Steven G.T. Reed
202.429.6232
sreed@steptoe.com

March 7, 2002

Via HAND DELIVERY

William F. Caton, Acting Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: In the Matter of: Implementation of the Satellite Home Viewer Improvement Act of 1999; Broadcast Signal Carriage Issues; CS Docket No. 00-96
***Ex Parte* Letter**

Dear Mr. Caton:

Pursuant to Section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b), EchoStar Satellite Corporation ("EchoStar") hereby responds to the supplemental filing of the National Association of Broadcasters ("NAB") dated February 13, 2002, and the letter filed by WLNY-TV and Golden Orange Broadcasting Co. (hereinafter "WLNY-TV") dated February 19, 2002.

NAB's Supplemental Filing

The NAB is wrong in asserting that the Commission has the authority to prohibit satellite carriers from requiring a second dish that is provided free of charge. While persisting in the mistaken argument that the Commission has already construed Section 338 to categorically ban second dishes, the NAB generally does not dispute—even belatedly—that the implementing regulation does not prohibit the use of a free second dish.

Rather, the NAB's principal thrust is to argue that the Commission has the authority to act under the statute. EchoStar argued in its opposition that the anti-discrimination provisions of Section 338(d) are very specific and do not apply in these circumstances. *See* EchoStar's Opposition at 4-8. The NAB does not dispute this argument, but responds by saying that, because "Congress did not *bar* the Commission from stopping this evasion," the Commission has jurisdiction to act under *Chevron* step-two. NAB Supplemental Filing, at 3. This is a misapplication of the *Chevron* doctrine.

In the first place, a statute is not ambiguous merely because it does not explicitly withhold authority from the agency. The courts have held that an agency may not obtain a power that Congress did not grant simply by applying the *Chevron* framework to congressional silence.

See, e.g., Ethyl Corp. v. EPA, 51 F3d 1053, 1060 (D.C. Cir. 1995) ("To suggest . . . that *Chevron* step two is implicated any time a statute does not negate the existence of a claimed administrative power . . . is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent") (citation and quotations omitted); *see also* Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 ADMIN. L. REV. 363, 370-71 (1986) (the theory that Congress has, by leaving a gap or ambiguity, implicitly delegated the authority to the agency is a "fiction").[1] Second, in this instance, it is clear that Congress affirmatively did not intend to give the Commission this authority. As EchoStar pointed out in its opposition, Congress limited the grant of regulatory jurisdiction to those specific types of discrimination enumerated in the statute, none of which apply in these circumstances. It is evident that Congress did not intend to enact a categorical ban on all second dishes as the NAB urges, because it eliminated a provision that would have accomplished precisely this result. "[H]ornbook law has it that Congress does not intend *sub silento* to enact statutory language that it has earlier discarded*." Bank of Am. v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 484 (1999). Lastly, the Commission has already promulgated its interpretation of Section 338, see 47 C.F.R. 76.66(i)(4), and the NAB makes no credible argument that EchoStar's activity violates the plain meaning of that regulation. *Cf. United States v. Mead,* 121 S. Ct. 2164, 2171 & n.8 (2001) (agency's interpretation entitled to less deference when it changes).

Even assuming the Commission had the statutory authority, the NAB is also wrong in asserting that the Commission may promulgate a new rule without going through the notice-and-comment rulemaking process. EchoStar established in its opposition that the Commission is required to follow normal APA notice-and-comment rulemaking procedures when it adopts a new position inconsistent with the governing regulation. *See* EchoStar Opposition, at 18-19. Despite the NAB's claims (p. 6-7), the "good cause" exception to APA notice-and-comment rulemaking, see 5 U.S.C. 553(b)(3)(B), does not apply here. Courts have construed this exception very narrowly. *See Utility Solid Waste Activity Group v. EPA,* 236 F.3d 749, 753-55 (D.C. Cir. 2001) ("we are mindful of our precedents that the 'good cause' exception is to be 'narrowly construed and only reluctantly countenanced.'") (citations omitted). "The exception is not an escape clause; its use should be limited to emergency situations." *Id*. at 754. The NAB makes no effort to show, nor could it, that this case presents an emergency situation, such as an impending crisis to public health or safety, that would warrant forgoing normal APA rulemaking procedures. *See id.*

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[1] *See also Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990) ("[I]t is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'"); *Board of Governors of Fed. Res. Sys. v. Dimension Financial Corp*., 474 U.S. at 374 ("The statute may be imperfect, but the board has no power to correct flaws that it perceives in the statute it is empowered to administer.").

