

Please Date Stamp and Return To
HOLLAND & KNIGHT LLP

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

OCT 31 2003

In the Matter of)
Request for Comment on Petition)
Regarding DBS Public Interest)
Obligations and Private Contractual)
Arrangements)

Docket No. MB 03-206 FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Media Bureau

REPLY COMMENTS OF DOMINION VIDEO SATELLITE, INC.

Dominion Video Satellite, Inc. ("Dominion"), by its counsel, hereby submits this *Reply* to the Comments filed by EchoStar Satellite Corp. ("EchoStar") and Trinity Broadcasting Company ("Trinity") in this proceeding. The Comments of EchoStar either misconstrue or misrepresent the background of Daystar's petition resulting in this proceeding, and EchoStar and Trinity also misconstrue the applicable Commission rules. Accordingly, Dominion submits the following reply to correct and clarify the record.

1. The Proceeding Before the Commission.

While much has been made in this proceeding about contracts between various parties, the question before the Commission is not contractual rights, other than as they may bear on the motives of Daystar and EchoStar in advancing their interests. Rather, the Commission's responsibility is to determine the public interest question of whether program exclusivity agreements adversely affect a DBS provider's responsibilities in the selection of programmers for the four per cent set aside channels. The record in this proceeding is totally barren of any facts put forth by Daystar, EchoStar or Trinity to support the proposition that a program exclusivity contract is contrary to the public interest. EchoStar remains free to allocate public interest capacity freely to all programming genres, save one. That one exception is a genre for which EchoStar simply implemented its allocation by means of a contract. To Dominion's

knowledge, the Commission has not been presented with a pattern of wide spread or even limited abuse of program exclusivity agreements that has resulted in injury to the public by limiting DBS providers in determining set aside programmers. Obviously, program exclusivity agreements are not causing public harm with regard to diversity on the four percent set aside channels. What the Commission has been presented with is a matter that affects the narrow provincial interests of Daystar and EchoStar, who are the only ones purportedly "harmed" by a program exclusivity agreement insofar as it affects their private arrangement for the use of one of EchoStar's four per cent set aside channels, and not a practice harmful to the public interest. Indeed, to Dominion's knowledge the only complainants are Daystar and EchoStar, who would benefit from a positive finding by the Commission on Daystar's petition. As shown in Dominion's earlier comments in this proceeding, however, the Commission has long recognized in its various rules and decisions that program exclusivity agreements can serve the public interest by enhancing diversity and competition between providers of program services, which benefits the public interest.

There is no provision in Section 25.701 which limits program exclusivity agreements because of a DBS provider's four per cent set aside requirements. **In the case of Daystar's channel, the public is not denied any program service. Prior to and throughout the litigation referred to by those filing in this proceeding the Daystar programming has been available on Dominion's Sky Angel service.** Given that Daystar is broadcast using the same satellite, encryption system, and receive equipment, any EchoStar subscriber can obtain the Daystar programming. If an Echostar subscriber desires to acquire Daystar's programming, it is available via Sky Angel's program service. This is wholly comparable to a DirecTV subscriber who wants to view the NFL package having to make an additional program purchase. The NFL purchasers need no new equipment to watch that programming.

Following its usual practice before the Commission, EchoStar tells only half the story.¹ EchoStar refers to Daystar's Petition citing the testimony of EchoStar's David Schwimmer, Senior Vice President of Programming, in the United States District Court for the District of Colorado, that without religious programmers like Daystar and FamilyNet there would be an insufficient number of available qualified public interest programmers. EchoStar then states that, if it were to meet its responsibilities pursuant to its agreement with Dominion, it is likely to result in EchoStar's inability to meet the Commission's four percent set-aside channel requirement. **Both Daystar and EchoStar, however, fail to state that United States District Court Judge Kane, who conducted the proceeding and listened to Mr. Schwimmer's testimony, concluded that EchoStar could comply with its agreement with Dominion and still meet its set aside requirements.** The Judge's conclusion, and Daystar's and EchoStar's apparent deliberate omission of the Judge's finding, should be of great significance to the Commission in reaching its determination in this proceeding.

2. The genesis of this proceeding is EchoStar's breach of its agreement to limit its broadcast of Christian programming in exchange for the use of Dominion's FCC licenses.

