

September 3, 2003

The Hon. Michael K. Powell, Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Implementation of Section 304 of the Telecommunications Act of 1996,
CS Docket No. 97-80, PP Docket No. 00-67; **EX PARTE**.

Dear Chairman Powell:

As the only nationwide all-digital television providers and the leading High Definition Television (“HDTV”) platforms in the United States, we continue to support your efforts to bring to fruition the digital transition. We are concerned, however, that the Commission in this proceeding is set to ignore completely the concerns that our companies have articulated for months.

The DBS industry has been frozen out of the plug-and-play rulemaking process. Despite our interest in doing so, we were not permitted to participate in the inter-industry negotiations held at your request. Our positions in this proceeding have been made a part of the record but apparently not a part of your deliberations. We believe that this calls into question the very validity of the notice-and-comment process under the Administrative Procedure Act.

For these and the other reasons we presented in this proceeding, we again call upon the Commission to exclude DBS operators from the requirements proposed by the cable and CE industries. This could be accomplished, for example, by including in the rules’ definition of “Covered Entity” only cable operators.

Nevertheless, in response to several requests made by Commission staff, we attach to this letter a “redline” version of the MOU and draft rules which, short of excising DBS from the agreement, would address our most pressing concerns. In the order in which they appear in the attachment, the issues addressed by our proposed edits are as follows:

1. Include DBS operators in the inter-industry process. The MOU on its face excludes DBS operators from the ongoing inter-industry compatibility process.¹ While the Commission does not have jurisdiction over the terms of the MOU, it

¹ See MOU at section 3.11. This provision should include the following additional language in bold: “MSOs and CE Manufacturers acknowledge that technology advances and certain standards may need to transition or sunset. MSOs, CE Manufacturers, **and DBS representatives** will meet at least annually to discuss technology sunsets, and may submit recommendations to the FCC as part of the biennial review process, or such earlier review as may be appropriate.”

- should not accept any proposed regulations unless the voluntary inter-industry process includes DBS operators.
2. Any television that implements a 1394 interface in addition to the required DVI or HDMI interface should support additional minimum standards, specified in the proposed regulations, which allow for improved compatibility with DBS.
 3. All digital content distribution methods, including the Internet (whether via cable modem, DSL or another mechanism) and digital recorded media such as DVDs, should comply with encoding rules and output control regulations. The current draft regulations, which exclude cable broadband from the regulatory requirements, establish a perverse incentive for cable operators to circumvent the rules by delivering video in an Internet (TCP-IP) format.
 4. Selectable output control must be permitted for interfaces that are intended for recording purposes only. There is no reason to pass content which may not be copied over recording only interfaces.
 5. Include personal video recorder ("PVR") functionality in the Defined Business Model definition. The PVR is an integral part of DBS operators' ability to remain competitive with cable in the interactive space. Excluding such services from the Defined Business Model category will hinder DBS operators' ability to innovate and bring products to market quickly.
 6. Other programming services offered today are not clearly classified in the Defined Model definition. For example, special events such as free concerts may require copy restrictions even though customers are not charged a fee for such events.
 7. Exclude DBS operators from the notice-and-comment procedures for Undefined Business Models. The categories of Defined Business Models in the draft rules closely track the business practices of cable operators today but are far too restrictive for the advanced and quickly evolving DBS platforms. Had the DBS operators been involved in drafting the proposal, we might have been able to address this issue earlier in the process. At this late date, however, it is far more expedient to subject only the cable industry to the rules they themselves helped to draft.

We remain hopeful that in crafting its final order in this proceeding, the Commission will take into account the 20 million DBS subscribers and the countless cable subscribers who benefit from the competition our companies provide. To date, that has not been the case. Given the great strides DBS has made in bringing HDTV to American consumers, the wholesale adoption of the cable/CE draft rules without bona fide consideration of our concerns would be counter-productive for consumers and unfair to our industry.

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Sincerely,

_____/s/_____
Eddy W. Hartenstein
Chairman and CEO,
DIRECTV, Inc.

_____/s/_____
Charles W. Ergen
Chairman and CEO,
EchoStar Communications Corp.