

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

In the Matter of:
Agape Church, Inc.
v.
EchoStar Communications Corporation
Request for Mandatory Carriage of
Television Station KVTN(TV), Pine Bluff, AR
CSR-6249-M

MEMORANDUM OPINION AND ORDER

Adopted: March 12, 2004

Released: March 16, 2004

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Agape Church, Inc. ("Agape"), licensee of commercial television station KVTN(TV), Pine Bluff, Arkansas ("KVTN"), filed the above-captioned carriage complaint against EchoStar Communications Corporation ("EchoStar"), pursuant to Section 338 of the Communications Act of 1934, as amended (the "Act"), and Section 76.66 of the Commission's rules, to require EchoStar to carry the station in a nondiscriminatory manner. KVTN states that EchoStar is providing "local-into-local" satellite service pursuant to the statutory copyright license -- provided under Section 122 of the Copyright Act -- in the Little Rock/Pine Bluff, Arkansas Designated Market Area ("DMA"). In its complaint, KVTN alleges that EchoStar has failed to meet its carriage obligations under the Commission's satellite broadcast signal carriage rules. EchoStar filed an opposition to the complaint and Agape, in turn, filed a reply.

1 See 47 U.S.C. § 338; 47 C.F.R. § 76.66. See also Public Notice, "Special Relief and Show Cause Petitions, Report No. 0092" (rel. Nov. 17, 2003).

2 See 17 U.S.C. § 122(a); 47 U.S.C. § 338. 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).

3 Under Section 76.66(m)(3) of the Commission's rules, a local television broadcast station that disputes a response by a satellite carrier that it is in compliance with its must carry obligations may obtain review of such denial or response by filing a "complaint" with the Commission in accordance with Section 76.7 of our rules. See 47 C.F.R. § 76.66(m)(3). Although styled a "complaint," a carriage complaint filed against a satellite carrier is treated by the Commission as a petition for special relief for purposes of the Commission's pleading requirements. See 1998 Biennial Regulatory Review: Part 76 - Cable Television Service Pleading and Complaint Rules, 14 FCC Rcd 418 (1999).

4 In response to Agape's Reply, EchoStar filed a "Motion to Partially Strike Reply or Accept Supplemental Comments." Specifically, EchoStar argues that certain exhibits included in Agape's Reply constituted new and previously unmentioned allegations of fact that should have been included in the original Complaint. Agape, in its

2. EchoStar, a provider of Direct Broadcast Satellite service for a fee through its DISH Network, began delivering local-into-local service to the Little Rock/Pine Bluff market on or about July 2, 2003.<sup>5</sup> Agape elected must carry status on behalf of KVTN(TV) and EchoStar proceeded to carry the television station on its satellite system. However, because KVTN is carried on a “wing” satellite and not on a full CONUS satellite where EchoStar’s core programming and the other local stations in the Little Rock/Pine Bluff DMA are carried, viewers must use a second satellite dish antenna to receive KVTN.<sup>6</sup> Agape contends that this arrangement constitutes discriminatory treatment in violation of Section 338 of the Act and Section 76.66 of the Commission’s rules.<sup>7</sup> Agape asserts that EchoStar’s “two-dish” implementation in the Little Rock/Pine Bluff DMA suffers from many of the same deficiencies found in the Media Bureau’s *Declaratory Ruling and Order* concerning EchoStar’s two-dish implementation in other markets (hereinafter “*Declaratory Ruling*”).<sup>8</sup> Specifically, Agape alleges that EchoStar – through its press releases, customer service representatives (“CSRs”), and retailers – continues to misinform customers about its “two-dish” plan. Agape argues that EchoStar’s failure to remedy these deficiencies violates the terms of the *Declaratory Ruling* and renders its “two-dish” plan for the Little Rock/Pine Bluff market unlawful. Accordingly, Agape asks that we order EchoStar to place Station KVTN(TV) on a CONUS satellite with the other Little Rock/Pine Bluff television stations or move all of the Little Rock-Pine Bluff television stations to the same “wing” satellite.

