission consent, in that same market, on any navigational device, on-screen program guide, or menu provided by the satellite carrier.”).

guide unless and until a second dish is obtained and installed. Indeed, EchoStar's on-screen program guide does not even list the affected stations and provides no disclosure that they are available with a second dish.¹⁰⁶ Broadcast commenters note that if a subscriber without the additional equipment knows the channel number of one of these stations and clicks to it, nothing appears and it skips to the next channel.¹⁰⁷ Broadcasters also note that EchoStar's program menu lists only EchoStar's "favored" local stations, and makes no mention of the "disfavored" stations.¹⁰⁸ Under EchoStar's "two-dish plan," when consumers look to the electronic program guide, they have no way of knowing that they may be able to access certain must-carry stations by obtaining additional equipment. EchoStar acknowledges that the stations carried on the "wing slots" do not appear on the electronic program guide until after the second dish is installed and the receiver is adjusted accordingly. Thus, subscribers attempting to tune to all the local stations that they have paid for as part of a package will be unable to find certain local stations in some markets. Based on the record in this proceeding, we find that EchoStar has failed to provide access to such local stations' signals in a nondiscriminatory manner on its on-screen program guide and menu as required by the statute and the Commission's rules.

D. Summary and Compliance Actions

29. Given the circumstances of this case and the need for immediate relief to affected local stations and subscribers, we require EchoStar to remedy the unlawful discrimination identified in this declaratory ruling as expeditiously as possible. We recognize there are various ways in which EchoStar may remedy the situation. To ensure that EchoStar's compliance efforts are prompt and effective, we are requiring that it file Compliance Reports within 30, 90 and 150 days describing both its plan and completed actions to bring its carriage of broadcast stations into compliance. We believe that an immediate response by EchoStar to remedy the situation is warranted here, particularly in light of broadcasters' legitimate concerns about the possibility that EchoStar's "two-dish" plan might become permanent. In this regard, we note that EchoStar initially claimed that its second dish offer was merely an "interim plan" which was necessary to ameliorate the failure of Lockheed Martin and Loral Space to deliver and launch spot-beam satellites on time. Now, in contrast with its initial position, EchoStar indicates that the two-dish offer will remain in effect until "EchoStar's pending merger with Hughes Electronics is approved."¹⁰⁹

30. EchoStar indicates that if we do not permit it to place certain local stations on wing satellites, it will have no choice but to terminate local-into-local service to as many as one million subscribers.¹¹⁰ In that regard, we underscore that placing certain local stations on wing satellites may be

¹⁰⁶ See Maranatha Comments at 11 ("nothing on the EchoStar program guide advises subscribers of the availability of WFMZ-TV or other Philadelphia stations or how subscribers may access those signals"). See also Jovon Broadcasting Comments at 2 ("WJYS(TV) does not appear on the on-screen electronic programming guide that depicts the local affiliates of the major networks"); Paxson Comments at 5 ("EchoStar subscribers . . . cannot watch the disfavored stations or even view the programming in the EPGs unless the subscriber first contacts EchoStar, schedules an installation appointment, wait weeks or more for the installers to arrive, and have a second dish and new set-top box or boxes installed (if such installation is even practical and permitted)").

¹⁰⁷ E.g., Paxson Comments at 5; Maranatha Comments at 9-10. See note 97, *supra*.

¹⁰⁸ See, e.g., Maranatha Comments at 10; Roberts Broadcasting Company Comments at 2. EchoStar's website menu of local stations available in each market is similarly incomplete and discriminatory with respect to the stations not carried on a CONUS satellite. See paragraph 17 (discussion of extent of EchoStar's website information) and notes 58-60, *supra*.

¹⁰⁹ EchoStar Opposition at 2.