Seeking to portray itself as an innocent bystander in a dispute between Dominion and the Daystar Television Network ("Daystar"), EchoStar asserts that Dominion wants "to eliminate an entire class of educational programming EchoStar may provide" (EchoStar Comments, p. 1.) EchoStar fails to acknowledge, however, that the genesis of this dispute is EchoStar's flagrant breach of its contract obligations, not any wrongful or underhanded conduct by Dominion.

¹ EchoStar's pattern of failing to give the Commission the whole story regarding its regulatory compliance and business practices is well documented. For example, in In re National Ass'n of Broadcasters & Ass'n of Local Television Stations, 17 FCC Rcd. 6065, 2002 WL 500468 (Apr. 4, 2002), the Commission noted that EchoStar has been subjected to maximum fines "based on [its] degree of misconduct, lack of voluntary disclosure and continuing violation of the Commission's rules," and that EchoStar had "been 'disingenuous' in its legal interpretations" and had "failed in its duty of candor." Id. at *6084 n.116 (citations omitted).

The only limits on the programming EchoStar may provide are limits that EchoStar voluntarily encouraged and accepted in a bargain for other valuable benefits. As part of the agreement between Dominion and EchoStar, including EchoStar's right to use initially three and now six of Dominion's satellite transponders, EchoStar agreed to place no more than three Christian-themed channels on its DISH Network.² EchoStar also insisted, however, that Dominion broadcast *only* predominantly Christian channels on its Sky Angel network. The parties entered into this arrangement because EchoStar and Dominion share satellite transponder capacity and receiving equipment. EchoStar did not want the Dominion DBS system competing for the same broad customer market served by DISH Network. Instead, Dominion serves the niche target audience of persons wishing to receive an extensive offering of Christian-religious channels via direct broadcast satellite.³

Even though EchoStar currently broadcasts over 500 diverse channels — including three Christian channels⁴ — it refuses to honor the agreement with Dominion. Instead, EchoStar insists on broadcasting Christian channels, such as Daystar, on DISH. To justify this obvious contract breach, EchoStar invokes the Commission's regulations requiring that DBS operators set aside four percent of channel capacity for noncommercial educational or informational programming. See 47 C.F.R. § 25.701(c). Hiding behind these rules, EchoStar claims that it has

² The fact that the parties' contract permits EchoStar to broadcast three Christian channels, two of them already designated public-interest channels, shows that Dominion does not seek to exclude any class of programming — only that EchoStar agreed to limit its programming in that particular genre on DISH Network's licensed frequencies. EchoStar also carries a Christian-themed medical educational channel, the Good Samaritan Network, that is designated as a public-interest channel as well.

³ Echo Star's suggestion that its contract with Daystar lessens a Dominion "hammerlock" over Christian programming delivered to EchoStar subscribers is laughable. (EchoStar Comments, p. 6.) EchoStar set this deal up, but now wants the FCC to validate a breach once it no longer wants to abide by the terms.

⁴ The three Christian-religious channels permitted by the parties' contract are the Trinity Broadcasting Network ("TBN"), the Eternal World Television Network ("EWTN"), and Angel One. Agreement § 8.3.

no discretion to honor the promise to refrain from broadcasting predominantly Christian channels. (EchoStar Comments, p. 5.)

Despite its noble rhetoric, the real reason EchoStar broadcasts Daystar is to wring a payoff out of the otherwise unprofitable four-percent of its broadcast capacity that is set aside for public-interest programming. In exchange for public-interest carriage, EchoStar required that Daystar give up valuable satellite spectrum by waiving the must-carry rights for all of its local stations (both current and future), as well as dropping two Commission complaints Daystar had brought against EchoStar. (Dominion *Opposition*, pp. 13-16 & Exhibits 10-16 thereto.)⁵ This bandwidth-for-carriage trade catapulted Daystar ahead of all other applicants for public-interest carriage on the DISH Network, and shut out any applicant that could not trade must-carry bandwidth for set-aside carriage. The fact that this arrangement constitutes a direct breach of the EchoStar-Dominion contract — and of Commission rules — does not seem to have occurred, or mattered, to EchoStar.

