

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

In the Matter of:)	
)	
EchoStar Communications Corporation)	
v.)	File No. CSR 5364-P
)	
Speedvision Network, L.L.C.)	
)	
Outdoor Life Network, L.L.C.)	

MEMORANDUM OPINION AND ORDER

Adopted: February 9, 2001

Released: February 20, 2001

By the Commission:

I. INTRODUCTION

1. EchoStar Communications Corporation and EchoStar Satellite Corporation (collectively “EchoStar”)¹ have filed an Application for Review, pursuant to Section 1.115 of the Commission’s rules,² of the Cable Services Bureau’s *Memorandum Opinion and Order* in the above-captioned proceeding (“*Order*”).³ The Bureau’s *Order* denied EchoStar’s program access complaint against Speedvision Network and Outdoor Life Network (collectively “the Networks”) without prejudice to the filing of another program access complaint by EchoStar after the conclusion of litigation pending between the parties in federal district court.⁴ EchoStar’s Application for Review asserts that the Bureau erred in its finding that it would not rule on EchoStar’s allegation that the Networks unreasonably refused to offer programming to EchoStar because the matter was inextricably intertwined with the resolution of the parties’ pending breach of contract litigation. The Networks filed an opposition requesting that the Commission deny EchoStar’s Application for Review.⁵ EchoStar filed a reply. For the reasons discussed below, EchoStar’s Application

¹ EchoStar is a direct broadcast satellite (“DBS”) provider that offers multichannel video programming distributor (“MVPD”) service throughout the United States. EchoStar operates satellites that allow it to offer over one hundred channels of digital television programming to its subscribers. As an MVPD, EchoStar competes against cable operators and other MVPDs in every cable franchise area, as well as against other DBS providers.

² 47 C.F.R. § 1.115.

³ *EchoStar v. Speedvision Network, L.L.C. et al.*, 14 FCC Rcd 9327 (1999) (“*Order*”).

⁴ See *OutdoorLife Network, L.L.C. and Speedvision Network, L.L.C. v. EchoStar Satellite Corporation and EchoStar Communications Corporation*, No. 3:98CV2378(AHN) (D. Conn. filed Dec. 7, 1998).

⁵ Pursuant to 47 C.F.R. § 76.1003(h), which provides for the confidentiality of proprietary information falling within an exemption to disclosure contained in the Freedom of Information Act, 5 U.S.C. § 552(b) (“FOIA”), the Networks requested that portions of their opposition be treated as confidential because they contain proprietary information and, accordingly, submitted a redacted copy of their opposition for inclusion in the Commission’s

(continued....)

for Review is denied.

II. BACKGROUND

2. On November 18, 1998, the Networks and EchoStar entered into an agreement for the carriage of the Networks' programming.⁶ While the agreement prohibited the carriage of the Networks' programming on an a la carte basis, it permitted EchoStar to carry the programming in one of three ways: 1) on EchoStar's expanded basic package; 2) on a specialty tier of programming later known as EchoStar's "Action Plus" package; or, 3) on a sports tier.⁷ On December 2, 1998, EchoStar launched its "Action Plus" package which included both Speedvision and Outdoor Life in its programming line-up.⁸

3. On December 7, 1998, following an alleged breach of the agreement regarding the packaging of the Networks' programming, the Networks deauthorized EchoStar's reception of Speedvision and Outdoor Life.⁹ According to EchoStar, approximately 23,000 "Action Plus" package subscribers were left without service.¹⁰ The Networks alleged that EchoStar had not properly packaged its programming because in addition to the Networks, only one other programming service was included in the package when EchoStar was to have included at least two other programming services other than Outdoor Life and Speedvision.¹¹ The Networks also alleged that EchoStar violated the a la carte prohibition of the agreement.¹² Also, on December 7, 1998, the Networks filed a complaint against EchoStar in the United States District Court for the District of Connecticut alleging, *inter alia*, breach of contract, fraudulent inducement and trademark infringement.¹³

4. On December 9, 1998, in a letter sent to the Networks, EchoStar offered to add another programming service to the "Action Plus" package.¹⁴ In a letter dated December 11, 1998, the Networks rejected EchoStar's offer by stating its position that the agreement was breached and therefore void, and that it was too late to remedy EchoStar's noncompliance by adding another programming service to the package.¹⁵ After providing the Networks with the requisite ten days notice of its intent to file a program

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public file. This *Memorandum Opinion and Order* observes the requested confidentiality.

⁶ *Order*, 14 FCC Rcd at 9331.

