

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

In the Matter of:	)	
	)	
Aerco Broadcasting Corporation and	)	CSR-5734-M
R y F Broadcasting Inc.	)	CSR-5770-M
	)	CSR-6965-M
v.	)	
	)	
DirecTV, Inc.,	)	
DirecTV Latin America, LLC, and	)	
EchoStar Satellite, LLC	)	
	)	
Requests for Mandatory Carriage	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 22, 2006**

**Released: May 24, 2006**

By the Deputy Chief, Media Bureau:

**I. INTRODUCTION AND BACKGROUND**

1. Aerco Broadcasting Corporation (“Aerco”), licensee of station WSJU, San Juan, PR, and R y F Broadcasting Inc. (“R y F”), licensee of WRFB, Carolina, PR, filed carriage Complaints<sup>1</sup> against DirecTV Latin America, LLC (“DTVLA”) and EchoStar Satellite, LLC (“EchoStar”), respectively, pursuant to Section 338 of the Communications Act of 1934, as amended (the “Act”), and Section 76.66 of the Commission’s rules.<sup>2</sup> The Complaints, which were placed on public notice, are based on DTVLA and EchoStar’s refusal to carry WSJU and WRFB’s signals on their satellite systems. The satellite carriers filed Oppositions to the Complaints, and Aerco and R y F each filed a reply. In light of the similar facts and issues presented in the Complaints, we consolidate them for purposes of this action.<sup>3</sup> For the reasons discussed below, we deny the Complaints.

**II. DISCUSSION**

2. Section 338(a)(1) of the Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”),<sup>4</sup> requires each satellite carrier to carry upon request all local television broadcast

<sup>1</sup> The Commission issued a Public Notice on January 23, 2006 with respect to Aerco’s complaint against DirecTV Latin America, LLC. See *Special Relief and Show Cause Petitions*, Report No. 0165 (rel. Jan. 23, 2006). Subsequently, counsel for Aerco and counsel for R y F each requested that the Commission reinstate complaints from 2001. See Letter from Steven Broeckaert, Deputy Chief, Policy Division, Media Bureau, to John A. Bosari, Bosari & Associates, PLLC (Feb. 17, 2006), *Special Relief and Show Cause Petitions*, Report No. 0013 (rel. Sept. 21, 2001); *Special Relief and Show Cause Petitions*, Report No. 0016 (rel. Oct. 15, 2001).

<sup>2</sup> 47 U.S.C. § 338; 47 C.F.R. § 76.66.

<sup>3</sup> See *MCI Telecommunications Corp. v. Pac. Northwest Bell Tel. Co.*, 5 FCC Rcd 216, 218 n.25 (1990) (“Due to the similarity of the issues and arguments raised by the parties, the complaints have been consolidated for disposition.”).

<sup>4</sup> See Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

stations' signals "within the local market" in which the satellite carrier carries at least one local television broadcast signal pursuant to the statutory copyright license (otherwise known as "local-into-local" service).<sup>5</sup> A station's market for satellite carriage purposes under the Act<sup>6</sup> is its Designated Market Area, or DMA, as defined by Nielsen Media Research,<sup>7</sup> as well as "the county in which the station's community of license is located."<sup>8</sup>

3. If a satellite carrier intends to deny a local station's carriage request, it must notify the station within 30 days of the carrier's receipt of the station's carriage request.<sup>9</sup> Otherwise, local television stations must be carried by the later of 90 days from the satellite carrier's receipt of the station's election request or upon commencing local-into-local service in the new television market.<sup>10</sup> If a local television broadcast station believes that a satellite carrier has failed to meet its obligations under Section 338 of the Act or the Commission's implementing regulations, such station shall first notify the carrier, in writing, of the alleged failure and identify its reasons for believing that the satellite carrier failed to comply with such obligations.<sup>11</sup> Within 30 days after such written notification, the satellite carrier shall respond in writing and comply with such obligations or state its reasons for believing that it is in compliance with such obligations.<sup>12</sup> If Commission action is necessitated, as Aerco and R y F allege here, a broadcast station must file a complaint with the Commission within 60 days after the satellite carrier submits a final rejection of a broadcast station's carriage request.<sup>13</sup> If a satellite carrier provides no response to a mandatory carriage election, the 60 days commences after the time for responding as required by the rule has elapsed.<sup>14</sup>

4. Aerco and R y F claim that DTVLA and EchoStar provide local television signals within their local markets. As discussed above, for purposes of carriage under the Act, a local market is the Nielsen Media Research DMA as well as the county in which a station's community of license is located.<sup>15</sup> Aerco and R y F are licensed in Puerto Rico, which does not fall within the boundary of any Nielsen DMA.<sup>16</sup> As a consequence, Aerco and R y F are only offered the right to demand carriage within the counties in which their communities of license are located, and we only consider the Complaints to the extent that they

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<sup>5</sup> 47 U.S.C. § 338(a)(1). Satellite carriers are afforded a statutory copyright license pursuant to 17 U.S.C. § 122.

