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Federal Communications Commission  
Office of Secretary

MARK D. COLLEY  
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September 2, 2003

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MEDIA BUREAU

MB 03-206

Marlene H. Dortch, Esquire  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: Programming Exclusivity Contracts of Direct Broadcast  
Satellite Providers

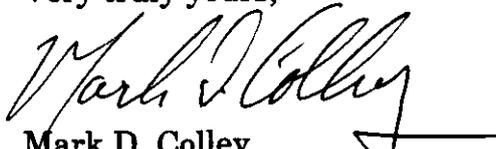
Dear Secretary Dortch:

Enclosed please find an original and 2 copies of Dominion Video Satellite, Inc.'s Opposition to Daystar Television Network's Request for Section 403 Inquiry and Declaratory Ruling.

An extra copy of the filing is enclosed. Please date-stamp the extra copy and return it to the courier.

In the event there are any questions concerning this matter, please contact the undersigned.

Very truly yours,

  
Mark D. Colley

enclosures

cc: David Solomon, Chief, Bureau of Enforcement

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Federal Communications Commission  
Office of Secretary

Federal Communications Commission

In the matter of: )  
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Programming Exclusivity Contracts )  
of Direct Broadcast Satellite Providers )  
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\_\_\_\_\_ )

FCC Docket # \_\_\_\_\_

**DOMINION VIDEO SATELLITE, INC.'S OPPOSITION  
TO DAYSTAR TELEVISION NETWORK'S  
REQUEST FOR SECTION 403 INQUIRY AND DECLARATORY RULING**

Dominion Video Satellite, Inc. ("Dominion"), a Direct Broadcast Satellite ("DBS") operator licensed by the Commission, opposes the request for inquiry and declaratory ruling submitted by Word of God Fellowship, Inc. d/b/a Daystar Television Network ("Daystar") on August 19, 2003 (the "*Request*"). For the following reasons, the Commission should deny Daystar's *Request*.

**Preliminary Statement**

Daystar has requested that the Commission issue a ruling invalidating a private programming contract to which Daystar is neither a party nor a third-party beneficiary. The contract — which has been reviewed and approved by the Commission — is between Dominion and EchoStar Satellite Corp. ("EchoStar") (the "Agreement"). Daystar asks that the Commission invalidate this approved Agreement because it allegedly violates Commission regulations requiring DBS operators to set aside four percent of available channel capacity for eligible public-interest programming. See 47 U.S.C. § 335(b)(5) (2002); 47 C.F.R. § 25.701(c) (2002). Daystar's *Request*, however, amounts to nothing more than an attempt to circumvent a ruling issued by a United States District Judge holding that Dominion is entitled to a preliminary injunction requiring that EchoStar comply with its Agreement with Dominion pending an

American Arbitration Association (“AAA”) arbitration between those parties. Daystar’s *Request* also runs afoul of established law precluding the Commission from determining rights in private contracts of its licensees. Further, contrary to its claims, Daystar is not an eligible public-interest programmer because it engages in commercial activity on its public-interest broadcasts, including selling airtime for broadcast on public-interest set-aside capacity. And, Daystar has exchanged excess compensation to EchoStar in return for being chosen over other eligible public-interest programmers, which is another practice prohibited by Commission rules.

### **Factual Background**

Dominion is licensed by the Commission to operate DBS high-power television frequencies. Dominion employs its FCC license to operate a television-programming network known as “Sky Angel.” Sky Angel broadcasts predominantly Christian religious, minority and educational programming to homes and churches. Dominion broadcasts Sky Angel programming from two transponders on a satellite owned by EchoStar (the “EchoStar satellite”). Dominion uses the two EchoStar transponders pursuant to a July 18, 1996 “Direct Broadcast Service Transponder Lease, Channel Use and Programming Agreement” between the parties, as amended (the “Agreement”).<sup>1</sup>

EchoStar, like Dominion, is also an FCC-licensed DBS provider. EchoStar operates the programming network known as the “DISH Network.” EchoStar broadcasts the DISH Network and other programming from other transponders on the EchoStar satellite, as well as from transponders on other satellites.

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<sup>1</sup> The original parties to the Agreement also included Directsat Corporation, Direct Broadcasting Satellite Corporation and Direct Broadcast Satellite Corporation, which have all since been merged into EchoStar Satellite Corporation.

Dominion's FCC license authorizes it to broadcast from eight frequencies on a satellite at the 61.5 degree orbital location, where the EchoStar satellite is situated. Under the Agreement as amended, EchoStar leases eight transponders on the EchoStar satellite to Dominion, and in return Dominion subleases back to EchoStar six of its frequencies, which permits EchoStar to employ those six frequencies for its own broadcasting for the 12 – 14 year life of the EchoStar satellite.

The Agreement also contains certain restrictions on the programming genres that EchoStar may include on the DISH Network and that Dominion may include on Sky Angel (the "Exclusivity Provisions"). Under the Exclusivity Provisions, EchoStar is prohibited from transmitting predominantly Christian programming on DISH Network channels except for three existing Christian channels that were broadcast on DISH at the time the Agreement was executed. The existing Christian-themed channels are the Trinity Broadcasting Network, Eternal Word Television Network, and Angel One.<sup>2</sup>

The Commission has reviewed and approved the Dominion-EchoStar Agreement — that included the Exclusivity Provisions. By order dated May 17, 1999 — after the final promulgation of the relevant public-interest regulations — the Commission authorized Dominion to broadcast from the EchoStar Satellite pursuant to the Agreement. (See Exhibit 1 hereto.)

Notwithstanding the clarity of the Exclusivity Provisions, in December 2002 EchoStar began broadcasting two predominantly Christian-religious channels, Daystar and FamilyNet. After months of correspondence objecting to this carriage, on April 9, 2003, Dominion filed for a preliminary injunction in the District Court for the District of Colorado, asking that the court order EchoStar to cease its improper broadcast of the two Christian-themed channels pending a private arbitration to be administered by the AAA per their Agreement.

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<sup>2</sup> DISH Network viewers and Sky Angel viewers can receive each satellite provider's programming separately or collectively on the same DISH-brand receiving equipment.

EchoStar has defended its decision to begin broadcasting both Daystar and FamilyNet on the ground that the Commission's set-aside rules preempt the Exclusivity Provisions and forbid EchoStar from considering its private programming contract with Dominion when choosing among eligible public-interest programmers.

To fill its four-percent "set-aside" requirement, EchoStar accepts applications from potential public-interest programmers who are interested in broadcasting on the DISH Network. At the time it accepted Daystar's application, three non-Christian-religious public-interest programmers also applied for carriage on the DISH Network, but EchoStar summarily rejected all three. (See Exhibit 2 hereto.)