⁷ *Id.*

⁸ *Id.* EchoStar stated that in addition to Speedvision and the Outdoor Life Network, the "Action Plus" package programming line-up also included Outdoor Channel, a cable network unaffiliated with Speedvision, and Angel One which is another unaffiliated channel available to all EchoStar subscribers and included in all other EchoStar packages. *Id.* at n.32.

⁹ *Id.* at 9331.

¹⁰ *Id.* at 9332.

¹¹ *Id.*

¹² *Id.* The Networks alleged that EchoStar offered "any or all" of the services comprising the "Action Plus" package, in violation of the a la carte prohibition of the agreement. *Id.* at n. 36.

¹³ *Id.* See also *Outdoor Life Network, L.L.C. and Speedvision Network, L.L.C. v. EchoStar Satellite Corporation and EchoStar Communications Corporation*, No. 3:98CV2378(AHN) (D. Conn. filed Dec. 7, 1998).

¹⁴ *Id.* at 9332.

¹⁵ *Id.*

access complaint, EchoStar filed its complaint with the Commission on January 14, 1999.¹⁶

5. In the *Order*, the Bureau denied EchoStar's program access complaint against the Networks.¹⁷ The Bureau noted that this was not the usual "refusal to deal" or "refusal to sell" case filed pursuant to Section 628(c) of the Communications Act of 1934, as amended ("Communications Act").¹⁸ Accordingly, the *Order* found that EchoStar's program access complaint was not a matter where programming vendors, such as the Networks, refused to sell their programming to a distributor, such as EchoStar, or refused to initiate discussions about the sale of programming when the vendors have sold their programming to that distributor's competitor.¹⁹ Instead, in this case, after three years of negotiations between the parties and 14 formal offers of carriage made from the Networks to EchoStar, the parties entered into a mutually acceptable agreement on November 18, 1998.²⁰ Thus, the *Order* noted that despite the length of negotiations, the Networks did deal with EchoStar and ultimately sold both Speedvision and Outdoor Life programming on terms agreed to by both parties.²¹ The Bureau's *Order* concluded that if not for the alleged breach of contract on the part of EchoStar, the Networks would still be providing their programming to EchoStar.²²

6. In denying EchoStar's program access complaint, the Bureau stated that the resolution of EchoStar's complaint was inextricably intertwined with the reasonableness of the Networks' actions resulting from EchoStar's alleged breach of contract.²³ The Bureau noted that the same set of operative facts involving this matter were already before a federal district court in a proceeding filed a month before EchoStar filed its program access complaint.²⁴ The Bureau determined that it would not substitute its judgment for that of a court of competent jurisdiction in adjudicating these same issues involving the alleged breach of contract and the reasonableness of the Networks' actions resulting from that breach.²⁵

III. DISCUSSION

7. EchoStar's Application for Review raises the following issues: (1) whether the Bureau erroneously concluded that EchoStar's alleged breach of contract issue was relevant to the issues in this proceeding; (2) whether the Bureau ignored or misinterpreted evidence that the breach of contract allegation was not the real reason, but merely pretext, for terminating the provision of the Networks' programming to EchoStar; and (3) whether the Bureau failed to follow Commission precedent when it denied the complaint.²⁶ EchoStar also alleges that the Bureau's *Order* impermissibly created a "race-to-the-courthouse" rule because the Bureau attached decisional significance to the fact that the Networks resorted

¹⁶ *Id.* See 47 C.F.R. § 76.1003(a).

¹⁷ *Id.* at 9337.

¹⁸ *Id.* See 47 U.S.C. § 548(c).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 9338.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Application for Review at 5-13; Networks' Opposition at 6-15.

to the federal district court before filing a program access complaint with the Commission.²⁷ EchoStar also argues that the Commission must clarify EchoStar's ability to file a program access complaint after the conclusion of litigation in the federal district court.²⁸ For the reasons discussed below, EchoStar's Application for Review is denied.