<sup>6</sup> 47 U.S.C. § 338(k)(3) refers to Section 122(j) of the Copyright Act for the definition of "local market."

<sup>7</sup> A DMA is a geographic area that describes each television market exclusive of others, based on measured viewing patterns.

<sup>8</sup> 17 U.S.C. § 122(j)(2)(A)-(C).

<sup>9</sup> See 47 C.F.R. § 76.66(d)(2).

<sup>10</sup> See 47 C.F.R. § 76.66(d)(2)(iii).

<sup>11</sup> See 47 U.S.C. § 338(f)(1); see also 47 C.F.R. § 76.66(m)(1).

<sup>12</sup> See 47 C.F.R. § 76.66(m)(2).

<sup>13</sup> See 47 C.F.R. § 76.66(m)(6).

<sup>14</sup> See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, 16 FCC Rcd 16544, 16574 (2001).

<sup>15</sup> 17 U.S.C. § 122(j)(2)(A)-(C).

<sup>16</sup> See *Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, MB Docket No. 05-181, Report and Order, FCC 05-159 at para. 9 (rel. Aug. 23, 2005); see also NIELSEN MEDIA, *210 Designated Market Areas* (2005), available at <http://www.nielsenmedia.com/DMA.html> (visited May 8, 2006). For the purposes of cable carriage, Puerto Rico, the U.S. Virgin Islands, and Guam are each considered a single market. 47 C.F.R. § 76.55(e)(1). This rule does not apply to satellite local markets.

request carriage in those respective counties.<sup>17</sup>

5. As the parties requesting relief, Aerco and R y F have the burden to provide evidence to establish a prima facie case that EchoStar and DTVLA are obligated to carry WRFB and WSJU.<sup>18</sup> EchoStar and DTVLA each provided sworn declarations that they do not provide local-into-local service in Puerto Rico pursuant to the statutory copyright license.<sup>19</sup> The Commission has recognized that Section 338 carriage requirements do not apply when satellite carriers have private agreements to broadcast the copyright holders' works: "[i]f a satellite carrier provides local television signals pursuant to private copyright arrangements, the Section 338 carriage obligations do not apply."<sup>20</sup> Aerco and R y F provide no evidence to establish a prima facie case that the satellite carriers provide local-into-local service pursuant to the statutory copyright license and therefore, based on the record evidence, we deny the Complaints.

### III. ORDERING CLAUSES

6. 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 carriage complaints filed by Aerco Broadcasting Corporation and R y F Broadcasting Inc., against DirecTV, Inc., DirecTV Latin America, LLC, and EchoStar Satellite, LLC **ARE DENIED**.

7. 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

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<sup>17</sup> WSJU is licensed to San Juan, PR, in San Juan County. WRFB is licensed to Carolina, PR, in Carolina County. See THE NATIONAL ATLAS OF THE UNITED STATES OF AMERICA, Puerto Rico County Map with selected Cities and Towns (2006), available at [http://nationalatlas.gov/printable/images/pdf/counties3/pagecenty\\_pr3.pdf](http://nationalatlas.gov/printable/images/pdf/counties3/pagecenty_pr3.pdf).

<sup>18</sup> See *General Plumbing Corp. v. New York Telephone Co. and MCI Telecommunications Corp.*, 11 FCC Rcd 11799, 11809 n. 63 (1996) ("A party is said to have . . . established a prima facie case, if the evidence presented is sufficient to enable a reasonable person to draw from it the inference sought to be established.")

<sup>19</sup> See DTVLA Answer and Motion to Dismiss, Declaration of Michael Hartman; EchoStar Opposition, Declaration of Eric Sahl; 47 C.F.R. §§ 76.6(a)(2)-(3).

<sup>20</sup> *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, Retransmission Consent Issues*, 16 FCC Rcd 1918, 1926-1927 (2000). Private copyright agreements are not the same as retransmission consent agreements:

To obtain private clearances for material carried by a particular station, the copyright holders of each of the programs, advertisements, and music aired by that station must consent to the retransmission. In some cases, however, a television station may have permission from the copyright holders to provide clearances on their behalf. We therefore conclude that unless the retransmission contract clearly provides for all copyright clearances, a carrier retransmitting television stations electing retransmission consent would be subject to the compulsory license and be required to carry all other local market television stations under the provisions set forth in Section 338.

*Id.* at 1927.