Instead of choosing one of these channels, whose presence on DISH would have allowed EchoStar to comply with both the regulations and the Dominion Agreement, EchoStar chose to give Daystar a public-interest slot. The reason for this was simple: Daystar and EchoStar had been involved in extensive negotiations under which Daystar offered to waive the "must-carry" rights of its local over-the-air stations in exchange for a public-interest slot for Daystar on DISH. See 47 C.F.R. § 76.66(c)(2002). Correspondence between Daystar and EchoStar, as well as the Daystar programming contract, make clear that Daystar was chosen over the three non-Christian themed programmers because Daystar was offering to give up the "must-carry" bandwidth for its local-into-local stations as compensation for carriage as a public interest channel. EchoStar took the valuable bandwidth availability offered by Daystar as the *quid pro quo* for accepting Daystar's public-interest application. (See *infra.*, pp. 13-14.)

On June 24 – 26, 2003, the district court held a full evidentiary hearing on Dominion's *Motion for Preliminary Injunction*. After three days of testimony and substantial pre- and post-trial briefing, on July 9 the court issued a 19-page *Memorandum Opinion and Order Granting*

*Plaintiff's Motion for Preliminary Injunction* (the "Order"). (Exhibit 3 hereto.) In the *Order*, Senior District Judge John Kane found, *inter alia*, that EchoStar could have chosen public-interest programmers other than Daystar that would not breach the Agreement while still fulfilling its public-interest set-aside obligations. The judge further found that it was for the arbitrators to decide the underlying merits of the dispute, including whether Commission regulations preempt the Exclusivity Provisions of the parties' contract. The judge did comment, however, on EchoStar's preemptive argument, and found it to be a "gross distortion of plain meaning" of the Commission's Report and Order accompanying the set-aside regulations. (*Id.* at 14.)

Daystar sought to intervene in the district court action, but the court denied intervention because the Agreement was a private contract between EchoStar and Dominion. (Exhibit 4 hereto.) Additionally, the court found that Daystar had no rights in the subject matter of the lawsuit that would justify its status as a party in litigation over the Dominion-EchoStar contract. (*Id.*)<sup>3</sup>

### Argument

1. **Daystar's improperly asks that the Commission invalidate a private contract and for a ruling subverting a judicial determination regarding that contract.**

Daystar, not satisfied with the district court's findings of fact and law, has filed its *Request* in an attempt to subvert the district court's factual finding that "EchoStar will suffer little harm and only slight expense by exerting a positive effort to find and assist potential public interest programmers to meet its FCC obligations while at the same time honoring its obligations under the Agreement. The two are not at all inconsistent or in opposition." (Exhibit 3 hereto,

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<sup>3</sup> Both EchoStar and Daystar have appealed the district court rulings. The appeals are pending before the U.S. Court of Appeals for the 10<sup>th</sup> Circuit.

pp. 13-14.) This fact finding is supported by ample evidence adduced at the district court hearing showing that many non-Christian channels applied for carriage as public-interest programmers on the DISH Network, yet EchoStar instead chose Daystar — an entity whose broadcast violates its private contract with Dominion. In addition, when adopting the set aside regulations, the Commission instructed that “each DBS provider must make reasonable, good faith efforts to identify qualified national educational programming suppliers to satisfy its obligations under our rules....” (Exhibit 5 hereto at ¶ 125.) The Commission permitted DBS providers to enter into joint ventures with programming suppliers, broadcast international programming, and even pay for programming, all to facilitate public-interest programming broadcasts. (Exhibit 5 hereto at ¶¶ 89, 91; 47 CFR ¶ 100.5 (c)(5)(c).) The District Court found, however, that EchoStar simply responds to inquiries rather than seeking out qualified public interest programmers. (Exhibit 3 hereto, p. 13.) The Commission should not disturb the Court’s factual findings.

It is settled law that the Commission does not have the general authority to void contracts between private parties. See Regents of Univ. of Ga. v. Carroll, 338 U.S. 586, 602 (1950). In Regents, the Board of Regents of the University of Georgia had received a radio station as a gift, and entered into a contract with the Southern Broadcasting Company for Southern to operate the station. Id. at 588. The Commission determined, however, that Southern’s operation of the station violated Commission rules. Id. at 589. Southern sued the Regents for breach of the contract, and the Regents defended on the ground that the Commission’s rules made performance of the contract impossible because there was a conflict between the rules and the state-law contract claim. Id. at 592. The Supreme Court held that notwithstanding the Commission’s rules, impossibility of performance was a state-law issue that had been properly decided in state

court. Id. at 593. The Court further held that “controversies as to rights between licensees and others are outside the ambit of [the Commission’s] powers,” and that the Commission did not have the “authority ... to determine the validity of contracts between licensees and others.” Id. at 602.

Here, Daystar insists that the Dominion-EchoStar Agreement is null and void because if EchoStar is not permitted to breach its contract with Dominion, there may not be enough eligible programmers available to meet the four-percent set-aside requirement. (*Request*, p. 6.) Then, Daystar requests that the Commission issue an order requiring EchoStar to disregard its contract with Dominion, although a district judge has issued a factual finding that EchoStar can comply with both the contract and the regulations. (Id. at 7.) Daystar’s *Request* amounts to nothing more than an attempt to subvert the district court’s ruling and for the Commission to invalidate the Dominion-EchoStar Agreement — which the Commission does not have the authority to do.

**2. The Commission’s DBS public-interest regulations are not intended to invalidate private programming contracts.**

Daystar also insists that the Commission’s public-interest regulations must be read to prohibit a DBS operator from entering into private contracts that exclude one particular genre of public-interest programmers. (*Request*, pp. 5-6.) This interpretation, however, is contrary to the plain language of the Commission’s Report and Order that accompanied the regulations.

One overriding theme permeates the Report and Order: Under the regulations, DBS operators have *lots* of discretion, and may consider *lots* of different factors when picking among eligible programmers. (See Exhibit 5 hereto, ¶¶ 99-102.) Absolutely nothing in the Report and Order suggests that EchoStar may not honor its contract with Dominion when choosing among eligible programmers.