8. As the Bureau noted in its *Order*, "this is not the usual 'refusal to deal' or 'refusal to sell' case."²⁹ The Networks did not refuse to sell their programming to EchoStar and the Networks did not refuse to initiate discussions about the sale of their programming to EchoStar while the Networks were selling that same programming to EchoStar's competitors. Instead, after years of negotiations and many offers of carriage made from the Networks to EchoStar, the parties came to a mutually acceptable agreement regarding carriage of the Networks' programming. After the alleged breach of contract on the part of EchoStar, the Networks terminated their programming and filed suit in federal district court. EchoStar complains that the Networks cut off their programming to EchoStar subscribers without giving EchoStar an opportunity to justify its packaging or repackage the programming in accordance with the Networks' wishes.³⁰ Moreover, EchoStar asserts that after the alleged breach when it did offer to repackage the Networks programming in order to appease the Networks, the Networks still refused to reinstate their programming.³¹

9. EchoStar argues that the Bureau erred by concluding that EchoStar's program access complaint is relevant to, or intertwined with, the alleged breach of contract issue.³² EchoStar contends that the underlying program access complaint only calls for the Commission to evaluate the reasonableness of the Networks' refusal to provide their programming to EchoStar based on EchoStar's post-breach offer to repackage the Networks' programming on the Networks' own terms and based on Networks' reading of the contract.³³ EchoStar argues that this evaluation does not require contract interpretation or resolution of the contractual dispute between the parties and the Bureau erred in finding that EchoStar's program access complaint is inextricably intertwined with the resolution of the pending litigation.³⁴ In addition, EchoStar argues that any relief provided by the Commission would not prejudice the outcome of the court litigation.³⁵ In that regard, EchoStar maintains that if the court decides that EchoStar's interpretation of the contract is correct, the Networks would be required to provide the programming based on that interpretation. On the other hand, EchoStar asserts that if the court sides with the Networks' interpretation of the contract, the Networks would still have an obligation to provide its programming to EchoStar on reasonable terms under the program access laws.³⁶

10. In response, the Networks argue that according to EchoStar's evaluation of this matter, the

²⁷ Application for Review at 14.

²⁸ *Id.* at 15.

²⁹ *Order*, 14 FCC Rcd at 9337.

³⁰ Application for Review at 5.

³¹ *Id.* at 6.

³² *Id.* at 8

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 9.

³⁶ *Id.*

Commission must order the Networks to deal with EchoStar as if no agreement had been previously negotiated, no breach had occurred, and no litigation commenced to redress that breach.³⁷ The Networks also dispute EchoStar's characterization of the Networks' purported independent obligation to provide its programming to EchoStar on reasonable terms and conditions even if the court agrees with the Networks' interpretation of the contract at issue.³⁸ The Networks argue that EchoStar's view of such an obligation runs contrary to general principles of contract law, antitrust law, and program access precedent.³⁹ The Networks maintain that the Commission only will order a programmer to provide its programming against its wishes if the programmer's refusal is unreasonable or otherwise is not based on a legitimate business reason. Here the Networks argue that their decision to deauthorize their programming was based entirely on EchoStar's intentional breach of a term of carriage that had been negotiated and made a material part of the contract.⁴⁰ The Networks maintain that the program access rules neither require programmers to deal with a party that disregards its contractual obligations nor require programmers to forgive that party "the day after" a breach has occurred.⁴¹ The Networks argue that a programmer's decision not to deal with a bad actor, such as a breaching party, is a legitimate business reason to deny access to programming.⁴²

11. We disagree with EchoStar that the breach of contract litigation and EchoStar's conduct in relation to that matter are not relevant to its program access complaint. The reasonableness of the Networks' actions resulting from EchoStar's alleged breach of contract is intertwined with the resolution of EchoStar's program access complaint. As the Bureau has stated, EchoStar's complaint cannot be resolved without making factual determinations related to the actions of the parties under contract.⁴³ EchoStar oversimplifies the matter by stating that:

All that the Bureau had to do in this case was to decide whether Speedvision ["the Networks"] may lawfully refuse to provide EchoStar its programming on its own terms based on an allegation that EchoStar is "untrustworthy." The court in Connecticut does not even have the power to make that determination; only the Commission does, and should decide that the "untrustworthiness" story is not a permissible justification for a refusal to deal."⁴⁴

The Commission will not prejudge this matter which is now pending in federal district court without the benefit of a full evaluation of the facts by the court. As the Bureau correctly stated, where a court of competent jurisdiction has been presented with the same set of operative facts that constitute a program

³⁷ Networks' Opposition at 6.

³⁸ *Id.* at 7.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 8.

⁴² *Id.*

⁴³ *Order*, 14 FCC Rcd at 9338.

