



WASHINGTON, DC OFFICE

*fifth floor*

*flour mill building*

*1000 potomac street nw*

*washington, dc 20007-3501*

TEL 202 965 7880 FAX 202 965 1729

OTHER OFFICES

*new york, new york*

*portland, oregon*

*seattle, washington*

GSBLAW.COM

GARVEY SCHUBERT BARER

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

*Please reply to* JAMES E. DUNSTAN  
*jdunstan@gsblaw.com* TEL (202) 298-2534

October 31, 2003

**VIA ELECTRONIC FILING**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12th Street, S.W.  
Washington, D.C. 20054

Re: Reply Comments of EchoStar Satellite Corporation  
Docket No. 03-206

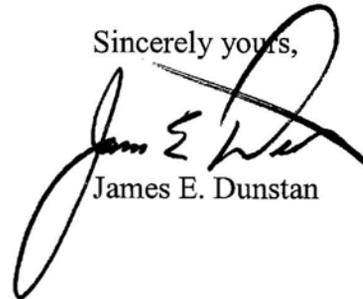
Dear Ms. Dortch:

Transmitted herewith on behalf of EchoStar Satellite Corporation is a copy of its "Reply Comments of EchoStar Satellite Corporation" in connection with Docket No. MB 03-206.

Additional copies of the pleading are also being delivered, either by email or by U.S. first-class mail, to each of those listed on the attached Certificate of Service.

If there are any questions concerning this matter, kindly communicate directly with this office.

Sincerely yours,



James E. Dunstan

JED:cll  
Enclosure

Before The  
**Federal Communications Commission**  
Washington, D.C. 20554

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

To: The Commission

**Reply Comments of EchoStar Satellite Corporation**

EchoStar Satellite Corporation (“EchoStar”), by its attorneys, hereby files these Reply Comments in response in the above-referenced proceeding.

The above-referenced proceeding is essentially a dispute between two parties -- *i.e.*, the Word of God Fellowship, Inc. d/b/a Daystar Television Network (“Daystar”) and Dominion Video Satellite, Inc. (“Dominion”). Based on additional comments filed, this proceeding appears to have been seized upon by others, however, as an opportunity to litigate issues that do not belong here or that have already been resolved by the Commission. This proceeding should not become a “free-for-all” for entities espousing conflicting views of how the FCC should have implemented Section 335 of the Communications Act.<sup>1</sup> Such wide-ranging attacks on the Commission’s implementation of Section 335 are beyond the scope of the narrow issue raised by Daystar, and should not be considered in the context of this proceeding.

---

<sup>1</sup> 47 U.S.C. § 335 (1992).

The question of Daystar's eligibility to be carried does not have direct implications for the eligibility of any one individual programmer to be carried. The issue raised by Daystar in this proceeding, and litigated in the Tenth Circuit, was whether Section 335 preempts the exclusivity provision of the agreement between EchoStar and Dominion, an agreement reached before the Commission promulgated its public interest set-aside rules. The demands for access to EchoStar's public interest set-aside capacity have historically exceeded that capacity. The issue which Daystar raises here, and which EchoStar testified to in the Tenth Circuit, is whether such a supply surplus will continue if EchoStar must deny programmers such as Daystar access to its set-aside capacity because of a contractual exclusivity provision.

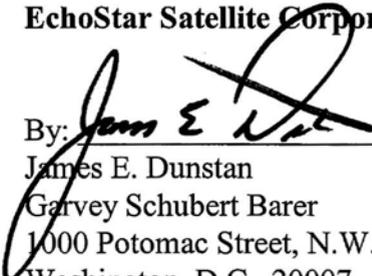
The critical issue (and the only relevant issue in this proceeding), therefore, is whether it is lawful and good public policy for a private contractual provision to be a criterion for selecting qualified public interest programmers in conflict with the flexibility granted DBS providers under Section 335(b).<sup>2</sup>

---

<sup>2</sup> "Thus, we believe [that] 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 (e.g., cultural, documentary, children's educational), the programmers' experience, reliability, and reputation for quality programming, and the quality of programming they may have produced in the past. . . . 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." *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, ¶ 102 (1998). See also Dominion Opposition, p. 8 (quoting this same language, as it applies to the EchoStar/Dominion Agreement).

EchoStar therefore urges the Commission to resist the temptation to expand the scope of the instant proceeding into a quasi-rulemaking review of Section 335, and instead limit this proceeding to the narrow question raised by Daystar in its Request.

Respectfully submitted,  
**EchoStar Satellite Corporation**

By:   
James E. Dunstan  
Garvey Schubert Barer  
1000 Potomac Street, N.W., 5th Floor  
Washington, D.C. 20007  
202-965-7880

October 31, 2003

**CERTIFICATE OF SERVICE**

I, James E. Dunstan, hereby certify that on this 31st day of October, 2003, copies of the foregoing "Reply Comments of EchoStar Satellite Corporation" have been served by U.S. first-class mail, postage prepaid, or by email, upon the following:

David Solomon \*  
Enforcement Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

Robert L. Olender  
James A. Koerner  
Koerner & Olender, P.C.  
5809 Nicholson Lane  
Suite 124  
North Bethesda, MD 20852

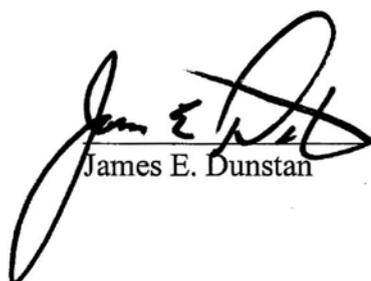
Marvin Rosenberg  
Mark D. Colley  
Thomas D. Leland  
David A. O'Connor  
Holland & Knight, LLP  
2099 Pennsylvania Ave., N.W.  
Suite 100  
Washington, D.C. 20006

Dr. Janet K. Poley  
CEO/President  
American Distance Education  
Consortium  
C218 Animal Science Building  
P.O. Box 830952  
Lincoln, NE 68583-0952

Charlie Mount  
General Manager  
Classic Arts Showcase  
P.O. Box 828  
Burbank, CA 91503

Colby M. May  
Law Office of Colby M. May  
205 3<sup>rd</sup> Street, SE  
Washington, D.C. 20003

\* Denotes service by email and hard copy.

  
James E. Dunstan