Rather, the Report and Order is replete with references to DBS operators' discretion to choose among eligible programmers and Congress' and the Commission's refusal to impose a pervasive regulatory scheme on the DBS industry through the public-interest regulations:

- “We conclude that the best reading of the editorial control language is that it prohibits DBS providers from controlling the selection of, or in any way editing or censoring, individual programs that will be carried on the reserved channels. It does not, however, prohibit DBS operators from selecting among national educational programming suppliers so long as the DBS provider does not refuse to make unused reserved capacity available to qualified suppliers.”
- “If the DBS provider selects from among these eligibles, we see no reason to conclude that allowing the DBS provider to select the programmer would contravene the fundamental Congressional purpose of making noncommercial educational or informational programming available. Further. . . Congress did not intend the ban on editorial control to bar selection of programmers; the ban comes into play only after the programmer is selected.”
- “[W]e believe DBS providers might permissibly consider a variety of factors in deciding which programmers to select, *including the broad genres of programming they plan to provide* . . . the programmers' experience, reliability, and reputation for quality programming, and the quality of programming they may have produced in the past.”
- “[T]he power to select among qualified programmers does not amount to 'editorial control' that Congress ought to prohibit in Section 335(b)(3).”
- “We decline to establish at the present time a complicated regulatory structure that sets out specific and detailed rules addressing the particular conduct DBS providers can or cannot engage in while selecting programmers.”
- “[W]e do not believe that the purpose of the DBS channel reservation would be frustrated by permitting DBS providers to select among qualified programmers when the reserved channels cannot accommodate all eligible programmers who wish to use the channels.”
- “[W]e find nothing in the statute or its legislative history, indicating any concern by Congress that one class of programmers might be favored over any other.”

(Id. at 99, 100, 102, 108 (emphasis added.)) As this language shows, there is no intention for the public-interest regulations to supplant a DBS operator's ability to enter into private contracts that may limit its ability to broadcast a particular genre of programming. Rather, it is plain that

Congress and the Commission granted DBS operators considerable freedom in deciding which programmers to choose for public-interest carriage. EchoStar's contract with Dominion simply implements a discretionary judgment about programming genres carried on DISH, a decision EchoStar was free to make with or without the contract. The fact that EchoStar implemented its genre choice via contract is a meaningless distinction.<sup>4</sup> There is nothing in the Report and Order or the regulations indicating Congressional or Commission intent that the regulations nullify such private programming contracts.

Notwithstanding the considerable flexibility and discretion that the regulations give to DBS operators, Daystar misleadingly asserts that the Exclusivity Provisions are voided by the Commission instruction that "DBS providers would have to make sufficient channel capacity available to fulfill the reservation requirements regardless of existing programming contracts." (*Request*, p. 4.) Daystar is referring to section IV, paragraphs 124 and 125 of the Report and Order, titled "Unused Channel Capacity," which provides that a DBS operator may use set-aside channel capacity for its own purposes only until an eligible programmer applies. Then, the "DBS provider will ... be required to vacate reserved capacity, *regardless of contractual obligations*, within a reasonable time after a qualified programmer's request for access has been received." (Report and Order, ¶ 125) (emphasis added.) In Daystar's view, this language means that in choosing among several eligible programmers, a DBS operator may not consider its private agreements. (*Request*, p. 4.) This section's plain language shows that it relates only to contracts with existing commercial programmers currently broadcast on set-aside channel

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<sup>4</sup> Daystar's wild hypotheticals about how EchoStar might systematically contractually tie up all of the public-interest capacity does not merit response. On the other hand, if EchoStar decided to fill the available public interest capacity by contracting with exclusive qualified providers of various programming genres, it could certainly do so as a means to implement the allocation of that capacity among qualified programmers.

capacity at the time an eligible public-interest programmer applies. Then, the DBS operator must make the public-interest capacity available “regardless of contractual obligations” that otherwise would have made that capacity unavailable. This has nothing to do with an agreement that EchoStar made to refrain from broadcasting a certain genre of programming, particularly when numerous other public-interest programmers have applied for carriage.<sup>5</sup>

Daystar’s reading of the Report and Order is wrong, as is its interpretation of Congress’s and the Commission’s intent behind the regulations. The regulations permit EchoStar to choose the genres of programming it will broadcast; they do not operate to invalidate the Dominion-EchoStar Agreement.

**3. Daystar is not an eligible public-interest programmer because it engages in commercial activities on designated non-commercial channel capacity.**

Daystar asserts that it “unquestionably qualifies under the Public Interest Obligations as a qualified public interest programmer.” (*Request*, p. 3.) Documents received in the district court litigation show, however, that Daystar is not an eligible public-interest programmer because it engages in commercial activities on channels reserved for non-commercial public-interest broadcasts.

In the district court litigation, Daystar Chief Executive Officer Marcus Lamb submitted a declaration in which he states that “Daystar’s exclusion from DISH Network would deprive Daystar of all the revenue uniquely derived from its access to 20 million viewers of the DISH Network, which includes *advertising*, donations for important religious and social causes and

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<sup>5</sup> The Christian-religious genre is already represented among DISH Network’s public-interest channels by Trinity Broadcasting Network (“TBN”) and Eternal Word Television Network (“EWTN”). TBN and EWTN are currently designated by EchoStar as public-interest channels. Even though the Commission encourages diversity in public-interest programmer selection (Exhibit 5, ¶ 117), by choosing Daystar EchoStar selected a programming genre already strongly represented among DISH Network’s public-interest channels, while turning down several other genres not represented currently on a DISH Network public-interest channel.

*revenue from the sale of time* to other programmers on the Daystar Network, most of which cannot ever be retrieved or recouped once lost." (Exhibit 6 hereto, ¶ 13) (emphasis added.) Additionally, the Daystar web page includes a reference to "Airtime Sales" on which one is directed to the individual to contact "for network program and spot time availabilities." (Exhibit 7 hereto.) In violation of Commission rules, Daystar charges \$3500.00 per half hour for "network program" time, based on total network audience reach of 44 million (including DISH subscribers), as stated in materials that Daystar circulated to Dominion's programmers to justify Daystar's position regarding the district court litigation. (Exhibit 8 hereto.)<sup>6</sup>

Not only is Daystar improperly selling airtime on a DISH public-interest channel, but is also doing so on its local full-power non-commercial educational licensed stations. Yet, Daystar cites these local "educational" licenses as proof of its qualification to be a "public interest" programmer on DISH. According to a recent FCC filing, Daystar owns and operates several full-service television stations, including several supposedly noncommercial educational licensed stations.<sup>7</sup> Comparison of a twenty-four hour period of Daystar's national feed on DISH and one of its local stations shows that the programming is virtually identical. Thus, by carrying Daystar's commercial programming, its noncommercial educational stations are engaging in commercial activities in violation of Commission rules.

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<sup>6</sup> When Daystar was placed on DISH Network's main programming satellite, its air time rates increased from \$2500 to \$3500 based on the new DISH subscribers.

<sup>7</sup> Dallas TX KMPX-TV 29 (Channel allocated to Denison, TX), Denver, CO KRMT-TV 41, Houston, TX KLTJ-TV 22 (Channel allocated to Galveston, TX), Boston, MA WYDN-TV 48 (Channel allocated to Worcester, MA), Norman, OK KOCM, Phoenix, AZ KDTP, Honolulu, HI KWBN 44 and Little Rock, AZ KKAP. (Exhibit 18 hereto.) While the above stations are licensed to different entities, Marcus Lamb is shown in applications on file with the Commission as the President of each entity: WYDN-TV, Educational Public TV Corporation; KMPX-TV, KLTJ-TV, and KRMT-TV, Word of God Fellowship, Inc.; KDTP-TV, Community Television Educators, Inc.; KWBN HO'ONA'AUAO-TV, Community TV, Inc. Daystar is also currently seeking approval to transfer two full-power commercial licenses for educational licenses: Dallas KMPX and Phoenix KDTP.

In addition, Section 73.621(d) permits a noncommercial educational station to present programming produced by or at the expense of, or furnished by persons other than the licensee only if no other consideration than the furnishing of the program and the costs incidental to its production and broadcast are received by the licensee. As explained, Daystar has a \$3500/half-hour rate for programming time on its network. Consideration received for the sale of program time on Daystar undoubtedly includes the value of the broadcast of that programming on the noncommercial educational stations which Daystar represents that it owns and operates. This presumed sale of program time on noncommercial educational stations is prohibited by Section 73.621(d).

Further, section 73.621(e) provides that each noncommercial educational station shall furnish a nonprofit and noncommercial broadcast service. Noncommercial educational stations are precluded from broadcasting promotional announcements for consideration and are only permitted to acknowledge contributions. The scheduling of any announcements and acknowledgements may not interrupt regular programming. Daystar publishes a rate card for spot announcement time. (Exhibit 9 hereto.) This rate card is for advertisements and such pricing presumably includes the value of the audience obtained by broadcasting Network advertising on the local noncommercial educational stations. Daystar's sale of advertising time on noncommercial educational stations, and the carriage of that commercial programming on those stations, violates the Commission's Rules.<sup>8</sup>

A review of Daystar broadcasts also shows that Daystar is promoting the sale of materials by a for-profit entity, including advising the audience that even more items are available for

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<sup>8</sup> Daystar apparently operates similar to the major commercial television networks — CBS, ABC, NBC, and FOX — which sell network program time that includes the value of the audience reached by affiliates.

purchase on that entity's web page, in further violation of rules against promoting for profit entities and products on educational stations and public interest channels. (Tape included as Exhibit 17 hereto.) Because it engages in significant on- and off-the-air commercial activities, Daystar is not an eligible public-interest programmer and should not be permitted to broadcast as one on public-interest set-aside capacity

**4. Daystar's broadcast as a public-interest programmer violates Commission rules because Daystar offered, and EchoStar accepted, excess compensation in exchange for public-interest carriage.**

Moreover, Daystar admits in its *Request* that it traded certain of its local-into-local stations' must-carry rights in exchange for public-interest carriage on the DISH Network. (*Request*, p. 3) ("Daystar has entered into an agreement with EchoStar whereby EchoStar would carry Daystar programming for good and valuable consideration, including the forbearance of some of Daystar's owned and operated broadcast stations from exercising their "must carry" rights in areas where EchoStar is providing local-into-local service ...."). Dominion submits that this exchange of bandwidth for public-interest carriage violates Commission rules relating to the exchange of excess compensation when choosing among public-interest programmers, and discriminates against smaller public-interest programmers that cannot offer this excess compensation.

Subsection 73.701(c)(5) of the Commission's rules limits the amount that a DBS provider can charge for capacity on a set-aside channel. In particular, the rules provide that a DBS provider's charges shall not exceed 50% of the total direct costs for making the channel available.<sup>9</sup> In applying the 50% to total direct costs, the FCC defines direct costs to include only the cost of transmitting the signal to the uplink facility and uplinking the signal to the satellite.

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<sup>9</sup> This provision is based on statutory direction. (Exhibit 5 hereto at ¶ 131.)

The statute specifically excludes from direct costs marketing costs, general administrative costs and similar overhead costs of the provider of direct broadcast satellite service. Thus, the rule is designed to carefully limit the consideration a DBS provider can charge for a set aside channel. According to its public file, EchoStar charges its public interest programmers, *including Daystar*, a \$10,371.66/mo. rate.

In exchange for choosing Daystar over the other eligible programmers that applied for public-interest carriage on DISH, Daystar offered, and EchoStar accepted, a waiver of all of Daystar's local-into-local stations' must-carry rights. In particular, on August 20, 2002, Marcus Lamb wrote to Charlie Ergen of EchoStar to request public-interest carriage on DISH. In addition to promising political favors designed to assist EchoStar in its failed merger attempt with Hughes Electronics, Lamb stated that, in exchange for public-interest carriage, "Daystar would drop our rights to our current eight Must Carry Stations and our future Must Carry Stations. This frees up your bandwidth." (Exhibit 10 hereto, p. 3.)

In October 2002, Lamb engaged in a series of e-mails with Eric Sahl of EchoStar in which Daystar again noted that it will waive its must-carry rights for eight stations, "which takes up a lot of spectrum (money) for EchoStar." (Exhibit 11 hereto.) In response, Sahl stated on behalf of EchoStar that "we would expect that national carriage [of Daystar] would include a waiver of your stations entitled to [Must Carry], both today and in the future." (Exhibit 12 hereto.) Lamb replied as follows: "You are exactly right. If we have national coverage on the DISH Network, then I am offering a waiver of all of our **current** Must Carry Stations, and a waiver of all of our **future** Must Carry Stations." (Exhibit 13 hereto.)

Accordingly, as a “Side Letter Agreement” to its public-interest contract, EchoStar and Daystar agreed that Daystar waived its must-carry rights for its local-into-local stations in exchange for public-interest carriage on the DISH Network. (See Exhibit 14 hereto.)

Then, in March 2003, EchoStar and Daystar agreed that EchoStar would migrate Daystar’s public-interest broadcast on DISH to the EchoStar full CONUS satellite located at the 110 degree orbital location. (Exhibit 15 hereto.) EchoStar conditioned this migration “upon Daystar’s acknowledgment of the binding nature of the existing public-interest agreement and side-letter agreement (in which Daystar waived carriage of all of its broadcast stations under federal must-carry regulations).” (*Id.*) Additionally, EchoStar informed Daystar that it must “waive and release any [and] all claims to date with respect to EchoStar’s carriage of Daystar – whether as a public interest channel or with respect to any Daystar owned and operated or affiliated broadcast station.” (*Id.*) Daystar obediently complied, dismissing two complaints of its local-into-local stations against EchoStar. (Exhibit 16 hereto.)

As this correspondence makes clear, Daystar offered, and EchoStar accepted, a waiver of must-carry rights as the *quid pro quo* for choosing Daystar over the other qualified public-interest programmers that applied for carriage on DISH. The surrender of Daystar’s must-carry rights gives EchoStar transponder capacity that can then be used to provide additional programming to subscribers. The additional programming provided on this transponder capacity enhances the program packages that EchoStar offers, and enables EchoStar to increase its subscribers to the DISH Network. The capacity can be used to increase EchoStar’s number of pay-per-view channels with a more direct opportunity for EchoStar to increase its revenues. This arrangement obviously discriminates between nonprofit entities that can provide a waiver of must-carry rights as additional consideration and non-profit entities that cannot add this

additional consideration to the payment of 50% of direct costs to EchoStar in exchange for public-interest carriage. Moreover, Daystar's waiver of its must-carry rights in exchange for a national set-aside channel is contrary to the public interest. The trade results in a station's community losing the programming directed to the local community's needs and interests which a local station is required to provide.<sup>10</sup>

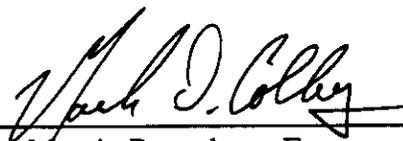
Accordingly, Daystar's exchange of its local stations' must-carry rights for public-interest carriage on the DISH Network, in addition to the standard monthly fee charged to public interest programmers, constitutes excessive compensation in violation of Commission rules.

### Conclusion

For these reasons, Dominion respectfully requests that the Commission deny Daystar's *Request*, and asks that the Commission issue a ruling finding that Daystar is not an eligible noncommercial educational or public-interest programmer, and that the waiver of must-carry rights constitutes excessive compensation under the DBS public-interest regulations.

Respectfully submitted,

Holland & Knight LLP



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<sup>10</sup> Indeed, Commission Chairman Powell recently formed a "Localism Task Force" to promote localism in television broadcasting. Daystar's waiver of its local-into-local stations' must-carry rights not only discriminates against smaller public-interest entities, but circumvents the task force's goal to promote local television broadcasting.

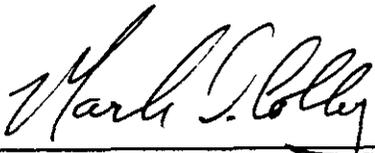
## Certificate of Service

I certify that on Sept. 2, 2003, I mailed a copy of the foregoing documents to the following:

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Federal Communications Commission

DA 99-915

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

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| In the Matter of  | ) |  |
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| Dominion Video Satellite, Inc.  | ) |  |
|   | ) |  |
| Application for Minor Modification of<br>Authority to Construct and Launch and to<br>Continue Construction and Launch of<br>Planned Satellite at 61.5° W.L. | ) | File No.: 12-SAT-ML-97<br>IBFS File No.: SAT-MOD-19961108-00132    |
|   | ) |  |
| Application for Additional Time to<br>Construct and Launch Direct Broadcast<br>Satellites   | ) | File No.: 13-SAT-MP/ML-97<br>IBFS File No.: SAT-MOD-19961108-00133 |
|   | ) |  |
| Application for Launch Authority  | ) | File No.: 108-SAT-LA-97<br>IBFS File No.: SAT-L/A-19970814-00074   |

ORDER AND AUTHORIZATION

Adopted: May 14, 1999

Released: May 17, 1999

By the Acting Chief, International Bureau:

I. INTRODUCTION

1. By this Order and Authorization, we grant Dominion Video Satellite, Inc. ("DVSI") authority to commence operation of a direct broadcast satellite ("DBS") service on its assigned channels (25 - 32) at the 61.5° W.L. orbital location, using the EchoStar III satellite which is currently operating at that location. Grant of this authorization will permit DVSI to commence DBS service to the public immediately. We grant DVSI, on our own motion, a waiver of the satellite construction and launch requirement of the DBS due diligence rules.<sup>1</sup> We also dismiss as moot DVSI's requests for (1) minor modification of its authority to construct and launch a satellite at 61.5° W.L., (2) additional time to construct and launch DBS satellites, and (3) launch authority at 61.5° W.L.<sup>2</sup>

<sup>1</sup> 47 C.F.R. § 100.19.

<sup>2</sup> Applications of Dominion Video Satellite, Inc., For Minor Modification of Authority to Construct and Launch, File No.: 12-SAT-ML-97, IBFS File No.: SAT-MOD-19961108-00132 (Nov. 8, 1996) ("Application for Minor Modification"); For Additional Time to Construct and Launch, File No.: 13-SAT-MP/ML-97, IBFS File No.: SAT-MOD-19961108-00133 (Nov. 8, 1996) ("Application for Additional Time"); For Launch Authority, File No.: 108-SAT-LA-97, IBFS File No.: SAT-L/A-19970814-00074 (Aug. 14, 1997) ("Application for Launch Authority").

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II. BACKGROUND

2. In 1982, DVSI was granted a DBS system construction permit.<sup>2</sup> DVSI was not, however, assigned DBS channels or authorized to launch and operate a DBS system at the time it was granted its construction permit. In 1988, DVSI was granted a four-year extension to commence operation.<sup>3</sup> Five years later, in 1993, the Commission granted DVSI a second extension of time to begin operation of its DBS system which expired on December 4, 1996.<sup>4</sup> In 1995, the International Bureau found DVSI had satisfied the first component of due diligence and assigned it eight DBS channels at the 61.5° W.L. orbital location.<sup>5</sup> Those eight channels are the subject of this Order.

3. In July 1996, according to DVSI's applications, DVSI and EchoStar entered into a "Direct Broadcast Service Transponder Lease, Channel Use and Programming Agreement" ("Agreement").<sup>6</sup> Among other things, the Agreement gives DVSI the right to lease eight transponders on EchoStar III, located at 61.5° W.L., in order to commence DBS service on its authorized channels that location.<sup>7</sup>

4. In its pending applications, DVSI asks us to rule that its lease of transponder capacity on the EchoStar III satellite collocated at 61.5° W.L. satisfies its due diligence requirements for its channels at that location.<sup>8</sup> Tempo Satellite, Inc. ("Tempo") opposes all three of DVSI's related

<sup>2</sup> CBS, Inc., Memorandum Opinion & Order, 9 FCC2d 64 (1982). Dominion originally was authorized under the name Video Satellite Systems, Inc.

<sup>3</sup> Dominion Video Satellite, Inc., Memorandum Opinion & Order, 3 FCC Rcd 6258 (1988).

<sup>4</sup> Dominion Video Satellite, Inc., Memorandum Opinion & Order, 8 FCC Rcd 6680 (1993).

<sup>5</sup> Application of Dominion Video Satellite, Inc. for Assignment of Direct Broadcast Satellite Orbital Positions and Channels, Memorandum Opinion & Order, 10 FCC Rcd 10480 (1995).

<sup>6</sup> DBS Transponder Lease, Channel Use and Programming Agreement of Dominion Video Satellite, Inc., EchoStar Satellite Corporation, Directsat Corporation ("Directsat"), Direct Broadcasting Satellite Corporation ("DBSC"), Direct Broadcast Satellite Corporation ("DBSCD"), and EchoSphere Corporation ("EchoSphere") (July 18, 1996) ("Agreement"). EchoStar, through its affiliate Direct Broadcast Satellite Corporation (DBSC), launched a satellite into 61.5° W.L. That satellite, EchoStar III, became operational in the Spring 1998. Direct Broadcast Satellite Corporation, Order & Authorization, 13 FCC Rcd 10080 (1997), Letter to Direct Broadcast Satellite Corporation from Regina M. Keeney, Bureau Chief, FCC, dated January 28, 1998, 13 FCC Rcd 10395 (1998) (license to cover operation of satellite space station on assigned DBS channels at 61.5° W.L.).

<sup>7</sup> Concurrently, DVSI filed its Application for Additional Time requesting an extension of time until December 4, 2000 to construct and launch its DBS satellites. Tempo filed a Petition to Deny both of DVSI's applications ("Petition to Deny").

<sup>8</sup> Dominion Video Satellite, Inc. Application for Authority to Launch Authorized Frequencies on Direct Broadcast Satellite Corporation Satellite at 61.5° W.L., File No. 106-SAT-LA-97, filed August 14, 1997.

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applications.<sup>10</sup>

III. DISCUSSION

5. Under Section 309 of the Communications Act of 1934, as amended ("Communications Act"),<sup>11</sup> the Commission shall determine whether the public interest, convenience and necessity will be served by granting of license applications.<sup>12</sup> The Commission also may, on its own motion,<sup>13</sup> grant a waiver of its rules in a particular case when the relief requested would not undermine the policy objective of the rule in question and would otherwise serve the public interest.<sup>14</sup> The issue raised in this case is whether waiving the DBS due diligence rule (Section 100.19), requiring construction and launch of a satellite, is in the public interest in this particular situation.

A. The DBS Due Diligence Rules

6. The Commission's DBS due diligence rules are contained in Section 100.19 of the Rules<sup>15</sup> and contain two prongs. The first prong requires a DBS permittee to complete contracting for its satellite(s) within a year of receiving its construction permit. The second prong states, in pertinent part, "[t]he satellite stations shall also be required to be in operation within six years of the construction permit grant."<sup>16</sup> The due diligence rules also provide that "DBS permittees and licensees shall be required to proceed consistent with all applicable due diligence obligations, unless otherwise determined by the Commission upon proper showing in any particular case."<sup>17</sup> The purpose of the due diligence rules is to ensure that permittees are committed to implementing service to the public as

<sup>10</sup> Tempo Petition to Deny, filed December 23, 1996 (opposing DVSF's Application for Minor Modification and Application for Additional Time), and Tempo Petition to Dismiss or Deny, filed September 12, 1997 (opposing DVSF's Application for Launch Authority).

<sup>11</sup> 47 U.S.C. § 309.

<sup>12</sup> *Id.*

<sup>13</sup> 47 C.F.R. § 1.3.

<sup>14</sup> *Walt Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

<sup>15</sup> 47 C.F.R. § 100.19.

<sup>16</sup> *Id.* In 1995, the Commission added to the DBS Rules the requirement that those granted construction permits after January 19, 1996 complete construction of their first satellite within four years of receiving their construction permit because of its concern that the existing due diligence rules were not sufficient to ensure "consistent and purposeful progress by DBS permittees." *Revision of the Rules and Policies for the Direct Broadcast Satellite Service*, Notice of Proposed Rulemaking, 11 FCC Rcd 1297 (1995) at § 26. See also *Advanced Communications Corp.*, Memorandum Opinion & Order, 11 FCC Rcd 3399, 3421 (1995).

<sup>17</sup> 47 C.F.R. § 100.19(a).

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quickly as possible and to prevent speculative warehousing of spectrum.<sup>18</sup>

7. DVSI acknowledges it has not built its satellites within the Commission's due diligence deadline. DVSI, however, seeks authority to use EchoStar III in lieu of constructing and launching its own satellite in order to commence service from its assigned channels at 61.5° W.L. Nothing in the Commission's rules, however, suggests that leasing capacity on another space station licensed to another DBS operator satisfies this due diligence requirement. Thus, we cannot find that DVSI has met the DBS due diligence construction and launch requirement.

B. Waiver of the Due Diligence Rules

8. We believe a waiver of Section 100 is appropriate here and waive the rule. As to the public interest prong of *Walt Radio*, a waiver will serve the public interest in several respects. First, it will facilitate deployment of service to the public. In 1991, the Commission authorized joint use of a satellite by United States Satellite Broadcasting ("USSB") and DirecTV, which was then under construction by DirecTV, to implement their respective DBS systems.<sup>19</sup> Under the USSB/DirecTV arrangement, USSB was authorized to provide DBS service transmitting on its five assigned channels at 101° W.L. using a portion of a DBS satellite — five transponders — purchased from DirecTV.<sup>20</sup> In the USSB case, the Commission held that because of USSB's efforts, the difficulties overcome, the rights of all parties, and the ultimate goal of service to the public, grant of the USSB request would serve the public interest.<sup>21</sup> The Commission recently approved DirecTV's acquisition of USSB's DBS licenses.<sup>22</sup> In doing so, the Commission waived the DBS due diligence rule requiring satellite construction for USSB's assigned channels at the 110° W.L. orbital location.

9. DVSI states that it currently has 50,000 subscribers through its program offering on

<sup>18</sup> DBS Order 90 FCC26 at 719 ¶ 114. See also *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, Report & Order, 11 FCC Red 9712, 15 - 16 ¶ 10 (1995) (adoption of additional due diligence requirements applicable to auction licensees is designed to "ensure consistent and purposeful progress toward construction and operation of DBS systems by those receiving permits" and to further the "congressional goals of preventing warehousing of spectrum and encouraging investment in and rapid deployment of new services." *Ching* 47 C.F.R. § 309.0(X)(B)).

<sup>19</sup> *United States Satellite Broadcasting Co.*, Memorandum Opinion & Order, 7 FCC Red 7247, 49 - 50 ¶¶ 11, 12 (1992) (USSB) (authorization found to be in the public interest because USSB purchased five transponder payload on DirecTV satellite to be located at same orbital location as USSB's channel assignment; satellite components specifically enumerated in contract; USSB will have "full operational control" over five transponders enabling it to cease operations; and USSB will have sole discretion over content of programming on its five assigned channels).

<sup>20</sup> USSB, 7 FCC Red 7250 at ¶ 18.

<sup>21</sup> *Id.*

<sup>22</sup> *United States Satellite Broadcasting and DirecTV Enterprises, Inc.*, Order & Authorization, DA 99-633 (Int'l Bureau, April 1, 1999) (USSB/DirecTV).

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one of EchoStar's channels at 61.5° W.L.<sup>23</sup> DVSI is prepared to commence expanded DBS service on its assigned channels at 61.5° W.L. using EchoStar's satellite. DVSI states that it would sell the EchoStar receiving equipment to its subscribers who would then be able to receive DVSI's service. EchoStar's subscribers also would be able to receive DVSI's service. In addition, DVSI has been authorized to construct an earth station in Naples, Florida that would be capable of transmitting programming directly to transponders DVSI would use on the EchoStar III satellite.<sup>24</sup> EchoStar's satellite has a total of forty-four transponders -- more than the number of transponders necessary to provide service on its eleven assigned channels -- which permits EchoStar to offer its extra transponder capacity to DVSI. Therefore, DVSI's use of these transponders to transmit on its assigned channels would not interfere with any other licensee's operations.

10. Second, authorizing DVSI to commence service will expand programming choices for DBS subscribers. For instance, USSB's DBS service, until the recent approval of the transfer of control to DirecTV, was available to the public as a stand-alone DBS service. USSB's service provides innovative alternative programming to subscribers as a complement to DirecTV's service or on its own. Similarly, DVSI's programming will provide another alternative for EchoStar subscribers, as the receiving equipment is the same, and a separate stand-alone service to DVSI's subscribers. Thus, waiving the due diligence rule will serve the public interest by increasing the choices available to consumers.

11. Third, the use of the EchoStar III satellite by DVSI at 61.5°W.L. will also make efficient use of existing DBS infrastructure. By allowing DVSI to use extra transponders on EchoStar III, rather than requiring DVSI to construct and launch another DBS satellite, the spectrum/orbit resource will be put to use more quickly and efficiently than if we were to revoke DVSI's authorization and re-license the channels, either by auction or another licensing mechanism. Taking advantage of the transponder capacity that is already in orbit will avoid the enormous expense and delay involved in constructing and launching a separate satellite. For these reasons, we believe that joint use of the EchoStar III satellite by EchoStar and DVSI promotes the public interest.

12. As to the second prong of *Wair Radio*, we also find that the policy objectives of the due diligence rules are not undermined by grant of a waiver in this case. The Commission has previously suggested that permittees may seek approval of cooperative ventures if existing assignments prove insufficient to commence an independent service.<sup>25</sup> In light of the underlying purpose of the Commission's due diligence rules to facilitate service to the public, the experience of permitting USSB and DirecTV to combine facilities, and the Commission's encouragement of permittees to seek

<sup>23</sup> Letter to Thomas Rosenberg, International Bureau, FCC, from Marvin Rosenberg, Holland & Knight LLP, Counsel for Dominion Video Satellite, Inc., dated October 1, 1998 (Attachment: Letter to Thomas Rosenberg from Robert W. Johnson, Chairman, Dominion, dated October 1, 1998).

<sup>24</sup> Public Notice, Report No. DS-1363, Authority to Construct and Operate New Earth Station, Grant (rel. July 23, 1999).

<sup>25</sup> *Continental Satellite Corporation*, Memorandum Opinion & Order, 4 FCC Red 6292, 99 ¶ 55 (1989) (because more equally qualified applicants than channels available and desire to begin construction as soon as possible, in the event all permittees retain permits and some resulting systems are unreasonably smaller than requested, permittees are free to seek Commission approval to combine assignments and resources through merger or buyout), *Advanced Communications Corporation*, Memorandum Opinion & Order, 11 FCC Red 3399, 3426-27 ¶ 73 (1995) (permittees that have entered cooperative ventures have met with success).

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approval of cooperative ventures, waiver of the construction requirement of the due diligence rules is appropriate in this particular case. Waiving the satellite construction requirement of the due diligence rules will not undermine, but rather, advance the policy objective of getting service to the public because it will permit DVSI to offer DBS service immediately. As a result, it also will encourage further competition in the multi-channel video programming distribution market.

13. The circumstances in this case justify the grant of a waiver of our due diligence rules. The facts before us demonstrate that, overall, DVSI has developed an efficient method of commencing service from its assigned DBS channels at 61.5°W.L. DVSI clearly has demonstrated by its actions that it is attempting to develop a substantial DBS service in the most efficient way possible.

### C. DVSI's Applications

14. As a result of the foregoing authorization of DVSI to commence service at 61.5°W.L., the outstanding Application for Minor Modification, Application for Additional Time, and Application for Launch Authority are moot. Tempo has raised other issues related to DVSI's applications, however, we do not need to reach those issues given our decision here. Therefore, DVSI's Application for Minor Modification, Application for Additional Time, and Application for Launch Authority are dismissed. Tempo Satellite, Inc.'s opposition to DVSI's applications is granted to the extent described above and denied in all other respects.

## IV. CONCLUSION

15. We conclude that it would serve the public interest to waive the construction component of the due diligence requirements in this particular case in order to facilitate quick deployment of DBS service to the public to increase choices to U.S. consumers, and to increase competition in the multi-channel video programming distribution market. For these reasons, we authorize DVSI to use the EchoStar satellite located at 61.5°W.L. to commence DBS service on DVSI's assigned channels. As previously stated, DVSI has filed three separate applications and Tempo has filed opposition to those applications. Therefore, the Application for Minor Modification of Authority to Construct and Launch and to Continue Construction and Launch of Planned Satellite (61.5° W.L.),<sup>26</sup> the Application for Additional Time to Construct and Launch Direct Broadcast Satellites requesting an extension of time until December 4, 2000 to construct and launch its DBS satellites,<sup>27</sup> and the Application for Launch Authority<sup>28</sup> are dismissed as moot.<sup>29</sup>

<sup>26</sup> File No. 13-SAT-ML-97, filed November 8, 1996.

<sup>27</sup> File No. 13-SAT-MP/ML-97, filed November 8, 1996.

<sup>28</sup> Dominion Video Satellite, Inc. Application for Authority to Launch Authorized Frequencies on Direct Broadcast Satellite Corporation Satellite at 61.5° W.L., File No. 102-SAT-LA-97, filed August 14, 1997.

<sup>29</sup> Filed December 23, 1996 and filed September 12, 1997, respectively.

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V. ORDERING CLAUSES

16. Accordingly, pursuant to authority delegated by Section 0.261 of the Commission's rules, 47 C.F.R. § 0.261, IT IS ORDERED that DVSI is AUTHORIZED to provide DBS service on channels 25-32, inclusive, at the 61.5°W.L. orbital location using EchoStar III.

17. IT IS FURTHER ORDERED that DVSI's authorization is SUBJECT TO THE CONDITION that DVSI comply with all applicable conditions set forth in *Direct Broadcast Satellites Corporation, Order & Authorization*, 13 FCC Red 10080 (1997), as applicable to DVSI's channels.

18. IT IS FURTHER ORDERED that DVSI is responsible for maintaining control over use of and programming on its assigned channels.

19. IT IS FURTHER ORDERED that, subject to the foregoing conditions, DVSI is licensed to provide DBS service on its assigned channels (25-32) until midnight May 14, 2009.

20. IT IS FURTHER ORDERED that this authorization does not and shall not vest in DVSI any right to operate the facilities specified herein, or any right to use the frequencies specified herein, beyond the term of this license. Neither this license nor the rights granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act or the Commission's rules. The facility specified in this license is subject to modification of technical parameters to the extent necessary to accommodate international coordination efforts involving implementation of this system in accordance with the appropriate provisions of the International Telecommunication Union Radio Regulations, including Appendix S30, S30A, and Resolution 42.

21. IT IS FURTHER ORDERED that DVSI's Application for Minor Modification of Authority to Construct and Launch and to Continue Construction and Launch of Planned Satellite (61.5° W.L.), Application for Additional Time to Construct and Launch Direct Broadcast Satellites, and the Application for Launch Authority are dismissed as moot. Tempo Satellite, Inc.'s opposition to DVSI's applications is granted to the extent described above and denied in all other respects.

22. IT IS FURTHER ORDERED that this order is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

  
Roderick K. Porter  
Acting Chief, International Bureau

**Public Interest 2002  
Public File  
As of 12/31/02**

**A. Orbital location of satellites operated by EchoStar Communications Corp.**

|            |                |
|------------|----------------|
| 119° W.L.  | Full-CONUS     |
| 110° W.L.  | Full-CONUS     |
| 61.5° W.L. | Not Full-CONUS |
| 148° W.L.  | Not Full-CONUS |

**Calculated channel capacity of EchoStar's system as of 12/31/02**

| Orbital Location                | 119°         | 110°         | 61.5°        | 148°           |
|---------------------------------|--------------|--------------|--------------|----------------|
| <b>Quarterly:</b>               |              |              |              |                |
| <b>3/31/02</b>                  | 168 channels | 232 channels | 110 channels | 139.5 channels |
| <b>6/30/02</b>                  | 168 channels | 232 channels | 110 channels | 139.5 channels |
| <b>9/30/02</b>                  | 168 channels | 232 channels | 110 channels | 139.5 channels |
| <b>12/31/02</b>                 | 168 channels | 232 channels | 110 channels | 139.5 channels |
| <b>Yearly Average</b>           | 168 channels | 232 channels | 110 channels | 139.5 channels |
| <b>Current Channels Carried</b> | 7            | 10           | 6            | 6              |

**Total Channels Carried: 23**

*\* Includes simulcast channels*



SKY-0201

**B. Entities to whom capacity is granted**

| Entities to whom capacity is granted                 | Amount of Capacity | Conditions | Rates          |
|--|--------------------|------------|----------------|
| DayStar.<br>Contact: Marcus D. Lamb, President & CEO | 1 video channel    | Ongoing    | \$10,371.66/mo |

**C.**

| Entities requesting capacity   | Disposition  | Reason   |
|--------------------------------|--------------|--|
| Clara Vision                   | Not Accepted | Number of applicants exceeded available slots.     |
| Daystar                        | Accepted     | Successfully met the criteria of the FCC, EchoStar |
| FamilyNet                      | Not Accepted | Number of applicants exceeded available slots.     |
| Health TV Channel              | Not Accepted | Number of applicants exceeded available slots.     |
| Inspirational Networks         | Not Accepted | Number of applicants exceeded available slots.     |
| Prophetic Word Ministries      | Not Accepted | Number of applicants exceeded available slots.     |
| Shepherd's Chapel              | Not Accepted | Number of applicants exceeded available slots.     |
| Tomorrow's Planet              | Not Accepted | Number of applicants exceeded available slots.     |
| Universal Education Foundation | Not Accepted | Number of applicants exceeded available slots.     |
| Word Network, The              | Not Accepted | Number of applicants exceeded available slots.     |

**D. Current Entities with Capacity**

| Current Entities with capacity   | Amount of Capacity | Conditions        | Rates          |
|--|--------------------|-------------------|----------------|
| Brigham Young University<br>Contact: John Reim, Director/CEO, KBYU TV                            | 1 video channel    | 12-month contract | \$10,371.66/mo |
| California Community Colleges Satellite Network<br>Contact: Sherilyn Hargraves, Project Director | 1 video channel    | 3-month contract  | \$10,371.66/mo |
| CoLours TV Network<br>Contact : Tracy Jenkins-Winchester   | 1 video channel    | 12-month contract | \$10,371.66/mo |
| *CSPAN<br>Contact: Peter Kiley, National Accounts  | 1 video channel    | ongoing           | \$0.00         |

A DBS operator cannot initially select a qualified programmer to fill more than one of its reserved channels except that after all qualified entities that have sought access have been offered access on at least one channel, a provider may allocate additional channels to qualified programmers without having to make additional efforts to secure other qualified programmers.

(5) *Rules, Terms and Conditions.*

(A) In making the required reserved capacity available, DBS providers cannot charge rates that exceed costs that are directly related to making the capacity available to qualified programmers. Direct costs include only the cost of transmitting the signal to the uplink facility and uplinking the signal to the satellite.

(B) Rates for capacity reserved under subparagraph (c)(1) shall not exceed 50 percent of the direct costs as defined in subparagraph (e)(3)(A) above.

(C) Nothing in this section shall be construed to prohibit DBS providers from negotiating rates with qualified programmers that are less than 50 percent of direct costs or from paying qualified programmers for the use of their programming.

(D) DBS providers shall reserve discrete channels and offer these to qualifying programmers at consistent times to fulfill the reservation requirement described in these rules.

(6) *Public File.*

(A) Each DBS provider shall keep and permit public inspection of a complete and orderly record of:

- (i) quarterly measurements of channel capacity and yearly average calculations on which it bases its four percent reservation, as well as its response to any capacity changes;
- (ii) a record of entities to whom noncommercial capacity is being provided, the amount of capacity being provided to each entity, the conditions under which it is being provided, the rates, if any, being paid by the entity;
- (iii) a record of entities that have requested capacity, disposition of those requests and reasons for the disposition; and
- (iv) a record of all requests for political advertising time and the disposition of those requests.

(B) All records required by this paragraph shall be placed in a file available to the public as soon as possible and shall be retained for a period of two years.

(7) *Effective Date.*

DBS providers are required to make channel capacity available pursuant to subsection (c) of this rule upon the effective date. Programming provided pursuant to this rule must be available to the public no later than six months after the effective date.

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