⁴⁴ Application for Review at 9. In the original program access proceeding underlying this matter, EchoStar notes that the Networks stated that they did not want to deal with EchoStar any longer after the alleged breach of contract because EchoStar's conduct had made EchoStar untrustworthy in the estimation of the Networks. *Id.* at 7; *see also* the Networks' Answer in the original proceeding at 54-56 ("EchoStar's breach of the express terms of the Agreement was merely one in a series of actions that demonstrated to the Networks that EchoStar never intended, and could not be trusted, to honor the terms of an agreement with the Networks.").

access case, we will not substitute our judgment for that of the court.⁴⁵ Depending upon the resolution of this dispute by the court, a determination as to the reasonableness of the Networks' actions in discontinuing the provision of its programming to EchoStar will be evident. In the interim, the Commission will not force the Networks to continue to provide its programming to EchoStar during the pendency of a breach of contract action between the parties on their underlying programming contract.

12. EchoStar also alleges that the Bureau ignored or misinterpreted evidence that the breach of contract allegation was not the real reason, but merely pretext, for terminating the provision of the Networks' programming to EchoStar. The evidence that EchoStar states that it submitted to the Bureau for evaluation is that: (1) the Networks deauthorized their programming without giving EchoStar an opportunity to justify its packaging or repackage the programming according to the Networks' wishes; and (2) EchoStar offered to repackage the Networks' programming after the alleged breach in accordance with the Networks' wishes, thus eliminating any rationale for the Networks actions.⁴⁶ The Networks respond that a review of the correspondence documenting the parties' negotiations over a three year period demonstrates the length and breadth of the negotiations between the parties and EchoStar's refusal to even respond to the Networks' requests for carriage.⁴⁷ After negotiations began, the Networks assert that the most critical aspect of the negotiations involved packaging.⁴⁸ The Networks argue that EchoStar's immediate breach of the agreement regarding a packaging term that was executed just prior to the execution of the agreement demonstrates that EchoStar's breach was intentional and that the Networks' actions were reasonable.⁴⁹

13. This matter involves the alleged breach of the express terms of the agreement entered into between EchoStar and the Networks. EchoStar argues that the Bureau was obligated to evaluate what it terms as the Networks's "implausible explanation" for termination of service after an alleged breach of contract in order to determine whether this was a permissible justification for the Networks' refusal to deal.⁵⁰ We do not agree. The precise issues presented to the Bureau were already pending for resolution in federal court. The reasonableness of both EchoStar's and the Networks' actions are within the jurisdiction of the federal court. To consider the reasons and legitimacy of why the Networks terminated their contract with EchoStar reaches squarely within the matters before the court. As the Bureau correctly noted, "this is not the usual 'refusal to deal' or 'refusal to sell' case."⁵¹ In the context of evaluating a program access complaint, the Commission is responsible for evaluating whether a programming vendor unreasonably refused to sell its programming to a distributor or refused to initiate discussions about the sale of its programming. This is a matter where negotiations were completed, a final agreement was entered into and the matter was under judicial review. EchoStar has not demonstrated that there was any intent on the part of the Networks to evade the Commission's jurisdiction.

⁴⁵ *Order* at 9338.

⁴⁶ Application for Review at 5.

⁴⁷ Networks' Opposition at 10, citing Exhibits 2-25 attached to the Networks' Answer in the original proceeding.

⁴⁸ *Id.*

⁴⁹ *Id.* at 10-11. The Networks also note that when they notified EchoStar of the breach, EchoStar denied the breach and never offered to fully cure. *Id.*, citing Exhibit 27 attached to the Networks' Answer in the original proceeding.

⁵⁰ Application for Review at 7.

⁵¹ *Order* at 9337.

14. EchoStar also alleges that the Bureau failed to follow Commission precedent when it denied its complaint, with the right to refile after the federal court litigation is completed. According to EchoStar, the Bureau was remiss in not evaluating the Networks' motion pursuant to the Common Carrier Bureau's decision in *ACC Long Distance Corp. v. Yankee Microwave, Inc.* ("*Yankee Microwave*")⁵² to determine whether EchoStar's complaint should have been dismissed or held in abeyance pending resolution of the matter in federal district court.⁵³ In *Yankee Microwave*, the defendant filed a "Motion to Hold in Abeyance" arguing that for reasons of administrative economy, the complainant, ACC Long Distance, should not be permitted to maintain an action before the Commission at the same time a prior contract action seeking identical relief was pending in court.⁵⁴ The Common Carrier Bureau noted that while the defendant technically may not have been seeking a stay of a Commission order or decision, the defendant was seeking relief similar to a stay *pendente lite*. The Common Carrier Bureau then determined that it was useful to examine factors or criteria that the Commission generally considers in determining whether or not to grant such a stay request.⁵⁵ The Common Carrier Bureau denied Yankee Microwave's motion and ordered the parties to file briefs on whether Yankee Microwave violated Sections 201(b) and 202(a) of the Communications Act.⁵⁶