¹¹⁰ See *id.* ("EchoStar faced a dilemma in which it would be forced to take down local service in multiple markets, disenfranchising as many as one million subscribers if it could not quickly develop another means of complying with the must carry law, utilizing all of EchoStar's orbital locations.").

permissible, but only insofar as such placement does not have a discriminatory effect.¹¹¹ We note that the action taken here is intended to address the violations without resulting in a loss of service to any existing subscribers. We also note that, in passing the SHVIA, Congress recognized that more local markets might be served if satellite carriers were permitted to “cherry pick” certain local stations, but Congress chose instead the “carry-one, carry-all” requirement.¹¹² We believe we are bound by this choice and by Congress’s concern for the local stations that are, as EchoStar puts it, “less popular.”

31. EchoStar must remedy the unlawful discriminatory actions described in this ruling. We outline here several actions EchoStar could take to achieve this required result. EchoStar can choose some or all of these approaches -- or others not enumerated here -- provided the actions result in compliance with the statute, rules and Orders, including this Declaratory Ruling. For example, EchoStar may move stations off the wing slot satellites and onto a CONUS satellite, or transfer all local-into-local stations in a market to a wing slot satellite, or take other measures that result in providing access to all local stations in a market without the need for additional equipment to access some of them.¹¹³

32. The record in this proceeding indicates that EchoStar’s means of communicating the two dish offer in a letter primarily concerning pay-per-view with a footnote containing a confusing reference to the two-dish offer was not effective to prevent the unlawful discrimination described above. Whatever methods EchoStar chooses to use to remedy its current unlawful behavior and avoid such future violations should ensure that the communications are effective in providing complete and accurate information promptly and clearly to all subscribers affected by its two-dish plan. For example, automatically providing the additional equipment to any existing or new subscriber to local-into-local service would likely be an effective remedy. Immediate and direct communication with all affected local-into-local subscribers that they are not receiving all the local stations for which they are paying unless EchoStar has installed the necessary additional equipment, and that EchoStar will provide the necessary equipment free of any charge, would also address the unlawful discriminatory actions.

33. EchoStar must take steps to remedy the current discriminatory treatment of certain local stations on its electronic program guide (EPG), other on-screen program guide, and menu so that they present a complete list of all the local channels in a nondiscriminatory manner. For example, the discriminatory exclusion of certain stations from the EPG available to every local-into-local subscriber must be remedied. In markets in which additional equipment is needed to obtain access to certain local-into-local stations, the guide or menu could, for example, describe the equipment necessary to obtain access to each station, including notification that there is no charge for the equipment or installation, and provide clear instructions on how to obtain the additional equipment. With respect to ensuring access to the retransmitted signals of all local stations on contiguous channels, one approach would be to ensure that when a subscriber attempts to tune to a particular channel number assigned to a local station, the subscriber either accesses the station or accesses a notification that the station is available with additional equipment, the equipment is available without charge, and the procedures to follow to obtain the equipment. EchoStar should also better educate its customer service representatives, distributors and retailers to ensure that subscribers and potential subscribers are given accurate and complete information

¹¹¹ As noted above, in this proceeding we are not deciding whether, as a practical matter, requiring additional equipment for some but not all of the local stations in a market is inherently discriminatory no matter how conscientiously implemented. *See* note 5, *supra*.

¹¹² *See SBCA*, 275 F.3d at 363-64.

¹¹³ EchoStar has already received Commission authorization to operate and launch EchoStar 7, which EchoStar has successfully launched. *See* note 22, *supra*. Further, we understand that EchoStar is planning to file an application for authorization to launch EchoStar 8, and that both EchoStar 7 and EchoStar 8 will include spot beams to provide local-into-local service.

concerning the free second dish offer. Updating its website with this information would also assist in remedying the situation.

34. To the extent that EchoStar is unable to come into compliance in every market immediately, EchoStar may seek a short-term waiver rather than terminate service in a market it is currently serving with local-into-local service.¹¹⁴ We would scrutinize any such waiver requests, however, to ensure that they are necessary, narrow, and limited in duration. We cannot consider or grant a waiver insofar as EchoStar's actions directly violate the statute.