Dominion regrets that the only way to get EchoStar to abide by the contract EchoStar actively pursued in 1996 has been through litigation, but Dominion's contract with EchoStar — and in particular the exclusivity provision — is the foundation of Dominion's business model. Dominion broadcasts only Christian-themed channels, but EchoStar now wants to invade even that niche market. It is neither improper — nor, in the case of EchoStar, unexpected — to

⁵ TBN filed Comments in which it asserts that the Commission should invalidate the Dominion-EchoStar contract under the Commission's DBS "must-carry" rules, 47 C.F.R. § 76.66(c). (TBN Comments, p. 6.) Must-carry obligations, however, are totally unaffected by the Dominion-EchoStar contract because nothing in that contract requires that EchoStar refrain from broadcasting any channels — Christian or otherwise — that are carried pursuant to the must-carry rules. TBN's comments do raise, however, the question of whether TBN has also traded must-carry spectrum for public-interest carriage on DISH since none of TBN's local channels are currently being carried on DISH Network.

invoke litigation to stop such a flagrant breach of contract.⁶ The Commission should not be taken in by EchoStar's disingenuous self-portrayal as an innocent victim. Rather, it is EchoStar's chronic inability to honor business agreements and Commission rules — not any action of Dominion — that forms the basis of this dispute.

3. EchoStar seeks to re-litigate a federal court finding that there is no conflict between FCC regulations and the EchoStar-Dominion contract.

As noted, after a three-day evidentiary hearing, a U.S. District Court has already found that EchoStar can comply with both the Commission set-aside rules *and* its contract with Dominion. (Order dated July 9, 2003, Exhibit 3 to Dominion's *Opposition* ("Order").) Judge Kane found that to identify public-interest programmers, EchoStar just passively accepted applications — it did absolutely nothing to facilitate non-Christian-religious public-interest channels' carriage on DISH. (*Id.* at 13-14.) Accordingly, Judge Kane found 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." (Order at 13-14.)

EchoStar simply refuses to accept this ruling. Instead, it insists that unless it is allowed to breach the contract by broadcasting more Christian channels than permitted, it will be unable to meet its regulatory obligations. (EchoStar Comments, pp. 3-5.) EchoStar's comments, however, simply restate the same lame assertions about alternative public-interest programmers that were

⁶ When Echo Star feels that its rights have been violated, it does not hesitate to resort to litigation to stop a programmer from violating an exclusivity contract. For example, in EchoStar Satellite Corp. v. TV Azteca S.A. de C.V., No. 02 CIV 4890, pending in the District Court for the Southern District of New York, EchoStar sued TV Azteca for breaching an exclusivity arrangement between it and EchoStar. EchoStar apparently does not believe that there is anything wrong with its exclusivity arrangement with TV Azteca, just with Dominion.

flatly rejected by the district court.⁷ It is not the Commission's function to reverse a fact finding issued by an Article III judge just because the losing party does not like the result. See Regents of Univ. of Ga. v. Carroll, 338 U.S. 586, 602 (1950) (the Commission does not have authority to second-guess a state court's finding that contractual performance was not an impossibility because of FCC rules.) EchoStar is using this proceeding as an opportunity to escape Judge Kane's ruling, which is patently improper.

In any event, EchoStar breezes past the three non-Christian programmers that applied for carriage on DISH at the time EchoStar cemented its spectrum trade with Daystar. The first, Health TV, was chosen just two months later as a replacement public-interest programmer and is currently broadcasting on DISH. EchoStar's complaints about Health TV simply confirm that EchoStar is perfectly capable of taking action to facilitate non-Christian public-interest programming. (EchoStar Comments, p. 4.) The evidence in the district court showed that the second applicant, the Universal Education Foundation, is already a functioning long-distance-learning channel. And the third applicant, Tomorrow's Planet, is financially backed by the Turner Group, which, ironically, has two commercial channels currently broadcasting on the DISH Network.⁸ The hearing evidence showed, and the district court agreed, that EchoStar

⁷ For instance while boasting to the Commission about its purported "due diligence," before the U.S. District Court EchoStar stipulated that it had done *nothing* to investigate the same alternative programmers.

⁸ EchoStar's public file indicates that EchoStar rejected these channels because the "[n]umber of applicants exceeded available slots," not because the applicants were unqualified, as EchoStar now claims. (Exhibit 2 to Dominion's *Opposition*.) The only reason slots were unavailable was because EchoStar had already cut deals with Christian programmers in breach of its contract with Dominion.

could meet its FCC obligations through broadcasting these or any other non-Christian public-interest programmer without violating the contract.⁹

The hearing evidence confirmed that EchoStar refuses to take any action under the contract to identify or facilitate public-interest channels that do not breach the agreement with Dominion (although numerous non-Christian-religious channels have applied for public-interest carriage). EchoStar refuses to advertise for non-Christian programmers, develop programming joint ventures or pursue international programmers. It will not lift a finger to attempt compliance with its contract with Dominion, but will bend over backwards to broadcast Daystar — an entity trading valuable capacity (otherwise required to satisfy must-carry obligations) in exchange for public-interest carriage.

As much as EchoStar may not like Judge Kane's fact findings, it should not get a second bite at the apple through this FCC inquiry. The Commission should not accept EchoStar's invitation to reverse an Article III judge's fact finding that EchoStar can meet *both* FCC *and* contractual obligations, and that there is no conflict between the two.

4. The EchoStar-Daystar contract is not an issue in this proceeding.

In apparent acknowledgment that the Commission lacks authority to invalidate the Dominion-EchoStar contract, EchoStar tries to turn this proceeding into a referendum on EchoStar's contract with Daystar, arguing that the Commission cannot find that Daystar is not a qualified public-interest programmer without simultaneously invalidating the EchoStar-Daystar contract. (EchoStar Comments, pp. 5-6.) Thus, argues EchoStar, if the Commission lacks

⁹ In addition to the non-Christian programmers that applied for carriage, several other secular programmers have shown an interest in broadcasting on DISH but for the requirement that programmers trade must-carry bandwidth for public-interest carriage. See Comments of Classic Arts Channel and American Distance Education Corp. Both these programmers indicated in their Comments that they have applied for carriage on DISH numerous times but that EchoStar rejected their applications. Neither programmer's broadcast on DISH would violate the Dominion-EchoStar contract.

authority to invalidate the Dominion-EchoStar contract, it similarly lacks authority to find that Daystar is not an eligible public-interest programmer because such a finding has the effect of voiding EchoStar's contract with Daystar. (Id.)

This is wrong. The fact that EchoStar may be acting pursuant to its contract with Daystar does not immunize EchoStar from Commission scrutiny. Even EchoStar acknowledges that “[t]he issue of whether Daystar qualifies as an educational programmer ... is a regulatory issue, and not a contractual one.” (Id. at 5 n. 11.) In contrast, Daystar's filing — which challenges the validity of the Dominion-EchoStar contract — presents a purely contractual issue, and not a regulatory one. As set forth in Dominion's *Comments* (filed on October 16, 2003), Daystar does not allege that the Dominion-EchoStar contract violates any existing Commission rule — it just does not like the deal those companies struck. Daystar's commercial activities on designated “educational” channels, however, violates specific Commission rules prohibiting those practices. (Dominion's *Opposition*, pp. 10-12); see also 47 C.F.R. § 73.621. As such, any effect on EchoStar's contract with Daystar is purely ancillary. In short, EchoStar may not freely breach Commission rules simply because it entered into a contract with Daystar to do so.

5. By requiring that public-interest programmers trade bandwidth for public-interest carriage, EchoStar is auctioning public-interest spectrum to the highest bidder in violation of Section 25.701(c)(5).

In a hyper-technical reading of FCC rules, EchoStar claims that Section 25.701(c)(5), which limits compensation for public-interest carriage to fifty percent of the direct costs associated with making the capacity available to the programmer, nevertheless permits it to require that programmers trade spectrum for public-interest carriage. It claims that the regulations give DBS operators “tremendous discretion” to enter into such “side agreements” as the *quid pro quo* for carriage. This interpretation is faulty.