15. As an affirmative defense in the court suit, ACC Long Distance asserted that its breach of contract was justified because the rates in the breached agreement were unlawful under the Communications Act.⁵⁷ Unlike the case here, in *Yankee Microwave*, the issues that the Common Carrier Bureau were asked to resolve did not depend on the breach of contract issue pending before the court. The Common Carrier Bureau determined that it had the expertise in *Yankee Microwave* to determine the reasonableness of the contract rates at issue under Section 201(b) and 202(a) of the Communications Act without waiting for the court's assessment of the breach of contract claim. In contrast, EchoStar's program access complaint would require the Commission to determine whether the Networks' refusal to deal with EchoStar after the alleged breach was reasonable. This matter is not severable from the claims concerning the alleged breach that are pending in federal court. The Bureau acted reasonably in determining that it would not rule on the merits of a program access complaint that it believed to be intertwined with a preexisting court action. The ruling in *Yankee Microwave* does not compel a different result from the one reached by the Bureau. The Bureau chose to deny the complaint and allow EchoStar to refile its complaint after the resolution of the pending lawsuit. Given the Bureau's ultimate decision not to rule on the merits of the complaint, EchoStar was not harmed because the Bureau denied its program access complaint without prejudice instead of dismissing it or holding it in abeyance.

16. We also find no merit to EchoStar's allegation that the Bureau's *Order* impermissibly created a "race-to-the-courthouse" rule. As the Bureau observed, the fact that the Networks' filed suit in federal district court before EchoStar filed its program access complaint did not automatically preclude the Bureau from reviewing EchoStar's complaint. Instead, the Bureau found that EchoStar's complaint and

⁵² 7 FCC Rcd 2289 (CCB 1992).

⁵³ Application for Review at 10; EchoStar Reply at 2.

⁵⁴ *Yankee Microwave*, 7 FCC Rcd at 2289.

⁵⁵ *Id.* Those criteria are: (1) Has the petitioner made a strong showing that it is likely to prevail on the merits? (2) Has the petitioner shown that without the requested relief, it will be irreparably injured? (3) Would issuance of a stay substantially harm other parties interested in the proceedings? (4) What action is in the public interest? *Id.* (citations omitted).

⁵⁶ *Id.* at 2290; 47 U.S.C. § 201(b) and 47 U.S.C. § 202(a).

⁵⁷ *Id.* at 2289.

the pending lawsuit were so interrelated that, when presented with the same set of operative facts already under consideration by a federal court, the Bureau determined that it would not substitute its judgement for that of the court.⁵⁸ The Commission has held in various other instances that it is not the proper forum for the resolution of private contractual disputes.⁵⁹

17. EchoStar also asks the Commission to clarify its ability to file a program access complaint after the conclusion of litigation in federal district court. EchoStar states that to the extent that the Commission is unwilling to overturn the Bureau's decision, the Commission needs to ensure that the Commission's limitations period that applies to program access cases will not affect EchoStar's ability to file another program access complaint or its ability to seek damages from the date that the Networks' terminated their programming. The Bureau's *Order* clearly states that "[o]ur decision is without prejudice to EchoStar filing a program access complaint after the contractual dispute between the parties is resolved by the federal district court."⁶⁰ Provided that EchoStar refiles its claim with the Commission within one year of a final order entered by the court, the limitations period for program access complaints will be tolled. Thus, the Bureau's decision will not prevent EchoStar from filing another complaint regarding this matter.⁶¹ Also, as we have previously stated, the appropriate date from which damages should accrue is the date on which the violation first occurred.⁶² The refiling of another complaint will not affect the date from which EchoStar could receive damages in the event that another program access complaint filed by EchoStar is granted and an award of damages is deemed appropriate.

⁵⁸ *Order* at 9338.

⁵⁹ See *Transcontinental Television Corp. (WROC-TV)*, 21 R.R. 945 (1961); *John L. Runner, Receiver*, 36 R.R. 2d 773 (1976); *Decatur Telecasting, Inc.*, 7 FCC Rcd 8622 (1992).

⁶⁰ *Order* at 9338.

⁶¹ See 47 C.F.R. § 76.1003(g).

⁶² See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, 13 FCC Rcd 15822, 15839 (1998).

IV. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that the Application for Review filed by EchoStar Communications Corporation against Speedvision Network, L.L.C. and Outdoor Life Network, L.L.C. **IS DENIED**.

19. **IT IS FURTHER ORDERED** that the request for clarification by EchoStar Communications Corporation **IS GRANTED** to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary