

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
Exclusivity Agreements	)	Docket No. MB 03-206
Affecting Direct Broadcast	)	
Satellite (DBS) Providers	)	
	)	
Request for Section 403 Inquiry	)	

**REPLY TO COMMENTS**

**WORD OF GOD FELLOWSHIP, INC.  
d/b/a DAYSTAR TELEVISION NETWORK**

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October 31, 2003

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## **SUMMARY**

Daystar's Request sought FCC examination of contracts entered into by DBS operators which limit the ability of such operators to provide programming to their subscribers, particularly if such contracts impact the DBS operators' ability to fulfill their public interest obligations under the channel set aside requirements.

For the most part, Commenters supported the proposition that exclusivity arrangements which limit the provision of broad genres of programming are contrary to established important governmental interests.

The Dominion-EchoStar arrangement, used by Daystar as an example of an exclusive arrangement, gives a DBS operator/programmer rights to control the selection and content of programming provided by a DBS operator. Such control is inimical to Supreme Court upheld free speech requirements, fair competition and the Congressional mandate that DBS operators provide, in the public interest, channels for non-commercial educational programming free from editorial control.

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To: The Commission		

**REPLY TO COMMENTS**

Word of God Fellowship, Inc., dba Daystar Television Network (“Daystar”), by its attorneys, hereby replies to the Comments filed in the above-captioned matter.

By Public Notice, DA 03-2884, released September 16, 2003, the Media Bureau sought comments on issues raised by Daystar in its Request for Section 403 Inquiry and for Declaratory Ruling (“Request”). The Bureau set October 16, 2003 as the deadline for submission of Comments and October 31, 2003 as the date for Replies.

Comments were filed and served upon Daystar, and/or appeared on the Federal Communication Commission’s (“FCC’s”) ECFS as having been filed as of October 24, 2003, by the following parties: American Distance Education Consortium (“ADEC”), EchoStar Satellite Corporation (“EchoStar”), Trinity Christian Center of Santa Ana, Inc., d/b/a Trinity

Broadcasting Network and Tri-State Christian Television, Inc. (collectively “Trinity”), and Dominion Video Satellite, Inc. (“Dominion”).<sup>1</sup>

## **Request and Comments**

### **1. Restatement of The Issues Presented by Daystar’s Request.**

The opposition and comments of Dominion seem to confuse the issues that are squarely before the FCC in this matter. Daystar’s Request asked the FCC to examine the issue of exclusive programming contracts entered into by Direct Broadcast Satellite (“DBS”) providers, and their effect on the provision of programming to subscribers and consumers, particularly as such contracts may affect the public interest obligations of DBS operators. More specifically Daystar’s Request asked the FCC to examine whether a DBS operator can, by an exclusivity clause in a contract with another DBS operator, eliminate broad genres of Qualified Public Interest Programmers from even being considered for selection for the 4% public interest set aside obligations of that DBS Programmer, based solely on the nature of the content of that Qualified Public Interest Programmer’s programming. In other words, is it permissible for DBS operators by private contract to editorially control public interest

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<sup>1</sup> Dominion filed a comprehensive Opposition to the Daystar Petition on September 2, 2003 (refiled on September 12, 2003), prior to the release of the Public Notice. Since that time, Dominion has bifurcated its Opposition. Sections 1 and 2 addressed the matters on which the FCC sought comment, which were further addressed by Dominion in its Comments filed October 16, 2003. Sections 3 and 4 were the subject of a letter dated October 10, 2003, addressed to the FCC’s Enforcement Bureau. Since the filing with the Enforcement Bureau did not reference the Docket Number of this proceeding, and Dominion’s October 16, 2003 Comments in this proceeding also separated that filing from this matter (Dominion’s Comments, fn. 2) Dominion clearly did not intend for that to be part of this proceeding. Daystar will respond to Dominion’s filing with the Enforcement Bureau in due course.

programming to the extent of totally eliminating certain categories of content, together with the entire genre of Qualified Public Interest Programmers who provide such content.<sup>2</sup>