35. Given our concerns about EchoStar's violations, and the severe impact they have on certain local stations and subscribers, EchoStar is required to submit a Compliance Report and Plan within 30 days after release of this Order. The purpose of submitting this Report and Plan is to describe the specific actions EchoStar has taken and plans to take to come into compliance with the SHVIA and the Commission's rules. For example, if EchoStar has remedied its violations by moving some local stations to different satellites, the Report should describe which markets and how these adjustments remedy the violations found herein. In addition, with respect to markets in which it remains necessary to obtain additional equipment to access some local stations, the Report should provide the number of subscribers as of the date of the Report who have requested a second dish to receive local stations, how many such antennas have been installed, and the average time period between a subscriber's inquiry concerning a second dish and successful installation. If EchoStar has taken steps to remedy the rule violations by communicating the terms of the two dish plan to current and new subscribers, then the Report should describe those steps and the means used to accomplish them (e.g., through prominent disclosure on the website, training of customer service representatives, etc.). In particular, the Report should describe how any local stations accessible only with additional equipment are presented on the on-screen program guides and menus.

36. EchoStar should not read the 30-day period for submitting the Compliance Report and Plan as an invitation for further delay in implementation of its carriage obligations. We expect that EchoStar will have taken steps necessary to remedy the unlawful discriminatory conduct within that period of time. EchoStar is required to update this Report and Plan with a second report filed 60 days after the first report (90 days after the release of this Order) and a third report 60 days later (150 days after release of this Order). At that time, we will decide if additional Compliance Reports are necessary.¹¹⁵

37. EchoStar's failure to comply with the statute, the rules and this Order on a timely basis, may subject it to further enforcement action, including forfeiture.¹¹⁶

¹¹⁴ A party seeking a waiver must meet the requirements of Section 1.3 of the Commission's rules by demonstrating good cause, lack of other reasonable alternatives, and compliance with general requirements for granting waivers. See 47 C.F.R. § 1.3. See also *Northeast Cellular Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

¹¹⁵ As some broadcasters contend, the relegation of some stations to "second dish" status is arguably tantamount to not being carried at all if such stations are otherwise rendered unavailable because of the inability of subscribers to obtain the station's signal. We note that we have received several must carry complaints on this basis, and we will continue to review those claims and address them separately. If we find that EchoStar's actions in light of this Ruling have not remedied the violations, we can develop and require appropriate specific remedial action pursuant to Section 338(f)(3). See 47 U.S.C. § 338(f)(3). See also 47 C.F.R. § 76.66(m)(5).

¹¹⁶ EchoStar has previously been fined by the Commission for rule violations and admonished for its "disingenuous" behavior and lack of candor. In June 1998, the Commission fined EchoStar, and its subsidiary Directsat, the maximum forfeiture amount permitted under the Commission's rules for operating satellites from non-authorized locations. See *In the Matter of EchoStar Satellite Corporation*, Notice of Apparent Liability, 13 FCC Rcd 16510 (1998) ("EchoStar Forfeiture NAL"); *In the Matter of Directsat Corporation*, Notice of Apparent Liability, 13 FCC

(continued...)

IV. ORDERING CLAUSES

38. Accordingly, **IT IS ORDERED**, pursuant to Sections 4(i), 303(r), and 338 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), 338, and Sections 1.2 and 76.66(i) of the Commission's rules, 47 C.F.R. §§ 1.2, 76.66(i), that the Emergency Petition filed the National Association of Broadcasters and Association of Local Television Stations **IS GRANTED** to the extent indicated herein.

39. **IT IS FURTHER ORDERED THAT** EchoStar shall submit a Compliance Report and Plan, describing the specific actions EchoStar is taking and plans to take to come into compliance as outlined in this Declaratory Ruling, which shall be filed with the Commission within thirty (30) days after release of this Order. EchoStar is also required to update this report with a second report filed 60 days after the first report (90 days after the release of this Order) and a third report 60 days later (150 days after release of this Order). The reports should reference "CSR-5865-Z," the file number assigned to this proceeding.