## II. DISCUSSION

3. 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 Commission’s rules.<sup>9</sup> 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.<sup>10</sup> EchoStar was directed to remedy each of the specified instances of unlawful discrimination as expeditiously as possible. The *Declaratory Ruling* discussed a variety of measures EchoStar could implement to address the violations, but also afforded EchoStar the flexibility to implement other measures of its own choosing as long as they served to end the unlawful discrimination.<sup>11</sup> Automatically providing the additional equipment to any

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opposition to the Motion, responds that the exhibits do not contain new and previously unmentioned allegations of fact, but instead merely provide the documentation underlying statements made in its Complaint. We agree with Agape and, therefore, will consider the Reply in total. Additionally, we will accept EchoStar’s supplemental comments concerning the exhibits.

<sup>5</sup> See Opposition at 1.

<sup>6</sup> A full CONUS satellite is capable of serving customers across the contiguous United States and also Alaska and Hawaii, while “wing” satellite operations (also referred to as “partial-CONUS” satellites) cover only a portion of the United States. Agape asserts that it is the lone signal in the Little Rock/Pine Bluff DMA that is carried on an EchoStar “wing” satellite located at 148° W.L. In its Opposition, EchoStar states that KVTN is not being singled out, since another station -- *i.e.*, KYPX, a PAX affiliate owned by Arkansas 49, Inc. – has also been selected for carriage on the 148° “wing” satellite, but that it is presently not being carried because of a signal quality dispute. See Opposition at 1-2 & n.2.

<sup>7</sup> See 47 U.S.C. § 338; 47 C.F.R. § 76.66.

<sup>8</sup> 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*”), petitions for reconsideration and applications for review pending.

<sup>9</sup> See *id.* at 6066. See also Pub. Law 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

<sup>10</sup> See *Declaratory Ruling*, 17 FCC Rcd at 6072-81.

<sup>11</sup> 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).

existing or new subscriber to local-into-local service was listed as one means of avoiding the discriminatory price violation found in the *Declaratory Ruling*.<sup>12</sup> 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 violation.<sup>13</sup> Educating its 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 a potential remedy.<sup>14</sup> In order to allow the Commission to monitor and evaluate EchoStar's remedial efforts, EchoStar was required to submit a series of compliance reports at 30, 90, and 150 day intervals following release of the *Declaratory Ruling*.<sup>15</sup> EchoStar timely filed the compliance reports, which are under review.<sup>16</sup> Also under review are petitions for reconsideration and applications for review of the *Declaratory Ruling*.

4. In considering Agape's complaint, we find that it charges EchoStar with the same discriminatory conduct already alleged and considered in the *Declaratory Ruling*. Therefore, to the extent the complaint is effectively a petition for reconsideration of the *Declaratory Ruling*, it is late-filed and subject to dismissal on that ground.<sup>17</sup> At this time, in the context of the *Declaratory Ruling*, we have no basis upon which to grant the station's request that we order EchoStar to carry its signal from the same satellite location as other local broadcast stations in the Little Rock/Pine Bluff market, nor any other relief inconsistent with the *Declaratory Ruling*. The fact that KVTN is the only station in the Little Rock-Pine Bluff DMA assigned to a wing satellite does not sufficiently distinguish this case from the issues raised in the *Declaratory Ruling* to warrant separate consideration in this Order. Further, we find that Agape's complaint contains the same legal issues raised by other parties in the pending petitions for reconsideration and applications for review of the *Declaratory Ruling*. As such, it would be inappropriate to address Agape's arguments pertaining to the merits of those issues and thereby prejudice the Commission's eventual ruling on those issues. 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 Agape may reassert its request for relief or sanctions if such relief is then appropriate and remains necessary.

5. Although we find that granting the requested relief at this time would not be appropriate for the reasons noted above, we are nevertheless concerned about the interaction between potential and existing EchoStar subscribers seeking to receive KVTN's broadcast signal and EchoStar's CSRs, retailers, and installation partners. Agape contends that EchoStar – through its press releases, CSRs, retailers, and installation partners – continues to misinform customers about its "two dish" plan, despite EchoStar's asserted compliance efforts in response to the *Declaratory Ruling*.<sup>18</sup> More specifically, Agape alleges that EchoStar CSRs appear to be omitting relevant information about the "two-dish" plan in order to discourage customers from requesting the second dish required to view KVTN.<sup>19</sup> In this regard, Agape

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<sup>12</sup> See *id.* at 6082.