Contrary to what is suggested in the opposition and comments of Dominion, the import of these issues transcend the dispute and litigation between Dominion and Daystar. The answers to the questions raised by Daystar's Request are of nationwide significance, magnitude and import and will resolve the conflict between the public interest, clearly recognized by this FCC and the Supreme Court, and the Dominion Contract which is subject to a pending Federal lawsuit between Dominion and EchoStar. The policy that Daystar is asking the FCC to decide (by its action or inaction in this matter) will determine or significantly affect, now and into the future: (1) the nationwide effect of whether and to what extent DBS operators can use exclusivity clauses to edit, control or prohibit content, (2) the rights and interests of Qualified Public Interest Programmers to compete for the available public interest channel capacity, (3) whether and to what extent DBS operators who are also programmers can use exclusivity clauses to unfairly compete, and (4) whether and to what extent exclusivity agreements between DBS operators can frustrate and thwart the following recognized public interests of the viewing public, which are of the "highest order"<sup>3</sup> and which include: (i) promoting the widespread dissemination of information from a multiplicity of sources, and (ii) promoting fair competition in the market for television programming. See *Turner Broadcasting System v. FCC*, 520, U.S. 180, 189-190 (1997); *Satellite Broad. & Communs. Ass'n v. FCC*, 275 F.3d 337, 362 (4<sup>th</sup> Cir. 2002); *Implementation of Section 25 of*

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<sup>2</sup> Since the DISH Network reaches about 25 million viewers from multiple satellites at all four of the possible orbital slots and Dominion reaches only about 0.45 million viewers from only six transponders at a single wing orbital slot (61.5 degrees), for all practical purposes the elimination from the DISH Network is tantamount to elimination from the entire potential viewing audience.

*the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations*, 13 FCC Rcd. 23254, 23290-23291 (1998) (*DBS Public Interest Order*)<sup>4</sup>.

Thus the issues at hand involve the determination of issues of the Federally protected public interest inherent in the public set-aside provisions, which are rooted in First Amendment protections against content and speech censorship and which are protected against anti-competitive market foreclosure by Federal antitrust law and policy.

## **2. Other Comment Matters**

ADEC's Comments do not directly address the issue of exclusive programming contracts.<sup>5</sup> However, they support the concept of channels set aside for educational and informational programming, but it is notable that they did not file to be a PIO channel for the Dish Network for 2003.

Trinity supports the proposition that exclusive programming contracts are inimical to the public interest in that they detract from the federal policy of fostering a multiplicity of outlets for programming. According to Trinity, such agreements have the effect of creating "ghettos" for various types of programming. Further, Trinity does not believe it is in the public interest for Dominion (or, presumably, any other program supplier) to act as a gatekeeper for a particular type of programming.

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<sup>3</sup> *Turner Broadcasting System*, 520 U.S. at 190.

<sup>4</sup> "117. Imposition of this limitation, we believe, is amply justified by Congress's intention to foster through Section 335(b) a robust and editorially diverse noncommercial educational programming service. Section 335(a) requires the Commission to "impose . . . public interest or other requirements for providing video programming." As traditionally interpreted in the broadcast and cable context, the public interest is served by affording the public diverse programming." *DBS Public Interest Order* (emphasis added.)

<sup>5</sup> Since ADEC did not serve Daystar with a copy of its Comments, they are *ex parte*, but they do appear in the Commission's ECFS.

As one of the two major DBS operators, EchoStar is in a position to provide valuable insight into the effect of exclusive programming arrangements. In particular, its Comments shed light on the difficulty of attracting qualified (including financially qualified) programmers to fill its channels. EchoStar correctly notes that the FCC's duty does not extend to interpreting agreements entered into by private parties, but does include the right to determine whether certain types of agreements involving its regulatees are in the public interest.<sup>6</sup>

Not surprisingly, Dominion is opposed to the FCC's looking into exclusive programming agreements, pointing out, quite correctly, that there is no present rule precluding such arrangements. Further, Dominion rejects Daystar's suggestions that existing rules governing broadcast stations and cable systems may act as analogies in determining whether the public interest is served by allowing such agreements.<sup>7</sup>

## **Reply**

### **1. General Reply to Comments.**

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<sup>6</sup> EchoStar's Comments also address the issue of determining the extent to which non-cash compensation can be attributed to programming agreements. However, that is beyond the scope of the present inquiry into the effect upon the public interest of exclusive programming agreements.

