

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

In the matter of:
University Broadcasting, Inc.
v.
EchoStar Communications Corporation
Request for Mandatory Carriage of
Television Station KGEB-TV, Tulsa, Oklahoma;
and
LeSEA Broadcasting Corporation
v.
EchoStar Communications Corporation
Request for Mandatory Carriage of
Television Station KWHB-TV, Tulsa, Oklahoma
CSR-6007-M
CSR-6008-M

MEMORANDUM OPINION AND ORDER

Adopted: February 19, 2003

Released: February 20, 2003

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. University Broadcasting, Inc., licensee of station KGEB-TV, Tulsa, Oklahoma, and LeSEA Broadcasting Corporation, licensee of station KWHB-TV, Tulsa, Oklahoma (collectively "the Stations") separately filed complaints with the Commission to require EchoStar Communications Corporation ("EchoStar") to carry their signals on EchoStar's satellite system in a nondiscriminatory fashion, pursuant to Section 338 of the Communications Act of 1934, as amended (the "Act"), and Section 76.66 of the Commission's rules. We are consolidating the two petitions into a single proceeding because they present essentially identical facts and issues.

2. On July 31, 2002, EchoStar began providing "local-into-local" satellite service pursuant to the statutory copyright license in the Tulsa, Oklahoma designated market area ("DMA") where the

1 Must carry complaints are treated as Petitions for Special Relief under Section 76.7 of our rules. See 1998 Biennial Regulatory Review: Part 76 - Cable Television Service Pleading and Complaint Rules, 14 FCC Rcd 418 (1999).

2 See 47 U.S.C. § 338; 47 C.F.R. § 76.66.

Stations operate.³ The Stations aver that they elected must carry status with EchoStar for the 2002-2006 election cycle.⁴ In their complaints, the Stations contend that EchoStar failed to meet its must-carry obligations under the Act and the Commission's satellite broadcast signal carriage rules by placing KGEB-TV and KWHB-TV on facilities other than EchoStar's main continental United States ("CONUS") satellites where other local stations in the Tulsa market, such as network-affiliated stations, are located.⁵ They state that, as a result, EchoStar subscribers who wish to receive KGEB-TV and KWHB-TV must obtain a second satellite dish antenna, although the other stations in the Tulsa market can be received using a subscriber's existing receive dish.⁶ They argue that this situation is inherently discriminatory and presents subscriber disincentives for obtaining a second dish, even if the additional dish is offered for free.

3. The Stations further contend that EchoStar has failed to comply with the remedial measures outlined in the Bureau's "two-dish" *Declaratory Ruling and Order* (hereinafter "*Declaratory Ruling*").⁷ The Stations ask the Commission to order EchoStar to carry their signals from the same satellite location as other local broadcast stations in the Tulsa market and to consider enforcement action, including issuance of a forfeiture.⁸ EchoStar filed an opposition to each Station's must-carry complaint, and the Stations in turn filed replies. For the reasons set forth below, we grant the Stations' carriage complaints to the extent indicated in this Order.

II. DISCUSSION

4. The *Declaratory Ruling* found that EchoStar's "two-dish" plan, as implemented, violated both the requirements of the Satellite Home Viewer Improvement Act of 1999 (the "SHVIA") and the

³ See EchoStar Opposition to LeSEA Complaint at i. The Satellite Home Viewer Improvement Act of 1999 grants satellite carriers a royalty-free copyright license that enables satellite carriers to make secondary retransmission of a broadcast station's signal into that station's local designated market area without obtaining authorization of those holding copyrights in the individual programs broadcast by that station. See 17 U.S.C. § 122(a); 47 U.S.C. § 339. A satellite carrier provides "local-into-local" satellite service when it retransmits a local television signal back into the local market of that television station for reception by subscribers. See 47 C.F.R. § 76.66(a)(6).

⁴ See University Broadcasting, Inc. ("UBI") Complaint at Exhibit D; LeSEA Complaint at Exhibit D.

⁵ EchoStar placed both stations on its "wing" satellite located at 148° West Longitude, and placed the other seven local stations in the Tulsa market on a spot beam from a CONUS satellite.