<sup>13</sup> See *id.* at 6073, 6082.

<sup>14</sup> See *id.* at 6082-83.

<sup>15</sup> See *id.* at 6083.

<sup>16</sup> See "EchoStar's Local Station Carriage Compliance Plan: 30 Day Report" in CSR-5865-Z (filed May 6, 2002); "EchoStar' 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).

<sup>17</sup> The Bureau has dismissed similar carriage complaints on this ground. See, e.g., *Telemundo Group, Inc.*, 17 FCC Rcd 22693 (MB 2002).

<sup>18</sup> See Complaint at 6-7.

<sup>19</sup> See *id.* at 10-12.

avers that many of its viewers who are DISH Network subscribers were never informed by CSRs during the ordering process (nor by installers at the time of installation) that they needed a second dish to receive KVTN's signal.<sup>20</sup> As an example, Agape states that a caller was told by an EchoStar CSR that CSRs are not required to tell callers about the availability of other local stations on "wing" satellites, unless the caller specifically asks for the information.<sup>21</sup> Agape also asserts that it received a direct mail advertisement to subscribe to DISH Network from a retailer – *i.e.*, Dish Works, Inc. – and that it complained to the retailer that its advertisement did not mention the need for a second dish.<sup>22</sup> Agape states that a Dish Works, Inc. representative confirmed that EchoStar had not instructed them on how to handle "two dish" issues and that they were unaware that the second dish is supposed to be provided free of charge.<sup>23</sup> Agape then undertook efforts to determine whether other EchoStar DISH Network retailers in the area properly informed consumers about the need to obtain a second dish to receive all available local channels in the market.<sup>24</sup> According to Agape, five out of seven retailers contacted in the Little Rock/Pine Bluff area failed to explain, without prompting, that a second dish is necessary to receive all available local channels.<sup>25</sup>

6. In response, EchoStar maintains that it has complied with the requirements set forth in the *Declaratory Ruling* in its implementation of a "two-dish" plan in the Little Rock/Pine Bluff market, and that the limited examples of deficiencies provided by Agape should be viewed in the context of EchoStar's overall remedial efforts.<sup>26</sup> Even after consideration of EchoStar's asserted efforts in the Little Rock/Pine Bluff market, the overall record in this proceeding indicates that EchoStar has not implemented its "two-dish" plan in the Little Rock/Pine Bluff consistently with the *Declaratory Ruling*. There remains evidence of subscribers not being fully informed or even being misinformed by EchoStar CSRs, retailers, and/or installers about the need for a second dish in order to view all the available local stations in the market, yet being charged full price for an incomplete local package.<sup>27</sup> EchoStar maintains that it has trained its CSRs to follow a script that calls for them to provide information concerning the free second dish offer to subscribers interested in the local-into-local package in Little Rock, and that it has never authorized any CSR to refrain from disclosing the free second dish offer as a way of saving EchoStar money, but nevertheless concedes the possibility that some CSRs contacted may not have been fully familiar with the free second dish offer.<sup>28</sup>

7. EchoStar also argues that the number of nationwide and local installations of free second

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<sup>20</sup> See *id.* at 7-8 & Exh. 6 (Decl. of Jim Grant). Jim Grant of KVTN documented a call from one of its viewers, Robert Rook, who is a KVTN viewer who subscribed to DISH Network but did not get a second dish installed at the time of initial installation. See Reply at Exhibits 1 and 2.

<sup>21</sup> See Complaint at Exh. 6.

<sup>22</sup> See *id.* at Exh. 6, ¶ 7.

<sup>23</sup> See *id.* at 9 & Exh. 6.

<sup>24</sup> See *id.* at Exh. 6, ¶¶ 9-10.

<sup>25</sup> See *id.* at 14.

<sup>26</sup> See Opposition at i, 4-10.

<sup>27</sup> The information from EchoStar's web site does not indicate that subscribers to the local package in the Little Rock/Pine Bluff market that do not have the second satellite dish antenna (and therefore cannot view KVTN) will be charged less than the \$5.99 per month charged to local-into-local subscribers in that market. See Complaint at Exh. 5 (copy of EchoStar web page information about local-into-local in the Little Rock/Pine Bluff, AR market). See also Opposition at Exh. 3 (copies of EchoStar print advertisements) (reflecting same).