WLNY-TV's Letter

WLNY-TV argues at length that EchoStar's second-dish compliance plan is barred by Section 338(d) because the second dish is a "navigational device." It relies in particular on the definition of "navigation devices" found in an unrelated part of the Commission's regulations, and on certain language found in Section 629 of the Act (which is not a definitional section). *See* WLNY-TV Letter at 2 (relying on 47 U.S.C. § 549 and 47 C.F.R. § 76.1200(c)). However, while EchoStar has questioned whether a satellite dish is intended to be encompassed within the Commission's regulations relating to competitive availability of equipment, the real point is that there is no persuasive basis for assuming that Congress, in enacting Section 338(d), intended the second dish to be considered a "navigational device," and the legislative history strongly suggests otherwise. As noted above, that history makes clear that Congress considered and rejected a provision that would have prohibited all uses of a second dish (the rule sought here by NAB and WLNY-TV). Consequently, it is simply not credible to believe that Congress, having rejected such a ban, intended to enact it through the "back door" by deeming a satellite dish to be a "navigational device."

Moreover, whether a satellite dish is encompassed by the rules relating to competitive availability of equipment (where the Commission has found compelling reasons for a broad reading of the term) is hardly controlling for purposes of construing Section 338(d) or the regulations under that provision. Indeed, the Commission's definition of "navigation devices" in 47 C.F.R. § 1200(c) is expressly prefaced with the phrase "[a]s used in this subpart" (referring to "Subpart P – Competitive Availability of Navigation Devices"), indicating that this definition was *not* intended to be exported to other sections. *Compare Vermont Agency of Natural Res. v. United States*, 529 U.S. 765, 783 & n.12 (2000) (refusing to apply a section-specific definition of "person" to a different section, where the definition departed from the usual meaning of that term). Nor does Section 629, which addresses rules for competitive availability of certain equipment, have any application to the subject of must-carry rules for DBS providers. *See McCarthy v. Bronson,* 500 U.S. 136, 142 (1991) ("the fact that Congress may have used the term 'conditions of confinement' in a different sense in legislation having a different purpose cannot control our interpretation of the language in this Act"); *United States v. Cleveland Indians Baseball Co.*, 121 S. Ct. 1433, 1440-43 (2001) (refusing to give the phrase "wages paid" the same interpretation in the "discrete taxation and benefits eligibility contexts"). In short, there is no indication that Congress or the Commission, *sub silentio*, intended to bar a free second dish through the "navigational devices" provision when they refused to enact such a provision explicitly.

Finally, as EchoStar stated in its initial filing in this proceeding, the broadcasters' characterization of the second dish flies in the face of actual consumer behavior. EchoStar has built a successful business model on consumers' willingness to *pay* for a second dish when they subscribe to high definition, foreign language, or other specialty content. Hundreds of thousands of EchoStar subscribers acquired a second dish to receive the content they desire. Here, Echostar is *giving away* a second dish to consumers who wish to view certain local channels. Subscribers who receive such dishes not only will be able to view all local channels, but will be able to

subscribe to specialty programming without having to purchase a second dish. If hundreds of thousands of subscribers are willing to buy a second dish to get the programming they want, it is not surprising that thousands of subscribers have obtained a second dish for *free* to get the local channels they want, and to have access to other programming they might want to receive in the future.

Respectfully submitted

/s/
Pantelis Michalopoulos
Steven G.T. Reed
Counsel to EchoStar Satellite Corporation

cc: W. Kenneth Ferree
Rockie Patterson
Michael Lance
Deborah E. Klein
Ben Bartolome
Rosalie Chiara
John P. Wong
Ronald Parver
William H. Johnson
Eloise Gore

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on March 7, 2002, via hand delivery (indicated by *), or by first class mail, upon the following:

William F. Caton*
Acting Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TWB - 204C
Washington, D.C. 20554

W. Kenneth Ferree*
Federal Communications Commission
Cable Services Bureau
445 12th Street, S.W.
Room 36-740
Washington, D.C. 20554

Rockie Patterson*
Federal Communications Commission
International Bureau
445 12th Street, S.W.
Room 6-B524
Washington, D.C. 20554

