

**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 <sup>1</sup>
	)	
Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 23, 2007**

**Released: August 24, 2007**

By the Chief, Media Bureau:

**I. INTRODUCTION**

1. In this Memorandum Opinion and Order, we address four petitions for reconsideration of the *Declaratory Ruling and Order* issued by the Media Bureau in the above-captioned proceeding (hereinafter “*Declaratory Ruling*”)<sup>2</sup> and an Amended Motion to Terminate Outstanding Must-Carry Proceedings filed by EchoStar.<sup>3</sup> In the *Declaratory Ruling*, the Bureau found that EchoStar’s “two-dish” plan -- a practice of placing some, but not all, local stations in a market on a “wing” satellite that necessitated subscriber use of a second satellite dish antenna -- violated Section 338(d) of the Act<sup>4</sup> and Section 76.66(i) of the Commission’s rules.<sup>5</sup> The *Declaratory Ruling*, however, did not specifically

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<sup>1</sup> For administrative convenience, and to ensure that interested parties were able to obtain copies of documents filed in the expedited proceeding below, parties that participated in the proceeding were required to file comments, replies, and other documents in CS Docket No. 00-96. The Bureau, in the *Declaratory Ruling and Order*, directed parties to file any subsequent documents in the proceeding referencing the file number assigned to the Order-- *i.e.*, “CSR-5865-Z.”

<sup>2</sup> See 17 FCC Rcd 6065 (MB 2002) (“*Declaratory Ruling*”). The following parties filed petitions for reconsideration or clarification of the *Declaratory Ruling*: Brunson Communications, Inc. (“Brunson”); a joint filing from LeSEA Broadcasting Corp., Christian Television Network, Inc., and Carolina Christian Broadcasting (collectively “LCC”); and Maranatha Broadcasting Company, Inc. (“Maranatha”). Although the joint filing from LCC indicates that Hardy, Carey & Chautin, LLP is filing the petition on behalf of itself and several broadcast clients, we observe that there is no indication in LCC’s filing that the Hardy, Carey & Chautin law firm has any interest in this proceeding outside of its interest in representing the listed broadcast station owners. EchoStar also filed a petition for reconsideration which was withdrawn. See Amended Motion to Terminate Outstanding Must-Carry Proceedings (filed June 15, 2006).

<sup>3</sup> Amended Motion to Terminate Outstanding Must-Carry Proceedings, filed June 15, 2006, by EchoStar.

<sup>4</sup> See 47 U.S.C. § 338(d) (A satellite carrier shall retransmit the signal of the local television broadcast stations to subscribers “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.”).

<sup>5</sup> See 47 C.F.R. 76.66(i) (rule implementing the requirements under Section 338(d) of the Act). See also *Declaratory Ruling*, 17 FCC Rcd at 6068-72 (providing detailed description of EchoStar’s satellite fleet and two-dish policy).

prohibit a two-dish approach, but instead ordered EchoStar to comply with various remedial measures to eliminate the unlawful discrimination. Subsequent to the Bureau's ruling, Congress amended the statute, in the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"),<sup>6</sup> to specifically prohibit the two-dish approach.<sup>7</sup> First, we vacate the Bureau's Declaratory Ruling to the extent that it concluded that EchoStar's former two-dish approach, as further described below, could comply with the statutory requirements.<sup>8</sup> In addition, we grant a motion filed by EchoStar to terminate the proceeding on the ground that it has been rendered moot by SHVERA and by EchoStar's subsequent compliance with that legislation, and to dismiss the pending petitions for reconsideration as moot.<sup>9</sup>

## II. BACKGROUND

2 Section 338 governs the carriage of television broadcast signals by Direct Broadcast Satellite ("DBS")<sup>10</sup> service providers.<sup>11</sup> Generally speaking, if a satellite carrier chooses to carry the signal of one local television broadcast station in a television market,<sup>12</sup> then the signals of all requesting local stations in the same market must also be carried.<sup>13</sup> Furthermore, and of particular relevance in this case, subsection (d) of Section 338 provides that a satellite carrier shall retransmit local television

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<sup>6</sup> See Pub. L. No. 108-447, 118 Stat. 2809 (2004). SHVERA was enacted on December 8, 2004, as Title IX of the "Consolidated Appropriations Act, 2005."

<sup>7</sup> See 47 U.S.C. § 338(g). See also 47 U.S.C. § 338(g)(1) ("Each satellite carrier that retransmits the analog signals of local television broadcast stations in a local market shall retransmit such analog signals in such market by means of a single reception antenna and associated equipment."). Section 338(g)(2) provides an exception to this requirement in the case of local digital signals by allowing satellite carriers to retransmit local digital channels to subscribers by means of a separate dish, provided they transmit all local digital channels to the same dish. See 47 U.S.C. § 338(g)(2). The statute's single dish requirement became effective on June 8, 2006.

<sup>8</sup> The Media Bureau granted a motion to terminate several petitions for reconsideration filed in mandatory carriage complaint cases involving EchoStar's two dish practices because they had been rendered moot by intervening legislation and by EchoStar's compliance with the requirements of that legislation. *Brunson Communications, Inc. et al*, DA 07-237 (January 29, 2007). Applications for Review in four similar cases remain pending. See *Christian Television Corp. CSR -5908-M*, *Telemundo Group CSR-5931-M*, *University Broadcasting CSR-6007-M*, and *LeSea Broadcasting CSR-6008-M*.

<sup>9</sup> See Amended Motion to Terminate Outstanding Must-carry Proceedings filed by EchoStar on June 15, 2006. No party filed an objection to EchoStar's motion.

<sup>10</sup> "DBS" is the acronym used in the United States to describe domestic implementation of the satellite service known internationally as the broadcasting satellite service ("BSS").