Trading bandwidth for public-interest carriage undermines Congressional intent. In the statute, Congress provided that the direct costs that DBS operators could charge should not include “marketing costs, general administrative costs, and similar overhead costs of the provider of direct broadcast satellite service” or “the revenue that such provider might have obtained by making such channel available to a commercial provider of video programming.” 47 U.S.C. § 335(b)(4)(C)(i) & (ii). Congress was plainly concerned about DBS providers using the public-interest set-aside capacity as a revenue-generating tool. And, Congress did not want the DBS providers to extract from public-interest programmers alternative economic benefits to substitute for revenues lost by not carrying commercial programming instead. This same concern is also evidenced in the FCC Report and Order accompanying the regulations, in which the Commission determined that Congress intended that the statute’s compensation limitation should not be interpreted in a way that would “keep many programmers out of the market, thus defeating Congress’ desire to make noncommercial programming readily available.” (*DBS Public Interest Order*, ¶ 130.) EchoStar’s actions directly contradict this Congressional purpose. By effectively shutting out programmers that cannot trade must-carry bandwidth, EchoStar has created an environment where public-interest channels simply go to the highest bidder.

EchoStar’s interpretation of the compensation-limitation provision in Section 25.701(c)(5) discriminates against smaller public-interest programmers that do not have the substantial financial resources of a television “ministry” such as Daystar. Two programmers, ADEC and Classic Arts Showcase, filed Comments stating that by allowing a public-interest programmer to trade spectrum for carriage the Commission would preclude broadcast of all programmers who could not offer such a trade. This is obviously contrary to Congress’s desire to keep an open, level playing field in which noncommercial programming is “readily available.”

The Commission should not allow EchoStar to use public-interest channels as a profit center. Doing so undermines the purpose of the set-aside statute and rules.

Even EchoStar acknowledges that “a DBS cannot ‘auction off’ the four percent set aside by charging programmers more than 50 percent of the actual cost of delivering the signal.” Yet, EchoStar wants the Commission to ignore the “total value of the deal” beyond direct cash charges. That EchoStar is not “charging” Daystar in cash does not make its action any less an auction. In the future, under EchoStar’s tortured interpretation of the Commission rules, one can only speculate what alternative sorts of bounty EchoStar might insist on in trade from potential public interest programmers who cannot release spectrum that would otherwise be used to transmit local programming pursuant to must carry obligations.

Additionally, as Dominion pointed out in its opposition to Daystar’s filing, the trading of must-carry local stations for a national public-interest channel is not in the public interest because it denies local markets access to locally-based programming. As Jim Goodman, the President and CEO of Capitol Broadcasting Company, stated at Commission’s first hearing on station localism in Charlotte, North Carolina, “Localism remains the cornerstone of our free broadcasting system in America.” Even now the Commission continues to hold other public hearings around the nation regarding how to keep local stations local. EchoStar’s swap of local broadcasts for national carriage frustrates this important broadcasting cornerstone.

6. Conclusion.

For the reasons set forth above, and the reasons set forth in Dominion’s *Opposition and Comments*, Dominion requests that the Commission deny Daystar’s *Request*.

Respectfully submitted,

DOMINION VIDEO SATELLITE, INC.

A handwritten signature in cursive script that reads "Marvin Rosenberg". The signature is written in black ink and is positioned above a horizontal line.

Marvin Rosenberg

Mark D. Colley

Thomas D. Leland

David A. O'Connor

Holland & Knight LLP

2099 Pennsylvania Ave., NW

Suite 100

Washington, DC 20006

Tel: (202) 955-3000

October 31, 2003

CERTIFICATE OF SERVICE

I, Vicki Redman, an employee of Holland & Knight LLP, hereby certify that on October 31, 2003, a copy of the foregoing "Comments of Dominion Video Satellite, Inc." was served, via first-class mail unless otherwise noted, to the following individuals:

W. Kenneth Ferree, Esq.*
Chief, Media Bureau
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

David Solomon, Esq.*
Chief, Enforcement Bureau
Federal Communication Commission
445 12th Street, SW
Washington, D.C. 20554

Rosalee Chiara, Esq.*
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Robert L. Olender
James A. Koerner
Koerner & Olender, P.C.
5809 Nicholson Lane
Suite 124
North Bethesda, Maryland 20852
Attorneys for Word of God Fellowship, Inc. d/b/a Daystar Television Network

Ross W. Wooten
Ricardo "Rick" Olsen
T. Wade Welch & Associates
2410 Fountainview, 7th Floor
Houston, Texas 77057
Attorneys for EchoStar Satellite Corp.

* Via E-mail



Vicki Redman