⁶ EchoStar provided the following explanation as to why KGEB-TV and KWHB-TV were placed on a wing satellite:

We serve three mid-America markets with the E7-9 spot-beam, Kansas City (DMA 33), Oklahoma City (DMA 45), and Tulsa (DMA 58). The larger Kansas City and Oklahoma City markets, each with eight stations, are single dish markets. The smaller Tulsa market, with nine stations, had to be a two-dish market. The capacity of the E7-9 spot beam's two transponders is at most 23 channels. We cannot add more stations to this spot-beam without running into potential signal degradation problems. Faced with this situation, we chose the least watched two stations in the smallest market served by the E7-9 spot-beam to be placed on the 148° satellite (the next adjacent EchoStar satellite). We did this so that we could introduce local-into-local service to all three of these markets with the least subscriber disruption.

Declaration of Eric Sahl, Director, Programming, EchoStar Satellite Corporation at 1-2, a copy of which is attached to EchoStar Opposition to LeSEA Complaint. See EchoStar Opposition to UBI Complaint (same).

⁷ See National Association of Broadcasters and Association of Local Television Stations – Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers, 17 FCC Rcd 6065 (MB 2002) ("*Declaratory Ruling*").

⁸ See UBI Complaint at 22-23 (listing relief requested); LeSEA Complaint at 24-25 (same).

Commission's rules.⁹ The *Declaratory Ruling* focused on the need to avoid the kinds of discrimination specifically mentioned in the SHVIA and potential means to accomplish this result while noting the possibility that there ultimately might be 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.¹⁰ Specifically, it concluded that EchoStar's two-dish plan failed to comply with the carriage requirements contained in Section 338(d) of the Act which relate to discrimination in price, channel positioning, and on-screen program guide and menu treatment.¹¹ EchoStar was directed to remedy each of the instances of unlawful discrimination specified as expeditiously as possible. The *Declaratory Ruling* discussed a variety of measures EchoStar could implement to address the violations; it indicated, however, that EchoStar had the flexibility to implement other measures of its own choosing as long as they served to end the unlawful discrimination.¹² Automatically providing the additional equipment to any existing or new subscriber to local-into-local service was listed as one means for avoiding the discriminatory price violation found in the *Declaratory Ruling*.¹³ Promptly notifying affected 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 and installation free of charge was also listed as a means to address the price discrimination violations.¹⁴ Educating customer service representatives ("CSRs"), distributors, and retailers to ensure that subscribers and potential subscribers are given clear, accurate, and complete information concerning the free second dish offer was also found to be needed.¹⁵

5. In order to allow the Commission to monitor and evaluate its compliance efforts, EchoStar was required to submit a series of compliance reports at 30, 90, and 150 day intervals following release of the *Declaratory Ruling*.¹⁶ EchoStar timely filed the compliance reports, which are under review.¹⁷ Also under review are petitions for reconsideration and applications for review of the *Declaratory Ruling*.¹⁸

6. In reviewing the Stations' complaints, we find that the Stations charge EchoStar with the same discriminatory conduct already argued and considered in the *Declaratory Ruling*.¹⁹ To the extent the complaints are effectively petitions for reconsideration of the *Declaratory Ruling*, they are late-filed

⁹ See *Declaratory Ruling*, 17 FCC Rcd at 6066. See also Pub. Law 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

¹⁰ See *Declaratory Ruling*, 17 FCC Rcd at 6066 n.5, 6073.

¹¹ See *id.* at 6072-81.

¹² See *id.* at 6081-83 (describing requirement to remedy all forms of discrimination found: discrimination in terms of price, discriminatory access to stations on the on-screen program guide and menu, and failure to offer stations on contiguous channels).

¹³ See *id.* at 6082.

¹⁴ See *id.* at 6073, 6082.

¹⁵ See *id.* at 6082-83.

¹⁶ See *id.* at 6083.

¹⁷ See "EchoStar's Local Station Carriage Compliance Plan: 30 Day Report" in CSR-5865-Z (filed May 6, 2002); "EchoStar's Local Station Carriage Compliance Plan: 90 Day Report" in CSR-5865-Z (filed July 3, 2002); "EchoStar's Local Station Carriage Compliance Plan: 150 Day Report" in CSR-5865-Z (filed Sept. 3, 2002).