Michael Lance*
Federal Communications Commission
Cable Services Bureau
445 12th Street, S.W.
Room 4-C818
Washington, D.C. 20554

Deborah E. Klein*
Federal Communications Commission
Cable Services Bureau
445 12th Street, S.W.
Room 4-A820
Washington, D.C. 20554

Ben Bartolome*
Federal Communications Commission
Cable Services Bureau
445 12th Street, S.W.
Room 4-A820
Washington, D.C. 20554

Rosalie Chiara*
Federal Communications Commission
445 12th Street, S.W.
International Bureau
Room 6-A521
Washington, D.C. 20554

John P. Wong*
Federal Communications Commission
Cable Services Bureau
445 12th Street, S.W.
Room 4-C838
Washington, D.C. 20554

Ronald Parver*
Federal Communications Commission
Cable Services Bureau
445 12th Street, S.W.
Room 4-A822
Washington, D.C. 20554

William H. Johnson*
Federal Communications Commission
Cable Services Bureau
445 12th Street, S.W.
Room 3-C742
Washington, D.C. 20554

Eloise Gore*
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 4-A726
Washington, D.C. 20554

J. Brian DeBoice
Ronald A. Siegel
Cohn and Marks LLP
1920 N Street, N.W., Suite 300
Washington, D.C. 20036
Counsel for WLNY-TV INC. and GOLDEN ORANGE BROADCASTING CO.

Jonathan D. Blake
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Counsel for Joint Broadcasters

Richard Millet
Senior Vice President
Assistant General Manager
KSCI-TV
1990 South Bundy Drive, Suite 850
Los Angeles, CA 90025

Harry F. Cole
Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street
11th Floor
Arlington, Virginia 22209
Counsel for African-American Broadcasting Company of Bellevue, Inc.

Lawrence M. Miller
Schwartz, Woods & Miller
Suite 300
1350 Connecticut Avenue, N.W.
Washington, D.C. 20036-1717
Counsel for The Board of Education of the City of Atlanta

Barry D. Wood
Paul H. Brown
Woods, Maines & Brown, Chartered
1827 Jefferson Place, N.W.
Washington, D.C. 20036
Counsel for Eagle III Broadcasting, LLC

John R. Feore, Jr.
Kevin P. Latek
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
Counsel for Roberts Broadcasting Company of Denver

Marilyn Mohrman-Gillis
Vice President, Policy and Legal Affairs
Association of Public Television Stations
666 Eleventh Street, N.W., Suite 1100
Washington, D.C. 20001

Barry D. Wood
Paul H. Brown
Woods, Maines & Brown, Chartered
1827 Jefferson Place, N.W.
Washington, D.C. 20036
Counsel for Brunson Communications Corporation

Henry L. Baumann
Benjamin F.P. Ivins
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036

Richard R. Zaragoza
Tony Lin
Shaw Pittman LLC
2300 N Street, N.W.
Washington, D.C. 20037
Counsel for State Broadcasters Associations

Peter C. Pappas
Executive Vice President
Government & Regulatory Affairs
1299 Pennsylvania Avenue, N.W.
Tenth Floor
Washington, D.C. 20004

Joseph C. Chautin, III
Hardy, Carey & Chautin, L.L.P.
110 Veterans Blvd., Suite 300
Metairie, La 70005
Counsel for HCC Commenters

Peter Tannenwald
Kevin M. Walsh
Irwin, Campbell & Tannenwald, P.C.
1730 Rhode Island Ave., N.W., Suite 200
Washington, D.C. 20036
Counsel for North Pacific International TV, Inc.

Scott R. Flick
Brendon Holland
Paul A. Cicelski
Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037
Counsel for Univision Communications Inc.

William L. Watson
Secretary
Paxson Communications Corporation
601 Clearwater Park Road
West Palm Beach, FL 33401

Robert E. Branson
Association of Local Television Stations
1320 19th Street, N.W., Suite 300
Washington, D.C. 20036

Barry A. Friedman
Barry D. Umansky
Carolina Coll
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
Counsel for Rancho Palos Verdes Broadcasters, Inc.; Costa de Oro Television, Inc.; KVMD Acquisition Corporation; Entravision Holdings, LLC

Mark Holtz
7943 Sungarden Drive
Citrus Heights, CA 95610-3133

/s/ _____
Alice E. Loughran