<sup>7</sup> Dominion also notes that it is not a program supplier, but a DBS operator. Daystar's Request identified Dominion as a DBS operator and a provider of programming under the "Sky Angel" trade name. The EchoStar comments also appear to identify Dominion as a program supplier. A ruling on exclusive contracts would apply to Dominion under either identity.

This Section replies to a number of issues raised by the comments and opposition of Dominion which require elaboration, but cannot be adequately placed into a “comment and reply” format.<sup>8</sup>

**A. The Issues Raised by Daystar Are Far Reaching, Not Trivial As Indicated by Dominion.**

It is most important to consider the essence of the questions now before the FCC because a reading of all of the comments and documents filed by Dominion leaves the impression that the only thing at issue here is a simple two party dispute between Dominion and Daystar, or even more succinctly between Dominion and EchoStar, to the exclusion of Daystar. The opposition and comments of Dominion, taken as a whole, trivialize the issues and public policies at stake and present a mischaracterization of Dominion’s legal and factual position.

Dominion’s Opposition and Comments are focused solely on issues and excuses which are unique to the parties in this dispute and wholly ignore the larger issues which are raised by Daystar’s Request which are restated above. Some of the background facts associated with the Dominion Contract are instructive and help to focus on why there may not have been at the time of adoption of the *DBS Public Interest Order*, but now is, a need for further rules on the questions of permissible exclusivity clauses and the selection process of Qualified Public Interest Programmers for the available 4% set aside channels.

It is important to remember that Dominion is not merely a DBS operator; it is also a video programmer and produces at least 2 full channels of 24/7 Christian religious

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<sup>8</sup> Dominion’s Comments filed on October 16, 2003 incorporates by reference Dominion’s Opposition to Daystar Television Network’s Request for Section 403 Inquiry and Declaratory Ruling (filed Sept. 2, 2003). That

programming, one for distribution to its subscribers on the Sky Angel Network and a second for distribution to all DISH Network subscribers on its Angel One (defined below) channel. As such, Dominion is a direct competitor with Daystar, Family Net, Trinity and all other sources and producers of the very same “Christian programs” that Dominion is seeking to block from the DISH Network and restrict to the almost negligible subscriber base of Sky Angel

Thus, Dominion is in direct competition with these national Christian programming suppliers, such as Daystar, for attracting the same marketable programs of Christian ministry and education and the same eyeballs of the viewing public. In essence, Dominion is using the exclusivity clause as a weapon to unfairly compete with its direct competitors, which will result in limiting and restricting the sources of national programming available to the viewing public.

**B. The Abuses by DBS Operators Have Established A Need For New Rules Regarding Exclusivity.**

The public interest obligations of DBS operators are set forth in *DBS Public Interest Order* adopted in 1998, wherein, among other things, the FCC stated in Paragraph 99:

“Section 335(b)(3) requires DBS operators to make "channel capacity available to national educational programming suppliers" but prohibits the DBS operator from exercising "any editorial control over any video programming provided [on the reserved channels]" (emphasis added). ... We conclude that the best reading of the editorial control language is that it prohibits DBS operators 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 from among national educational programming suppliers **so long as the DBS operator does not refuse to make unused reserved capacity available to qualified suppliers.** Nor does it prohibit operators from refusing to carry non-qualifying

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Opposition (herein so called) contains lengthy statements of fact and has an entire section entitled “Argument” which properly raises the necessity for the comments and responses set forth in this Reply.

programming or ineligible programmers.” 13 FCC Rcd. 23254, 23296. (Emphasis added.)

The FCC further stated in paragraph 102 of *DBS Public Interest Order* adopted in 1998:

**“We are unwilling to assume that DBS operators will improperly attempt to influence programming content through their selection process. .... If in the future, it appears that DBS operators seek to use the selection process as a means of improperly influencing programming provided on the reserved channels, we will take appropriate action.** We decline to establish at the present time a complicated regulatory structure that sets out specific and detailed rules addressing the particular conduct DBS operators can or cannot engage in while selecting programmers. **We conclude that such detailed rules are unnecessary ... where we have no reason to believe that these entities will not fulfill their obligations under the rules.**” 13 FCC Rcd. 23254, 23297. (Emphasis added.)

The assumption of the FCC in 1998 that DBS operators would not attempt to improperly influence programming was appropriate. at the time. Unfortunately, the trust on which that assumption was based had already been violated at the time the *DBS Public Interest Order* was issued. The FCC could not have known that 2 years prior, two of the DBS operators had already done so. What we now have is proof that DBS operators have acted so as to not fulfill their obligations to the public, the FCC and network providers under the rules. Instead two of the three existing DBS operators have entered into a contract to control and thus edit the content of programs that can be broadcast on their DBS systems.

Dominion has thus used its unique position of trust as a holder of DBS construction permits and later licenses, not for the purpose of merely providing DBS carriage of other programming networks as contemplated by the Rules, but for the express and sole purpose of gaining an unfair competitive advantage for itself in at least three respects: (1) placing its own network or source of programming (Angel One) on the DISH Network and excluding from the DISH Network subscribers all other national programming network or national source

competitors such as Daystar and Family Net, thus (2) denying the DISH Network subscribing public access to a multiplicity of national programming sources of the proscribed content other than Angel One, and (3) creating a veritable monopoly for its own DBS transponders by forcing all networks or sources of Christian religious programming and all individual Christian religious programs to the untenable choice of either being carried solely on Dominion's proprietary DBS or not being carried at all on any of the DISH or Dominion satellites. Dominion has thus used its DBS license to monopolistically determine (and thus control in its sole discretion) which of the national programming networks or sources and individual programs of the proscribed content can be carried both the Dominion licensed transponders and all other satellites and transponders of . Such result is the antithesis of the public interests stated above that underpin the issuance of the DBS license to Dominion and is the trigger for the need for further rules against exclusivity clauses that act as the prohibited type of editorial control as discussed by the Commission in the *DBS Public Interest Order*. Since actual abuse is the threshold requirement for further rules, it is mandatory to see the level of abuse in the instant case. Thus, more detailed facts are required.

**C. The Dominion Exclusivity Clause And The Actions Of Dominion Are Abuses Of Publicly Held Rights That Demand Additional Rules.**

Dominion (as well as all of the other DBS operators) have been placed in a unique position of trust, as articulated in the quoted portion of paragraph 102 of the *DBS Public Interest Order* above, and as derived from the grant to them of the DBS permits and licenses by the FCC to further the public interests of promoting the widespread dissemination of information from a multiplicity of sources, and promoting fair competition in the market for

television programming. These obligations and duties are amplified in the public interest set aside obligations of DBS operators.

The problem with this exclusivity clause is that it was negotiated, executed and effective before the satellites in the contract were launched and at a time when it was impossible for Daystar, Family Net or any other network programmer to have commenced negotiations for any carriage agreement that would be impacted by the agreement. In other words, Dominion used its position of superior knowledge and its position of trust under the DBS construction permit and license to create for itself a position of unfair and vastly superior bargaining position over all possible competitors in the broadcast of an entire genre of programming content.

The same result would obtain if that genre had been weather or sports or any other entire genre of programming content. The comments of EchoStar verify that Christian religious broadcasting is the largest genre of Qualified Public Interest Programmers. Thus, by the stroke of its pen years before the satellite was launched and three (3) years before the FCC granted Dominion the necessary waiver of satellite construction and launch requirements of the due diligence rules on May 17, 1999, the largest genre or pool of Qualified Public Interest Applicants was eliminated from the DISH Network set aside selection process. Stated another way, after the passage of the Cable Act of 1992 creating the set aside obligations and preliminary implementation rules of the FCC, Dominion had already divided the spoils of the DBS licenses for its own selfish anticompetitive purposes, and thus subverted and impaired the selection process for set aside programmers by eliminating an entire genre based solely on content.

As stated above, the exclusivity clause creates the power and opportunity for the following abuses by a DBS operator: (1) excluding, based solely on content, entire genres of Qualified Public Interest Programmers from consideration in the public interest selection process, and (2) controlling, based solely on content, national programming networks and individual programs it will permit to be carried on its own small DBS Network and which of those national programming providers and individual programs will be carried on or forced to be carried on or limited to only certain other DBS Network(s).

The issue of whether Dominion, in particular, would abuse and control the power and privilege granted it by the FCC is no longer an abstract or hypothetical consideration of potential abuse via the exclusivity clause and impermissible editorial control. Not only does the subject exclusivity clause hypothetically give Dominion the power to control, censor and edit the content of DBS programming, Dominion has proven that it will exercise, and has actually exercised, that power by systematically and regularly blocking portions of Daystar's live programming that has been carried on the Dominion DBS system and by the statements, opinions and positions of Dominion in the form of trailers superimposed by Dominion on and across the Daystar programming, for the sole reason that Dominion disagreed with or did not like the content of such programming.

Dominion has also launched a serious direct marketing campaign to solicit for carriage on its Angel One the primary individual programs carried on Daystar, with the stated enticements that Angel One airtime would be free and that Angel One reaches all of the DISH subscribers unlike the other Christian networks that are limited to Dominion's subscriber base. These abuses by Dominion of its DBS license privileges are particularly disturbing when considered in light of the history of Dominion.

At the time of the Agreement in July 1996, EchoStar was a successfully operating DBS operator, However, Dominion held only rights assigned by the FCC under a construction permit for only eight (8) frequencies, or transponders at only a single orbital slot (61.5°). The construction permit had an expiration date of December 4, 1996. There was reason to conclude that further extensions of the expiration date of the construction permit were not likely.<sup>9</sup>

It is established in the pending lawsuit that Dominion could not afford the hundreds of millions of dollars required to place its own transponders into orbit in 1996, facing the real and imminent possibility of the loss of its construction permit and thus its existence. The Dominion Contract provided that Dominion would bear no cost to build or launch the satellite or any transponders, nor would it bear any cost associated with (1) the construction or operation of the satellite, transponder or uplink facilities, (2) the operation of call centers for subscription orders, (3) the facilities to code and decode signals for customers, or (4) the provision and activation of receivers for subscribers.

Thus, the key benefit of the agreement for Dominion was the launch of a satellite (at no cost to Dominion) which kept the FCC construction permits of Dominion from expiring and resulted in full FCC licenses for Dominion's eight frequencies. The exclusivity provision was clearly, in comparison, a much less significant, and ancillary, part of the Dominion Contract.

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<sup>9</sup> The construction permit was issued in 1982 and had already been extended twice: first for 4 years by Order of the Commission in 1988, and second for 5 years by Order of the FCC in 1993. In its Memorandum Opinion dated August 4, 1995, The International Bureau of the FCC stated in Paragraph 11 that "a decision by Dominion to further delay satellite construction will be considered unfavorably in any future requests Dominion may make for extension of time of its Construction Permit."

Importantly, under the Dominion Contract, Dominion obtained the right to broadcast its own Christian programming (“Angel One”) on a single channel on the DISH Network at the 119° Slot on another of EchoStar’s satellites. Angel One currently reaches over 9 million homes, or approximately 25 million viewers on DISH.

Thus, in one fell swoop, Dominion established its own right as a source or network (as opposed to a mere DBS service provider) to assemble, produce and broadcast Christian religious programming on Angel One to all subscribers for no charge, and to prohibit all of its competitor networks, such as Daystar and Family Net, from being broadcast on DISH. This gave Dominion a significant and unfair competitive advantage over all competitors with respect to the solicitation of individual Christian programs desiring to reach the DISH subscriber base and the viewing public. Today, in stark contrast to 1996, EchoStar has multiple satellites located at the 61.5°, 110°, 119°, 148° west longitude orbital slots. As a result of its exponential growth, EchoStar today has hundreds of channels on these satellites and over 20,000,000 viewers. Incredibly, Dominion takes the position that the exclusivity clause applies to all of those EchoStar satellites.

**D. The Power To Exclude Content From Public Interest Carriage Is Tantamount to Editorial Control.**

The issue of whether a rule should be adopted to preclude the subject exclusivity clause from interfering with the public interest selection process is not limited to the elimination of networks that have historically carried predominately Christian religious programs. EchoStar has stated to the 10<sup>th</sup> Circuit Court of Appeals that one of the educational Qualified Public Interest Programmers, Educating Everyone, currently carried by EchoStar on its public interest set aside channels was entirely educational and non-religious in nature at the

time it was selected, but that some time later, Educating Everyone changed the content of its programming to become predominately Christian religious programming.

Thus, in order to comply with the enforcement of the exclusivity clause sought by Dominion and the injunction entered at Dominion's request in the Federal Court case filed by Dominion in Denver (now stayed pending ruling by the 10<sup>th</sup> Circuit), EchoStar would have to instruct Educating Everyone to either change the content of its programming or be removed from the set aside channel. This is the quintessence of the type of editorial control proscribed by Section 335(b)(3).

Similarly, EchoStar followed the current FCC rules in selecting and carrying Daystar programming on DISH's public interest set aside channel, and Daystar is currently being carried as such. However, in order to comply with the enforcement of the exclusivity clause sought by Dominion and the injunction entered at Dominion's request (now stayed), EchoStar would have to instruct Daystar as a selected Qualified Public Interest Programmer that Daystar must either: (1) change the content of its programming so that it is predominately educational and not predominately Christian religious programming, or (2) have its programming removed from the set aside channel. The same holds true for Family Net.

In order to comply with the enforcement of the exclusivity sought by Dominion, EchoStar will be forced to monitor the content of all of its set aside channels to make sure that none of them transition to predominately Christian religious programming. If any does, EchoStar will have to advise them to change the content of the public programming or be removed from the set aside channel.

Finally, in order to comply with the enforcement of the exclusivity sought by Dominion, EchoStar will be forced to change its selection process for set aside applicants. by

requiring them to submit the content of all of their programming so that EchoStar can determine if the content is predominately Christian religious programming or not. The selection will be determined based on the content of the applicant.

Thus, in every conceivable situation regarding the selection process and in the carriage of every public interest set aside applicant, EchoStar will in essence and in fact be required to control and edit the content of the public interest broadcasting, which is impermissible in any application of the public interests and policies adopted by Congress and the FCC in connection with Section 335(b)(3).

**E. The Exclusivity Clause Violates Standard of Fair Competition Of The Public Interest Selection Process Embodied In Section 335(B)(3) And The FCC Implementation Rules Mandating Fair Competition.**

There was great debate and consideration given to the selection process for national educational programming suppliers and its impact on the prohibited editorial control in the *DBS Public Interest Order*. Paragraphs 97 -114 go into great discussion about the selection process and how the DBS operator should have freedom of selection. The eligibility requirements for national educational programming suppliers were established by Congress in the Cable Act of 1992.

To meet the Congressional mandate and the well recognized public policies of the “highest order”, the selection process cannot block the public’s interest to (1) promote the widespread dissemination of information from a multiplicity of sources, and (2) promote **fair competition** in the market for television programming. These requirements apply equally to the commercial and non-commercial/public interest areas. It is antithetical and untenable to have a statute that mandates the set aside of channel capacity for “public interest”

programming and at the same time allow a selection process that fails to meet the well established “public policies and interests” upon which the statute is based.

Therefore, the public interest set aside selection process must provide the applicants, such as Daystar and Family Net, the opportunity of **fair competition** with the other applicants for the available set aside capacity. Banning Daystar and all other Christian religious programmers who are Qualified Public Interest Programmers from the set aside selection procedure based solely on the content of their programming is patently **unfair competition** and will in turn defeat the promotion of the widespread dissemination of information from a multiplicity of sources.

Banning qualified public interest applicants from consideration in the selection process is untenable for another reason: Congress defined the qualifications for applicants, and the exclusivity clause has the effect of supplanting those qualifications for set aside applicants established by Congress with the qualifications set by two private contracting parties for their own purposes, and without any opportunity to consider the interests of the public viewers that Congress sought to protect. In essence by entering into the private exclusivity clause before the set aside rules were adopted and before any applicants could apply for the set aside channels, the DBS operators *a fortiori* replaced the interests of the public viewers with their own private business interests.

Because of the strong public interests and strongly stated Congressional intent in adopting the pertinent provisions of the Cable Act of 1992, the public interest set aside and the robust and editorially diverse noncommercial educational programming was of the utmost importance to Congress. No private parties operating under private contracts can be permitted

to undermine, override and supplant the set aside and the selection process that Congress went to such effort to establish.

## **2. Reply To Specific Comments.**

As Trinity cogently commented, federal policy has long been to foster a multiplicity of programming sources (or voices). In *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997), the Supreme Court reaffirmed that “promoting the widespread dissemination of information from a multiplicity of sources” is “an important governmental interest”. It is in light of that policy determination that the Request and the Comments must be studied.

An exclusive programming arrangement, by definition, places some limit on the widespread dissemination of information or the multiplicity of sources. This is not to say, however, that all exclusive arrangements should be prohibited. Our focus here is that exclusive arrangements that block and exclude broad genres of programming based solely on content from the entire DISH Network are inimical to the recognized public policies and interests.

Dominion states that Section 73.658(m)(2) of the Rules permits an exclusive arrangement by which a single television station has national rights to the broadcast of a program. Dominion also points to rules governing cable systems which uphold syndicated program exclusivity. However, it should be noted that those rules apply to exclusive rights with respect to a particular program or broadcast, not an entire genre of programming.

Similarly, in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 10 FCC Rcd. 3105 (1994), cited by Dominion, while the FCC

declined to broaden the scope of Section 76.1002 to prohibit the exclusive DBS contracts then at issue, those contracts at issue involved agreements between a DBS operator and a program supplier granting exclusive rights with respect to two movie channels from one orbital location.

In other words, that exclusive arrangement involved the exclusive right of a DBS operator to exclusive carriage of the two proprietary movie channels. The exclusive arrangement did not prohibit the DBS operator from carrying movie content in general or other movie channels on the satellite at the same orbital location, nor did they prohibit the movie programmer from contracting for carriage of those two movie channels by another DBS operator on its satellite at a different orbital location.

It also bears mentioning that the arrangement thus approved by the FCC occurred nearly a decade ago, when the DBS industry was truly in its infancy. Today, the DBS industry is fully-established, or at least nearly so, as a competitor to cable. Accordingly, arrangements which might have been appropriate ten years ago to assist the growth of the DBS competition might not be acceptable today.

At issue here is an agreement admittedly entered into years ago.<sup>10</sup> Further, it is not disclosed in this record whether the arrangement has any termination date short of EchoStar's loss of FCC authority.<sup>11</sup> Unlike more narrowly drawn contracts involving a single program, sporting event, or channel, the Dominion arrangement prohibits one of only two major DBS operators from delivering an entire genre of programming to its subscribers. EchoStar

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<sup>10</sup> Daystar used the Dominion/EchoStar Contract as an example of an exclusive arrangement because it is the only such agreement of which it was aware. There may be other agreements involving EchoStar or other DBS operators to which any declaratory ruling would also apply.

subscribers are deprived of receiving any Christian programming unless they are willing to pay additional subscription fees for the programming that is delivered by Dominion on its two transponders.

Imagine a similar arrangement involving news channels. Would the public interest be served if DISH (or DirecTV) provided only Fox News or only CNN or only MSNBC? More comparable to our situation would be an arrangement where one of the two major DBS operators was prohibited from carriage of any news channels. It cannot be disputed that these programmers are direct competitors for eyeballs, and that subscribers should have the opportunity to view all of them.

Even within the narrower realm of Christian programmers, should one entity be able to limit DISH (or DirecTV) subscribers to experiencing its particular sect of Christian religion or programming? Dominion has sent letters in the past stating that if the attempted DISH/DirecTV merger had occurred, Dominion's exclusivity agreement with EchoStar would survive the merger and Dominion would be the sole carrier of Christian religious programs on DBS.

Carried to its extreme, a DBS operator could theoretically enter into exclusive arrangements with purveyors of each type of programming content, thereby eliminating a multiplicity of voices within each genre. As Trinity has pointed out, there is little reason to doubt that a DBS operator would give scant consideration to the impact on the public interest of exclusivity arrangements. It is their business judgments and bottom line that would dictate their interests.

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<sup>11</sup> Dominion acknowledges that if its exclusivity agreement conflicts with a rule, such as the must-carry rule, the agreement must yield. Similarly, if the agreement is found to conflict with an announced public interest policy, the agreement must also yield.

When the FCC adopted the 4% set aside for satisfying the public interest obligations of DBS operators, it set forth only broad guidelines as far as qualifications are concerned. “We believe that the tax code definition of non-profit will apply to qualify an entity as an eligible national educational programming supplier. Thus, an entity with an educational mission that is organized under the tax code as a nonprofit corporation will be eligible as a national educational program supplier.”<sup>12</sup> Except for prohibiting DBS operators from exercising editorial control over the programming provided, the FCC gave the DBS operators wide discretion to choose from among eligible programmers to fill their channels.

In the *DBS Public Interest Order*, the FCC was clearly concerned with the selection process “when the reserved channels cannot accommodate all eligible programmers who wish to use the channels.” 13 FCC Rcd. at 23299. EchoStar’s Comments indicate that such a situation is not, at least at this time, its problem. EchoStar even states that it has gone so far as to subsidize some eligible programmers by waiving access fees or manually feeding tapes. Yet, it still cannot fill its set aside channels.

If there is to be a “gatekeeper” for determining the use of the reserved channels, the FCC made it clear that Congress intended this is to be the DBS operator. While the FCC gave an affirmative nod to the use of a consortium or clearinghouse to assist the DBS operator in the selection of qualified programmers, the final determination for compliance with the requirements rests with the DBS operator. 13 FCC Rcd. at 23300.

## **Conclusion**

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<sup>12</sup> *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations*, 13 FCC Rcd. 23254, 23290-23291 (1998) (*DBS Public Interest Order*) (internal footnote omitted).

Daystar is disappointed that other parties such as DIRECTV, Inc. (the only other major DBS operator), major cable companies or other program suppliers, all of whom might have supplied valuable information, did not respond to the FCC's invitation to submit comments on this important issue. It is understandable why they did not. They are not directly impacted by the Dominion exclusivity clause and have no such content impairments to their public interest selection process. Nevertheless, it is clear that exclusivity arrangements of the breadth of the EchoStar-Dominion agreement severely and adversely impact the federal policy of fostering a multiplicity of voices. Such agreements that block programming from DBS operators on a broad content basis are inimical to the very strong public policies underpinning the scheme of DBS operation and should be declared to be contrary to the public interest and against public policy.<sup>13</sup>

Respectfully submitted,

**WORD OF GOD FELLOWSHIP, INC.**  
**d/b/a DAYSTAR TELEVISION NETWORK**

By: \_\_\_\_\_

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<sup>13</sup> Because agreements of this type also impair a DBS operator's ability to meet its obligations with respect to channels set aside for non-commercial educational purposes, they are even more to be deemed objectionable, and at a minimum should be prohibited with respect to such set aside programming .

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## CERTIFICATE OF SERVICE

I, Molly M. Parezo, secretary at Koerner & Olender, P.C., do hereby certify that on this 31<sup>st</sup> day of October, 2003, I caused a copy of the foregoing **“Reply to Comments”** to be served by first-class mail, postage prepaid, to the following:

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