<sup>28</sup> See Opposition at Exh. 2 (Decl. of Audrey Moskowitz, EchoStar Manager of Local Programming), ¶ 3 ("I did mention to [Jim Grant, general manager of KVTN,] that we had a large number of CSRs, and that there was a fairly high rate of turnover. I recall then saying that it was possible that the particular CSR he spoke of might not have been fully familiar with the free second dish offer.").

dishes supports a finding that EchoStar has properly trained its CSRs and otherwise implemented its “two-dish” plan consistently with the *Declaratory Ruling*.<sup>29</sup> In this regard, EchoStar reports that they have completed over 1,300 free second dish installations in the Little Rock market since introducing local-into-local service there. However, we cannot assess the effectiveness of EchoStar’s compliance efforts in the Little Rock/Pine Bluff market based simply on the number of second dish installations without also knowing the total number of local-into-local subscribers in that market, which EchoStar did not provide.<sup>30</sup> With respect to Agape’s allegations concerning EchoStar retailers, EchoStar states that “DISH Works” is a reseller and not an authorized DISH Network retailer and, therefore, its actions should not be accorded much weight. EchoStar argues that it should be the responsibility of the retailer, and not EchoStar, to properly educate resellers about EchoStar’s “two-dish” operation.<sup>31</sup> We disagree. Whatever the nature of the arrangement, it is EchoStar’s responsibility ultimately to ensure that all local-into-local subscribers are provided with a seamless and complete package that allows access to all local-into-local stations. After all, it is EchoStar (not any distributor) that must send the local signals to the subscriber, and it is EchoStar that charges subscribers for the local-into-local package.

8. Because the record in this proceeding indicates that EchoStar has not cured the specific violations cited in the *Declaratory Ruling* in the Little Rock/Pine Bluff market related to KVTN, we are ordering EchoStar to submit a Compliance Report and Plan detailing the specific actions it has taken in that market, and specifically as it concerns KVTN, 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*.<sup>32</sup> In addition, the Report should provide the percentage of local-into-local subscribers who requested a second dish in the Little Rock/Pine Bluff market, the number of second dish installations completed, the average number of days from the time the installation request is made to completion of the installation, 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 the most current sample scripts).<sup>33</sup> In this regard, EchoStar should state whether it directly notified (*e.g.*, by letter) individual local-into-local subscribers in the Little Rock/Pine Bluff market 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 Little Rock/Pine Bluff 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 are fully aware of the need for a second dish at the retail level.

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 KVTN in the Little Rock/Pine Bluff market. Accordingly, we will defer consideration of any enforcement action in this proceeding until Commission resolution of these related matters.

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<sup>29</sup> See Opposition at 10 & Exh. 1 (Decl. of Eric Sahl, EchoStar Vice President of Programming), ¶ 8.

<sup>30</sup> EchoStar can submit this information as part of its Compliance Report.

<sup>31</sup> See Opposition at 6 & n.20.

<sup>32</sup> See *Declaratory Ruling*, 17 FCC Rcd at 6081-83.

<sup>33</sup> EchoStar should describe the efforts it is undertaking to monitor the accuracy and completeness of CSR conversations with customers.

### 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(d)(2)(ii) of the Commission's rules, 47 C.F.R. § 76.66(d)(2)(ii), that the carriage complaint filed by Agape Church, Inc. on behalf of KVTN(TV), Pine Bluff, Arkansas **IS 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 Little Rock/Pine Bluff, Arkansas DMA, describing the specific actions EchoStar has taken and plans to take to come into compliance with its carriage obligations in that market, and specifically as it concerns KVTN(TV), as outlined in the *Declaratory Ruling*, 17 FCC Rcd 6065 (MB 2002), and this Memorandum Opinion and Order.

12. **IT IS FURTHER ORDERED** that EchoStar's "Motion to Partially Strike Reply or Accept Supplemental Comments" **IS GRANTED IN PART AND DENIED IN PART**.

13. This action is taken by the Deputy 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

William H. Johnson  
Deputy Chief, Media Bureau