40. This action is taken by the Chief, Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree
Chief, Media Bureau

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Rcd 16505 (1998). The FCC justified the forfeiture amount based on EchoStar's degree of misconduct, lack of voluntary disclosure and continuing violation of the Commission's rules. In November 1999, EchoStar tried to disregard its public interest programming requirements by placing all of its public interest programming on secondary satellites in violation of the Commission's DBS rules. See *American Distance Education Consortium Request for an Expedited Declaratory Ruling and Informal Complaint*, Declaratory Ruling and Order, 14 FCC Rcd 19976 (1999). In this instance, the Commission assessed a forfeiture against EchoStar, finding that it had willfully violated the Communications Act and the Commission's rules, that it had been "disingenuous" in its legal interpretations, and that none of the circumstances EchoStar presented supported mitigation of the forfeiture. In *the Matter of EchoStar Satellite Corporation, Notice of Apparent Liability for Forfeiture*, 15 FCC Rcd 5557, 5558-59 (EB 2000). In August 2001, the Commission found that "EchoStar failed in its duty of candor" by withholding information from the Commission. See *EchoStar Satellite Corporation v. Young Broadcasting, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 15070, 15075 (CSB 2001).

APPENDIX: List of Parties**Comments:**

African-American Broadcasting Company of Bellevue, Inc.
Arizona State University, Benedek Broadcasting Corporation, Draper Communications, Inc., and LIN Television Corporation (joint comments) (collectively “Arizona State University”)
Association of Public Television Stations and Public Broadcasting Service (“APTS/PBS”)
Board of Education of the City of Atlanta
Brunson Communications, Inc.
Cornerstone Television, Inc.
EchoStar Satellite Corporation (“EchoStar”)
Hardy, Carey & Chautin, LLP, LeSea Broadcasting Corporation, Christian Television Network, Inc., Carolina Christian Broadcasting, Inc. (joint comments) (collectively “HCC”)
Jovon Broadcasting Corporation
KSLS, Inc.
The Long Island Educational Television Council
Maranatha Broadcasting Company, Inc.
Mark Holtz
National Association of Broadcasters and Association of Local Television Stations (“NAB/ALTV”)
North Pacific International Television, Inc. (“NPIT”)
Pappas Telecasting Companies (“Pappas Telecasting”)
Paxson Communications Corporation
Rancho Palos Verdes Broadcasters, Inc.; Costa de Oro Television, Inc.; KVMD Acquisition Corp.; and Entravision Holdings LLC (joint comments) (collectively “Rancho Palos Verdes Broadcasters”)
Roberts Broadcasting Company and Roberts Broadcasting Company of Denver (joint comments)
Satellite Broadcasting and Communications Association (“SBCA”)
State Broadcaster Associations (joint comments of California Broadcasters Association, Colorado Broadcasters Association, Illinois Broadcasters Association, Massachusetts Broadcasters Association, Texas Broadcasters Association, *et al.*) (“State Broadcaster Associations”)
Telemundo Group, Inc.
Univision Communications Inc.
William H. Cummins
WLNY-TV Inc. and Golden Orange Broadcasting Co. (joint comments) (“WLNY-TV/Golden Orange”)

Replies:

Association of Public Television Stations and Public Broadcasting Service
EchoStar Satellite Corporation
Maranatha Broadcasting Company, Inc.
National Association of Broadcasters
Paxson Communications Corporation
Rancho Palos Verdes Broadcasters, Inc., *et al.*
Telemundo Group, Inc.
Univision Communications Inc.
WLNY-TV Inc. and Golden Orange Broadcasting Co.

Supplemental Filings:

Brunson
EchoStar
National Association of Broadcasters
State Broadcaster Associations
WLNY-TV, Inc. and Global Orange Broadcasting Co.