¹⁸ See petitions for reconsideration and applications for review filed in CSR-5865-Z. LeSEA Broadcasting filed a joint "Petition for Partial Reconsideration or Clarification" of the *Declaratory Ruling* with Hardy, Carey & Chautin, LLP, Christian Television Network, and Carolina Christian Broadcasting on April 18, 2002.

¹⁹ See UBI Complaint at 7-20; LeSEA Complaint at 7-22.

and subject to dismissal on that ground. At this time, in the context of the *Declaratory Ruling*, we have no basis upon which to grant the Stations' request that we order EchoStar to carry their signals from the same satellite location as other local broadcast stations in the Tulsa market, nor any other relief inconsistent with the *Declaratory Ruling*.²⁰ These same issues have been raised by some parties in the pending petitions for reconsideration and applications for review of the *Declaratory Ruling*. As such, we choose not to address the Stations' arguments here so as not to prejudge the Commission's eventual ruling on that issue. After that decision is reached it will be applicable on a general basis to all "local-into-local" satellite service provided by EchoStar covered by Section 338 of the Communications Act, and the Stations may reassert their request for relief or sanctions if such relief is then appropriate and remains necessary.

7. Although for the reasons noted we find that granting the requested relief at this time would not be appropriate, we are nevertheless concerned with alleged failures of EchoStar to comply with the discrimination avoidance measures discussed in the *Declaratory Ruling*, specifically with respect to EchoStar's efforts to ensure that subscribers, old and new, are fully aware of the status of the local stations in the Tulsa market and of EchoStar's free second dish offer. In their complaints, the Stations allege that, in the Tulsa market, EchoStar's print and broadcast advertising, notices to subscribers, and direct customer service representations all present numerous and substantial obstacles to learning about or obtaining a "free" second dish to receive the Stations' signals.²¹ While EchoStar denies the conclusion the Stations draw from this conduct, it does not dispute the specific facts. As an example, the Stations submitted a direct mail piece from EchoStar that was sent to a potential subscriber in November 2002 (four months after EchoStar launched service in Tulsa and seven months after we issued the *Declaratory Ruling*), pitching local service to households in the Tulsa market without any disclosure of the necessity of a second dish and without any information that would prompt subscribers to request or accept the offer of a free dish.²² One declarant reported that, in listening to DISH Network radio advertisements, "local radio stations promote the availability of Tulsa television stations on DISH Network's system, but there is no mention that a second dish is required to receive some local channels."²³ The Stations then provided declarations from individuals describing their conversations with EchoStar customer service representatives that raise questions about information disclosure and the adequacy of EchoStar's training efforts or the effectiveness of the scripts prepared by EchoStar for its CSRs. On this point, one declarant stated: "When I asked the CSR to confirm that all local channels in Tulsa were available with just one dish, I was told that was accurate. At no time did the CSR mention anything about the need for a second dish to receive some local stations in Tulsa."²⁴ EchoStar did not challenge the veracity of this and other

²⁰ The Bureau has dismissed similar must-carry complaints on this ground. See, e.g., *Telemundo Group, Inc.*, 17 FCC Rcd 22693 (MB 2002).

²¹ See UBI Complaint at 12-17; LeSEA Complaint at 13-18.

²² See LeSEA Reply at 8 ("In the direct mail piece attached hereto as Exhibit B, sent on or about November 12th to a Tulsa resident, local channels are pitched for \$5.99 a month and nowhere, not even in the fine print, does it say a second dish is needed. Clearly, the affidavit setting forth the 'subsequent advertising' claim cannot be trusted."). See also UBI Reply at 8 and Exhibit B.

²³ See UBI Complaint at Exhibit H (Affidavit of Bill Paddock); LeSEA Complaint at Exhibit J (same).