<sup>11</sup> See 47 U.S.C. § 338.

<sup>12</sup> A station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media Research. A DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. 47 U.S.C. § 338(k)(3) and 17 U.S.C. § 122(j)(C).

<sup>13</sup> See 47 U.S.C. § 338(a)(1) ("Subject to the limitations of paragraph (2), each satellite carrier providing, under section 122 of title 17, United States Code, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located within that local market, subject to section 325(b).") This is known as "carry-one, carry-all."). A satellite carrier's carriage obligations are not triggered by the decision to carry a local broadcast station's signal per se, but they are triggered by the decision to carry that station by making use of the compulsory copyright license under Section 122 of the Copyright Act. See 17 U.S.C. § 122 (this statutory copyright license enables satellite carriers to make secondary transmissions of a broadcast stations' signal into that station's local market without obtaining the authorization of those holding copyrights in the individual programs by that station).

broadcast stations to subscribers “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.”<sup>14</sup>

<sup>3</sup> The *Declaratory Ruling* focused on whether the conduct described in the NAB/ALTV Petition<sup>15</sup> was consistent with the requirements of Section 338(d) of the statute and Section 76.66 of the rules, and concluded that EchoStar was violating each of these obligations – *i.e.*, (1) the manner in which the two-dish requirement was administered resulted in prohibited price discrimination; (2) the signals were not carried on contiguous channels; and (3) the signals were not listed on the program guide in a nondiscriminatory manner.<sup>16</sup> At the same time, however, we concluded that offering local broadcast signals from multiple satellites requiring multiple antennas for reception would not necessarily and unavoidably violate the statute or the rules if a satellite carrier took steps to avoid the discriminatory conduct cited in the *Declaratory Ruling*.<sup>17</sup>

### III. DISCUSSION

<sup>4</sup> We found in the *Declaratory Ruling* that requiring multiple antennas or different equipment to receive all the local stations in a market caused the type of discriminatory treatment Congress intended to prevent. The fact that EchoStar was unable to remedy this discrimination,<sup>18</sup> and Congress’s prohibition of this behavior in SHVERA, lead us to conclude that our initial decision was flawed insofar as it held out the possibility that such split-market carriage could be lawful and effective to remedy the discrimination. The decision wrongly offered EchoStar remedial options, rather than banning the two-dish approach outright.<sup>19</sup> Accordingly, we vacate the *Declaratory Ruling* to the extent that it held that split-market carriage could be lawful. We also grant EchoStar’s motion to terminate the proceeding

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<sup>14</sup> 47 U.S.C. § 338(d).

<sup>15</sup> See Emergency Petition of National Association of Broadcasters and Association of Local Television Stations to Modify or Clarify Rule in CS Docket No. 00-96 (filed Jan. 4, 2002) (“NAB/ALTV Petition”). Since this filing, we are informed that ALTV has dissolved.

<sup>16</sup> See 17 FCC Rcd at 6072-81.

<sup>17</sup> 17 FCC Rcd at 6072.

<sup>18</sup> First, there were inconsistencies in EchoStar’s disclosures concerning the two-dish offer. See, e.g., EchoStar 30-Day Report, at Exhibit 4 (sample page from its website) (states that “Local Channels [are] available with the installation of a 2<sup>nd</sup> dish free of any charge,” but is ambiguous as to whether the second dish is also free) (emphasis added). Based on EchoStar’s Reports and other filings, the letter notification about its two-dish policy was not routinely sent to new local-into-local subscribers, potentially leaving many of them unaware that they were paying for an incomplete service. Additionally, EchoStar was unable to confirm whether its retailers, installers and customer service line were disclosing accurate and complete information to new local-into-local subscribers. On one or two occasions when Commission staff described reports of misinformation concerning the two-dish program to EchoStar, staff was told that it was due to independent retailers that EchoStar could not control. See also EchoStar Ex Parte, February 21, 2003 at 7. Second, the Compliance Reports filed in the *Declaratory Ruling* proceeding and in the individual carriage cases demonstrated that many subscribers never received a requested second dish and those who did were required to wait an average of two weeks to have the additional equipment installed. See EchoStar February 21, 2003 Ex Parte at 4 (EchoStar documented that 14.84 days is the national average time from the creation of the work order to the date of completion). See also Tri-State Christian TV, Inc. Complaint in CSR-6210-M (filed July 8, 2003) (regarding Station WTCT-TV, Marion, Illinois); Agape Church, Inc. Complaint in CSR-6249-M (filed Oct. 31, 2003) (regarding Station KVTN-TV, Pine Bluff, Arkansas).

<sup>19</sup> See 17 FCC Rcd at 6081-83.

on the ground that it has been rendered moot by SHVERA and by EchoStar's subsequent compliance with that legislation, and we dismiss the pending petitions for reconsideration.<sup>20</sup>

#### IV. ORDERING CLAUSES

5 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 Section 76.66 of the Commission's rules, 47 C.F.R. §§ 1.106, 76.66, that the above captioned proceeding is terminated and the Media Bureau's Order in *National Association of Broadcasters and Association of Local Television Stations*, 17 FCC Rcd 6065 (MB 2002) **IS VACATED** to the extent described herein.

6 **IT IS FURTHER ORDERED** that the Petitions for Reconsiderations filed by Brunson Communications, Inc.; LeSEA Broadcasting Corp., Christian Television Network, Inc., and Carolina Christian Broadcasting; and Maranatha Broadcasting Company, Inc. **ARE DISMISSED** as moot.

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai  
Chief, Media Bureau

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<sup>20</sup> See Amended Motion to Terminate Outstanding Must-Carry Proceedings filed by EchoStar on June 15, 2006.