²⁴ See *id.* Another subscriber recounted the following conversation with an EchoStar CSR:

I asked the Dish Network customer service representative (CSR) what I needed to do to get local channels, and was told that all I had to do was order it and that it cost \$5.99 per month. When I questioned whether this would be for all local stations, the CSR told me that the \$5.99 monthly fee would be for all local stations and mentioned some of the major network stations. Up to this point, the CSR did not mention anything about the need for a second dish to receive some local stations. I then asked if the CSR was sure that all local channels would be included. Only then

(continued...)

similar claims, but maintains that it trained its CSRs to provide the free second dish information. Despite the Stations' complaints, EchoStar provided no information as to what actions, if any, it plans to take to address the apparent deficiencies in its CSR training and customer notification efforts. We are also concerned about the deficiencies because they occurred in a relatively new market. EchoStar introduced local-into-local service in Tulsa after the *Declaratory Ruling* was issued, and therefore EchoStar was fully aware of the concerns reflected in it.

8. Because the record in this proceeding indicates that EchoStar has not cured the specific violations cited in the *Declaratory Ruling* in the Tulsa market as it concerns the Stations, we are ordering EchoStar to submit a Compliance Report and Plan detailing the specific actions it has taken concerning KWHB-TV and KGEB-TV within 30 days of the release of this Order. The Compliance Report and Plan should provide the same types of information requested in the *Declaratory Ruling*. In addition, the Report should provide the percentage of local-into-local subscribers who requested a second dish in the Tulsa market, the number of second dish installations completed, an explanation as to why any requests could not be completed, and an estimated date of completion for the remaining installation requests. EchoStar should also provide details about current and future customer notification efforts, advertisements about its local package offering, and CSR training efforts (including sample scripts). In this regard, EchoStar should state whether it directly notified (*e.g.*, by letter) individual local-into-local subscribers in Tulsa that they are not receiving all of their local stations and that EchoStar, as part of its local package offering, will provide the additional satellite dish antenna, including its installation, free of charge. EchoStar's Compliance Report and Plan should provide details of the steps it has taken (or will be taking) to ensure that potential local-into-local subscribers in the Tulsa market are fully aware of the availability of local stations and EchoStar's free second dish and installation offer. This information should also include EchoStar's efforts to ensure that potential local-into-local subscribers at the retail level are fully aware of the need for a second dish. As indicated above, the *Declaratory Ruling* provided EchoStar with the option of automatically providing the additional equipment to any existing or new subscriber to local-into-local service to remedy the price discrimination violation. We ask EchoStar to contemplate implementing this remedial measure immediately or to explain in its Compliance Report and Plan why it chooses not to adopt this remedy.²⁵

9. Our actions here should not be viewed as a review or approval of EchoStar's overall compliance efforts with respect to the *Declaratory Ruling*, or as an indication of the outcome of the pending petitions for reconsideration and applications for review of that Order. To the extent that EchoStar's compliance record is found to be insufficient, any further remedial action mandated by the Commission would apply to EchoStar's local-into-local operations nationwide, including carriage of the Stations in the Tulsa market. The Commission's resolution of the pending petitions for reconsideration and applications for review of the *Declaratory Ruling* shall have similar nationwide effect. Accordingly, we will defer consideration of any enforcement action in this proceeding until Commission resolution of these related matters.

III. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED**, pursuant to Section 338 of the Communications Act, as amended, 47 U.S.C. § 338, and Section 76.66 of the Commission's rules, 47 C.F.R. §§ 76.66, that the

(...continued from previous page)

did the CSR disclose that a second dish would be necessary to receive a "couple" of the local stations and that the second dish would be installed free of charge.

LeSEA Complaint at Exhibit O (Affidavit of Roger Murphy).

²⁵ EchoStar can also address the violations by moving all the local stations carried in this market to one satellite or satellite slot so that no additional equipment is necessary. See *Declaratory Ruling*, 17 FCC Rcd at 6082.

must-carry complaints filed by University Broadcasting, Inc. and LeSEA Broadcasting Corporation **ARE GRANTED** to the extent indicated herein.

11. **IT IS FURTHER ORDERED** that within 30 days after the release of this Memorandum Opinion and Order, EchoStar shall submit a Compliance Report and Plan with respect to the Stations, describing the specific actions EchoStar has taken and plans to take to come into compliance with its carriage obligations for the Stations, as outlined in the *Declaratory Ruling and Order*, DA 02-765, and this Memorandum Opinion and Order.

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

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau