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February 13, 2004

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VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Ex-Parte Presentation
MB Docket No. 03-206

Dear Ms. Dortch:

Pursuant to Section 1.1206(b)(1)(2) of the Federal Communications Commission's Rules, this is to advise of an ex-parte presentation by Dominion Video Satellite, Inc. ("Dominion") to members of the Media Bureau on February 12, 2004. Present on behalf of Dominion were Robert W. Johnson, President and Chief Executive Officer, and Kathy Johnson, Vice President Programming, together with Dominion's legal counsel Mark D. Colley and Marvin Rosenberg of Holland & Knight LLP. Present from the Media Bureau were Deborah E. Klein, Chief of Staff, William H. Johnson, Deputy Bureau Chief, Mary Beth Murphy, Division Chief, Policy Division, Eloise Gore, Assistant Division Chief, Policy Division, and Rosalee Chiara, Public Interest Obligations of Satellite/DBS Licensees.

The meeting addressed the provision in the Direct Broadcast Service Transponder Lease, Channel Use and Programming Agreement, dated, July 18, 1996 between Dominion and EchoStar Satellite Corporation, et. al. ("EchoStar") on program exclusivity and that this agreement permits EchoStar, as a DBS licensee, to fully comply with the FCC's requirements on public interest

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public interest channels as provided in Section 25.701 of the FCC's Rules. At the meeting, two written presentations were provided and a copy of each is attached hereto.

Very truly yours,

A handwritten signature in cursive script that reads "Marvin Rosenberg". The signature is written in black ink and is positioned above the printed name.

Marvin Rosenberg

Enclosures



AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between

Dominion Video Satellite., Inc.,
Claimant,

Case No. 77 181 00326 03

v.

Arbitrators:

EchoStar Satellite Corp.,
Respondent.

Samuel D. Chervis
Michael L. Beatty
Cecil E. Morris, Jr.

REPORT OF ANDREW JAY SCHWARZTMAN
SUBMITTED TO
HOLLAND & KNIGHT

FEBRUARY 9, 2004

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I. INTRODUCTION AND SUMMARY

I have been retained to review the history of the enactment and implementation of the FCC's public interest set-aside for direct broadcast satellite ("DBS") operators and to provide my opinion as to

1. Whether it is possible for EchoStar Satellite Corporation ("EchoStar") to comply with the requirements of 47 USC §335 ("Section 335"),¹ and FCC regulations promulgated thereunder, without breaching its contract with Dominion Video Satellite, Inc. ("DVS"), and
2. Whether EchoStar's obligations under Section 335 preempt its contract with DVS.
3. Whether the use of programming exclusivity contracts is an accepted practice in the context of television broadcasting.

In reaching these opinions, I have reviewed the relevant provision of the EchoStar/DVS contract and other documents pertaining to the relationship between EchoStar and DVS and other programmers. I have relied upon experience gained through my participation in the drafting and enactment of Section 335, the implementation of Section 335 by the Federal Communications Commission, and in discussions with programmers and DBS operators and their representatives during the initial phases of the implementation of the DBS set-aside. I have also relied upon my experience as legal counsel for organizations representing viewers and listeners before the FCC and the courts for more than 30 years.

EchoStar and DVS have entered into a contract which includes a exclusivity provision under which DVS has exclusive rights to transmit "Christian Programs" on EchoStar transponders. I have

¹Section 335 was adopted as Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").

been informed that EchoStar contends that

1. It is impossible to satisfy its obligations under 47 USC §335 because there are insufficient qualified programmers to satisfy EchoStar's obligation to devote at least 4% of its capacity for so-called "public interest" programming; and
2. FCC regulations preempt its ability to comply with the EchoStar/DVS contract.

It is my opinion that:

1. There are a significant number of qualified programmers willing and able to provide programming to assist EchoStar in meeting its obligations under 47 USC §335.
2. EchoStar should have little difficulty meeting its obligations under 47 USC §335 without having to rely upon programming which is "exclusive" to DVS within the terms of the EchoStar/DVS contract.
3. Even if EchoStar were unable to obtain sufficient qualified programming from existing suppliers, it is still possible for EchoStar to fulfill its obligations under 47 USC §335 without carrying programming which is subject to the exclusivity provision. I believe that there are several steps EchoStar could take to satisfy its obligations under Section 335, and that there is a high likelihood that one or a combination of these measures would enable it to obtain qualified programming without having to use programming subject to the exclusivity provision.
4. In the highly unlikely event that EchoStar were unable to satisfy its obligations under Section 335 without having to rely upon programming which is subject to the exclusivity provision of the EchoStar/DVS contract, there is a substantial likelihood that EchoStar could avoid a conflict between Section 335 and its contractual obligations to DVS by obtaining a waiver from the FCC allowing it to carry a second or third channel from existing qualified programmers, particularly PBS and C-SPAN.
5. Only if EchoStar had exhausted all of the other means I have described, and failed in a good faith effort to obtain a partial waiver of its obligation to devote 4 percent of its capacity to the Section 335 set aside, would its contractual obligation to DVS be temporarily preempted by Section 335. This highly unlikely hypothetical condition would continue only until such time as EchoStar located suitable programming which did not require it to breach its contractual obligation to DVS. I believe that it would be only a short period of time, probably less than one year, before other qualified programmers would come forward to take advantage of the opportunity to offer programming using EchoStar's set-aside capacity.

As set forth below, it is my view that program exclusivity is a critical component in the video

programming market. Program exclusivity is a common element in many distribution agreements. It can benefit program suppliers as well as program distributors by reducing the financial risk for investment in new programs, especially if the material is unorthodox in nature.

II. QUALIFICATIONS

I am President and CEO of Media Access Project (“MAP”) a non-profit public interest law firm which represents the public’s First Amendment rights to receive information.²

My exposure to communications law began while I was in law school, when I served as a full-time intern in a law school credit-bearing program at the Center for Law and Social Policy in Washington, D.C. My principal accomplishment was assisting in the briefing of the appeal of an FCC decision involving the so-called fairness doctrine.

After law school, I joined the staff of the United Church of Christ Office of Communication, which had recently won the right for citizens to participate in FCC proceedings. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1965). The office had a program assisting local citizens in filing broadcast license renewal challenges on issues such as programming in the public interest, equal employment opportunity and minority ownership.

From 1974 through 1978, I was an attorney on the staff of the former Federal Energy Administration, which became part of the United States Department of Energy in 1978.

I joined Media Access Project in 1978. My title was changed from Executive Director to President and CEO several years ago, but the job responsibilities have been the same.

My practice is concentrated on mass media issues. The substantial majority of my work has been before the Federal Communications Commission and the federal appeals courts in matters

²The organization’s website url is <http://www.mediaaccess.org>.

involving review of FCC decisions. I supervise a staff of three attorneys and a support staff, as well as law student interns from national law schools, many of whom receive full law school credit for their semester's work. *National Law Journal* identified me as one of the 30 leading telecommunications attorneys in the United States.

I am frequently called upon to discuss telecommunications issues on national radio and television programs such as *The Today Show*, *All Things Considered*, *Marketplace Radio*, *Now With Bill Moyers*, *C-SPAN* and *Nightline*. I have appeared on all of the major network evening newscasts and on all of the major cable TV news networks.

I have testified at Congressional hearings at least 20 times, including appearances before subcommittees of the House commerce and judiciary committees, and Senate subcommittees on commerce, judiciary and banking. I have testified before the Federal Communications Commission sitting *en banc* perhaps a dozen times on matters such as media ownership, "equal time," video programming distribution and cable television "open access." In December, 1997, I testified about public interest programming standards before President Clinton's Advisory Committee on Public Interest Obligations of Digital Television Broadcasters.

My academic professional activities are set forth in my *curriculum vitae*, which is attached hereto as Exhibit A.

I have been involved in policymaking involving direct broadcast satellites since the early 1980's. I participated in rulemakings and in a number of challenges to mergers in the DBS industry. In a number of those proceedings, my clients' positions have been aligned with EchoStar; on other occasions, our positions have been adverse. In 2002, at EchoStar's request, I submitted a brief *Amicus Curiae* to the United States Court of Appeals for the 11th Circuit, in support of EchoStar in litigation

over the Satellite Home Viewer Act. *CBS Broadcasting, Inc. v. EchoStar Communications*, 265 F.3d 1193 (11th Cir. 2001).

I was heavily involved in lobbying surrounding the 1992 Cable Act, several provisions of which were central to the creation of the current DBS industry. Among these provisions were Section 19, which governs program access, and Section 25, which contains the public interest set-aside requirement at issue in the current dispute between EchoStar and DVS. I worked with staff from the Association of Public Television Stations and Rep. Al Swift (primary advocate for the set-aside in the House of Representatives) in drafting legislative proposals for the set-aside. I wrote letters and spoke to members of the House and Senate and their staffs on behalf of the set-aside, and consulted on the drafting of report language for Section 25.

After Section 25 was enacted, I participated in litigation over the facial constitutionality of Section 25 as counsel for Intervenors supporting the FCC and United States. *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996), *rehearing en banc denied*, 105 F.3d 723 (D.C. Cir. 1997). Later, I served in a similar capacity in litigation challenging the constitutionality of the Satellite Home Viewing Act. *SBCA v. FCC*, 275 F.3d 337 (4th Cir. 2001).

I was a very active participant in the FCC's proceedings implementing the DBS set-aside, participating in the filing of comments, reply comments and engaging in extensive negotiations with the parties and the FCC staff.

III. 47 USC SECTION 335 AND ECHOSTAR'S ROLE IN ITS IMPLEMENTATION

The FCC has always interpreted the public interest standard of the Communications Act as including within it the First Amendment goal of assuring that the public receives access to diverse programming from diverse and antagonistic sources. *See, e.g., Red Lion Broadcasting Co. v. FCC*,

395 U.S. 367 (1969). (“[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”)

A. Public Interest Programming and DBS

Congress and the FCC have, of necessity proceeded gingerly in creating rules and policies pertaining to programming and program content. As the society and the technologies have changed, it has been possible to alter and ease proscriptive programming rules that characterized the early years of broadcast regulation. The FCC has explored many means of fulfilling these of goals. *See, e.g., NCCB v. FCC*, 567 F.2d 1095, 1112-1115 (D.C. Cir. 1977) (remanding for consideration of alternative means of affording access).

As technological changes have permitted new and different approaches, the FCC and Congress have sought to develop access schemes which can best take advantage of these advances and assure the public that their spectrum and/or rights of way are used for public, as well as private, purposes. Cable systems operate under franchises which often require that “PEG channels” be set aside for public, educational and government use. 47 USC §531. Cable operators are also required to make a specified proportion of their capacity available for “commercial leased access.” 47 USC §611.

Direct broadcast satellites are licensed as broadcast licensees pursuant to Title III of the Communications Act.³ In 1992, Congress enacted 47 U.S.C. §335 to define the means by which

³The Commission has ruled that, once they are licensed, subscription-based services will not be regulated as broadcasters for most purposes. *Subscription Video Services*, 2 FCC 2d 1001 (1987), *aff’d, sub nom., National Assoc. for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988). That distinction has no practical significance here because, for all purposes relevant to this report, the FCC’s *Subscription Video* ruling was superceded by the enactment of 47 USC §335 in 1992.

public access rights would be assured on the new DBS service. In addition to extending “equal time,” *see* 47 USC §315, and federal candidates’ “reasonable access” rights to DBS, *see* 47 USC §312(a)(7), Section 335 also required operators to reserve between 4 and 7 percent of their channel capacity “exclusively for noncommercial programming of an educational or informational nature.”

B. The FCC’s Rulemaking

Implementation of Section 335 was delayed by litigation for more than four years. There were additional delays while the FCC received supplemental comments to refresh the record, and the FCC issued its initial regulations implementing Section 335 in 1998. *Implementation of Section 25 of the Cable Television and Consumer Protection Act of 1992*, 13 FCCRcd 23254 (1998).⁴ The regulations are codified at 47 CFR Part 25, Subpart J.⁵

C. EchoStar’s Role in Implementation of Section 25

EchoStar’s conduct during the development and implementation of the FCC’s rules for the DBS set-aside was manifested by a seemingly studied lack of comprehension of the goals of the set aside, minimal cooperation and foot dragging. While I do not believe it ever said so in private or in public, EchoStar’s behavior suggested that the set-aside was something to be endured rather than embraced. It repeatedly attempted to “game the system” to make use of the set-aside difficult and, when forced to make it available to others, to generate maximum revenue in so doing.

⁴The FCC has not completed final action on the DBS public interest docket. As of this date, it is still reconsidering issues pertaining to the political broadcasting requirements of 47 USC §312(a)(7) and §315.

⁵A common cause of confusion is that there are references in various FCC precedents to DBS rules in “Part 100.” The Commission originally had relevant rules in both parts of its regulations, but, in August, 2002, it consolidated them in a revised Part 25. *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCCRcd 11331 (2002).

EchoStar was conspicuous by its absence during the early phase of the FCC's consideration the public interest set-aside. Although most other major DBS applicants filed comments and reply comments on how to implement Section 335 during the early months of 1993, EchoStar did not. The Satellite Broadcasting and Communication Association, a trade association which came to represent the interests of the DBS industry, also participated actively.⁶ During the late spring and summer of 1993, there were some informal negotiations between and among some of the public interest and industry parties, but it is my recollection that EchoStar played no role in those discussions.

Shortly after the legal status of Section 335 was definitively clarified in 1997, *see Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996), *rehearing en banc denied*, 105 F.3d 723 (D.C. Cir. 1997), the FCC reopened its legal docket to refresh the record. *See Public Notice*, 12 FCCRcd 2251 (1997). By that time, EchoStar was in operation and the DBS industry had consolidated into a handful of companies. At about the same time, EchoStar entered into a merger agreement with Rupert Murdoch's company ("News Corp.") to create a joint venture which was to be called ASkyB.⁷ In an evident effort to obtain support for this initiative, EchoStar finally responded to numerous requests from the public interest community to discuss plans for the public interest set-aside. In a meeting attended by a number of Washington, D.C.-based public interest groups, EchoStar for the first time presented details of "Educating Everyone," a venture it had been designing with a former EchoStar executive named Scott Zimmerman. They disclosed that EchoStar and Mr. Zimmerman had created an elaborate business plan for this project, which was intended to provide distance learning

⁶I believe (but do not specifically recall) that EchoStar was a member of SBCA during that period.

⁷The venture was ultimately abandoned.

and religious programming for the *entire* public interest set-aside. While the meeting was cordial, the public interest representatives informed the EchoStar representatives that this plan bore no relationship to the kind of programming which would be qualified within the meaning of Section 335 and that the close relationship between EchoStar and Educating Everyone, as well as the absence of any protections against EchoStar's editorial control of the programming rendered it unsuitable for consideration of implementation at the FCC. They also pointed out that DirecTV, EchoStar's major competitor, had been far more cooperative, and contemplated a plan which much more clearly resembled what was contemplated by the law.

EchoStar persisted for a period of time in asking the FCC to adopt rules which would have permitted the Educating Everyone plan to be implemented. The FCC declined to do so. In addition to emphasizing that the purpose of the set-aside was to have a diversity of editorial voices, the FCC adopted rules which limited the number of set aside channels which any single programmer could occupy. *See Implementation of Section 25 of the Cable Television and Consumer Act of 1992*, 13 FCCRcd at 23202-03.

D. EchoStar's Initial Implementation of the Set-Aside

EchoStar's manifest hostility to the set-aside obligation was evident during the final phases of the FCC's rulemaking proceeding as well as in its slow and uncooperative attitude towards programmers considering whether to seek access on DBS satellites.

The FCC gave DBS operators one year within which to implement their DBS set-aside programming. The deadline was December 15, 1999. There were several incidents of relevance during this period. In addition to taking a very long time to make details of its plans available, EchoStar attempted to vest significant power in Educating Everyone, its original partner. Because

my focus during this period was on FCC regulatory issues, my memory as to this aspect of EchoStar's implementation is incomplete, but I do recall that, in addition to appointing Educating Everyone as its agent for the set aside, EchoStar also attempted to induce programmers to participate in some sort of umbrella plan which would be programmed and controlled by Educating Everyone.

After considerable delay, EchoStar finally adopted a complicated and somewhat obscure application process, to which it substantially adheres today. It required applicants to meet an unreasonably short deadline for filing, it limited program selection to one time per year and provided for a very short time between selection and the need to be on the air. These practices are not required by Section 335 or FCC rules adopted thereunder.⁸

In addition to its generally uncooperative attitude, EchoStar was not forthcoming about how it calculated its access rates, and initially declined to make them available. This created great uncertainty for potential programmers.

Most significantly, EchoStar attempted to segregate its public interest channels on its 61.5° W.L. satellite. Not only would this have made it impossible for some subscribers to receive public interest channels,⁹ but it would have also required many subscribers to have to obtain a second satellite "dish" which would have to be separately aimed at the transmitting satellite.

Because of these problems, and because the December 15, 1999 deadline for the public interest

⁸Another important compliance problem, which continues until today, emerged during this period - EchoStar's insistence on having signals delivered to its transmission site at the expense of the programmer. There is no requirement in the law one way or another in this regard, but since these expenses are often much more than the "direct costs" for which EchoStar is permitted to charge for access, this has proved to be a major obstacle, and has made it very difficult for start-up programmers to figure out how they could participate.

⁹The 61.5° W.L. "bird" is located over the Atlantic Ocean, and (because it does not deliver a signal to the entire continental United States) is not deemed a "full-CONUS" satellite.

set-aside was approaching, my public interest law firm assisted the American Distance Education Consortium ("ADEC") in filing a request for declaratory ruling on these issues. The request was supported by 23 other organizations in filings with the FCC. On November 24, 1999, the FCC granted the requested ruling. *American Distance Education Consortium*, 14 FCCRcd 19976 (1999). Rejecting EchoStar's rather incredulous defenses, it held that the public interest set-aside service must be "full-CONUS" (*i.e.*, available to all subscribers). The Commission also directed EchoStar to provide the requested financial information. It did rule in favor of EchoStar with respect to its use of Educating Everyone as an agent, although it warned EchoStar to insure that the agent adhered to FCC rules.

Although the outcome of the ADEC proceeding was not in genuine doubt among almost everyone interested in the matter, and the FCC staff had signaled its predilections all along the way, EchoStar evidently took few steps to prepare for providing full-CONUS compliance. Instead, on December 10, 1999, four days before the compliance deadline, EchoStar requested a six week extension. The Commission denied this request on December 16, 1999. *EchoStar Satellite Corporation*, 15 FCCRcd 1814 (1999). The speed with which the full Commission (not the agency staff) acted was quite unusual, and indicated that the matter was one of considerable import. In an unusually forceful opinion, it said that EchoStar's behavior was "disingenuous," *id.*, 15 FCCRcd at 1816, that "any lack of preparedness on the part of programmers likely stems, in part, from EchoStar's failure to establish a timely application process to select qualified public interest programmers for carriage on its system..." *id.*, 15 FCCRcd at 1817, and that "EchoStar has had sufficient time to comply with the obligations and responsibilities associated with the Commission's DBS public interest rules." *Id.*

Acting with unusual speed, the Commission staff initiated an enforcement proceeding, and

fined EchoStar the maximum available penalty, \$11,000. *In the Matter of EchoStar Satellite Corporation, Notice of Apparent Liability for Forfeiture*, 15 FCCRcd 5557 (EB 2000). The staff's notice decisively rejected EchoStar's defenses. It is my understanding that EchoStar did not further contest the matter and paid the fine.

After the Commission resolved the EchoStar complaint, my organization helped ADEC obtain pro-bono assistance from a major law firm. Thus, my direct knowledge of what happened thereafter is not first-hand. However, it is my understanding that ADEC has been unable to obtain carriage on EchoStar, and that it among current and potential programmers, it is widely believed that ADEC has been "punished" for seeking the FCC's intercession in these matters.¹⁰

¹⁰Another incident bears mention. In 2002, broadcasters filed a complaint with the FCC about EchoStar's planned compliance with the newly enacted "local into local" statute. They explained that EchoStar had developed a "two dish plan" intended to segregate many local channels on the 61.5° W.L. satellite in evident contravention of the new law. The Commission's Media Bureau Chief agreed, and in a stinging opinion declared EchoStar's plan unlawful. In warning EchoStar to comply immediately, he included this footnote:

EchoStar has previously been fined by the Commission for rule violations and admonished for its "disingenuous" behavior and lack of candor. In June 1998, the Commission fined EchoStar, and its subsidiary Directsat, the maximum forfeiture amount permitted under the Commission's rules for operating satellites from non-authorized locations. See *In the Matter of EchoStar Satellite Corporation, Notice of Apparent Liability*, 13 FCC Rcd 16510 (1998) ("EchoStar Forfeiture NAL"); *In the Matter of Directsat Corporation, Notice of Apparent Liability*, 13 FCC Rcd 16505 (1998). The FCC justified the forfeiture amount based on EchoStar's degree of misconduct, lack of voluntary disclosure and continuing violation of the Commission's rules. In November 1999, EchoStar tried to disregard its public interest programming requirements by placing all of its public interest programming on secondary satellites in violation of the Commission's DBS rules. See *American Distance Education Consortium Request for an Expedited Declaratory Ruling and Informal Complaint, Declaratory Ruling and Order*, 14 FCC Rcd 19976 (1999). In this instance, the Commission assessed a forfeiture against EchoStar, finding that it had willfully violated the Communications Act and the Commission's rules, that it had been "disingenuous" in its legal interpretations, and that none of the circumstances EchoStar presented supported mitigation of the forfeiture. *In the Matter of EchoStar Satellite Corporation, Notice of Apparent Liability for Forfeiture*, 15 FCC Rcd 5557, 5558-59 (EB 2000). In August 2001, the Commission found that "EchoStar failed in its duty of candor" by withholding information from the

IV. EXCLUSIVITY

In general, the FCC's attitude with respect to program exclusivity is that of neutrality. It exercises its powers to intervene in private contracts only reluctantly, and with great caution, and has terminated such intervention when conditions permit. *See, e.g., Second Report and Order*, 8 FCC Rcd 3282 (1993) (repealing "fin-syn" rules prohibiting exclusivity).

Program exclusivity is typically included in many, and probably a preponderance, of video program distribution contracts. Exclusivity serves a number of important purposes. For example, it provides certainty for sellers and buyers enables each group to benefit from "brand identification." Exclusivity enables broadcasters to develop viewer loyalty. In the case of nationally distributed programming, exclusivity assists in the development of nationwide promotional campaigns.

Exclusivity can be abused when program producers have excessive control over the program market. Dominant players can use exclusivity as a tool for attempting to restrict entry or raise the costs of existing rivals by raising their program acquisition costs. Indeed, the broadcast networks' efforts to exploit program exclusivity was the subject of one of the FCC's first regulatory initiatives, and led to one of the first U.S. Supreme Court decisions involving the Communications Act. *NBC v. U.S.*, 319 U.S. 190 (1943).

Absent anti-competitive abuse, exclusivity is a generally beneficial and entirely appropriate element of video program distribution.¹¹ It is related to, and an element of, the vertical integration

Commission. *See EchoStar Satellite Corporation v. Young Broadcasting, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 15070, 15075 (CSB 2001) *National Association of Broadcasters and Association of Local Television Stations*, 17 FCC Rcd 6065 at 6083, n. 116. (2002).

¹¹There are many antitrust cases discussing the role of exclusivity in general. *See, e.g., Omega Environmental, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997) ("There are, however,

which has typified the video programming on all platforms. Exclusivity generates considerable efficiencies in distribution, promotion and sales costs.

Abuse of program exclusivity was undoubtedly a major factor in inhibiting the early development of DBS and other competitors to the cable television monopoly. Section 19 of the 1992 Cable Act, codified as 47 USC §548, which prohibits vertically integrated cable operators from misusing program exclusivity was a critical element in the creation of the DBS industry, and it is beyond doubt that DirecTV, EchoStar and other DBS operators could not have become viable without Section 19. It is noteworthy, however, that Congress has recognized that program exclusivity is a legitimate business practice, see S. Rep. No. 102-92 at 28, and therefore limited the duration of the FCC's powers under Section 19, and required it to reassess the need for exclusivity after 10 years.¹²

V. IMPOSSIBILITY: ALTERNATIVE MEANS OF SATISFYING THE SET-ASIDE REQUIREMENT

I believe that it not only is possible for EchoStar to obtain qualified secular programming to meet its set-aside obligations,¹³ but that it would not be difficult to do so. There are at least several programmers which could likely be immediately available to EchoStar. Moreover, I believe that

well-recognized economic benefits to exclusive dealing arrangements, including the enhancement of interbrand competition."); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236 (1st Cir. 1983) (Breyer, J.) ("[V]irtually every contract to buy 'forecloses' or 'excludes' alternative sellers from some portion of the market, namely the portion consisting of what was bought.").

¹²The FCC has recently renewed its Section 19 regulations. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 17 FCCRcd 12124 (2002).

¹³Based on my review of portions of EchoStar's public files and EchoStar's website, it appears that EchoStar is carrying one more channel than is required, and therefore, that it would need two additional channels to replace three Christian services it now carries as public interest channels: Daystar, Educating Everyone and FamilyNet. TBN, another Christian service, also uses a set-aside channel. Under my reading of the EchoStar/DVS contract, TBN is grandfathered.

EchoStar could generate many additional applications by changing its practices and seeking out qualified programmers domestically and internationally.

Although I believe that there are sufficient non-religious programmers willing and able to satisfy EchoStar's public interest set-aside obligation, I have nonetheless considered how EchoStar might fulfill this duty without breaching its contractual obligations to Dominion in the event that it were unable to locate enough qualified programming to meet the 4% percent minimum established under FCC rules. I believe that it would be possible for EchoStar to obtain additional qualified programming by reducing its rates. It could also begin to purchase programming and/ or subsidize programmers. In the unlikely event that these steps did not generate sufficient additional programming, I believe EchoStar would then be well-placed to obtain a waiver of the one channel per programmer limitation set forth in the FCC's rules, and that two or more additional programming channels would likely become available under such a waiver.

A. Existing and Available Secular Programming Services

I believe that there are a sizeable number of qualified secular programmers currently capable of providing programming for the EchoStar set-aside. Several of the services of which I am aware would likely be ready to begin service on EchoStar almost immediately.

ADEC ought to be able to provide programming without difficulty. (It is important for me to reiterate here that ADEC is a former client of mine.) Indeed, ADEC has recently told the FCC in written comments that it "is most wiling to compete with other qualified...providers...." *Letter from Janet K. Poley to Marlene Dortch, Secretary, FCC, filed in Docket MB 03-206 (October 16, 2003).* As noted above, ADEC bravely challenged EchoStar's non-compliance, and it is quite possible that

EchoStar's refusal to carry ADEC is retaliatory.¹⁴

Another programmer which I believe to be ready to provide service on EchoStar is DUTV, operated by Drexel University. DUTV, which has unsuccessfully sought access on EchoStar, is presently carried by cable systems in the Philadelphia area.

Tomorrow's Planet is another service which could be quickly operative on EchoStar's set-aside. I understand that Tomorrow's Planet has prepared a rather eclectic distance learning service and would be able to respond quickly were it offered access on EchoStar. It, too, has unsuccessfully sought access on EchoStar's set-aside.

The Universal Education Foundation ("UEF"), based in Syracuse, New York has prepared content which would be suitable for online education and for television. It seeks to utilize a proprietary software system which enables real time interactivity via the Internet. I understand that UEF has a number of important non-profit partners, including several school systems, which currently utilize UEF's content delivered terrestrially. It claims to have funding which would enable it to become operative very quickly if DBS access were made available.

B. Reducing Barriers to Access.

EchoStar's barely concealed hostility towards its set-aside responsibility has in all likelihood deterred potential service providers from seeking access on its set-aside channels.

EchoStar might well be able to obtain additional programmers by presenting itself as open to applications, and by seeking out qualified programmers. What it needs to do is to adopt a program

¹⁴ADEC's letter is noteworthy in another respect. The letter refers to its belief that there is an abundance of programmers "for the limited channels that are available" on the public interest space. This may be further evidence of the fact that ADEC is aware of other programmers. It may also be evidence that, in denying access to its satellite, EchoStar has told ADEC, or let it believe, that there is great competition for its public interest service.

using practices analogous to the widely-accepted and successful methods which have been used in affirmative action programs seeking to expand employment of minorities and women in industry.

So far as I am aware, EchoStar has done nothing to advertise or promote the availability of its access channel to likely programmers. It has never sought out the assistance of organizations whose members might be interested in providing such channels, such as the Association of Independent Video and Filmmakers, the National Federation of Community Broadcasters and the Alliance for Community Media. Nor do I believe it has advertised in those organizations' publications, or in *Current*, the trade publication of non-commercial broadcasters.

One category of programming which might be a fruitful area for aggressive solicitation is international video services. I am unaware of any effort that EchoStar has made to obtain programming from international sources. While I am not intimately familiar with international programming markets, it is my understanding that there are many international programming services which might be suitable for carriage on EchoStar's public interest channels.¹⁵

EchoStar, for no sensible reason apparent to me, has utilized a confusing and cumbersome application process for programmers seeking access to the public interest set-aside. From the very beginning of the set-side implementation, EchoStar's process has been off-putting and counterproductive. EchoStar can easily revise these practices, none of which are required by FCC regulation or policy.

¹⁵Indeed, at the time Section 335 was adopted, it was argued that DBS is inherently well-suited to program to geographically dispersed, but "linguistically linked" communities throughout America. There are, for example, a number of immigrant ethnic groups, such as the Hmong clans from Laos, which have settled in a relatively small number of closely-knit communities spread all over the country. While these communities may each be too small to justify a television station, DBS can aggregate these audiences and achieve the necessary critical mass.

For example, parties selected for the EchoStar set-aside typically receive, at least initially, a contract with a one-year term. The unit cost of program production is significantly reduced when the producer has some assurance that it will be able to “spread” those costs over a period of time, the longer the better. Since foundations and other funders for non-profits often seek assurances of viability that run much longer than that, extending the contract term would likely stimulate additional grantmaking as well.

Another deleterious EchoStar practice has been to give successful applicants a very short time to get on the air. Program production requires substantial “up front” investment, and the less lead time there is, the more relatively expensive it is to produce programming. A short time frame also interferes with promotion and similar activities designed to obtain viewers. “Cold starts” delay viewer acquisition, and make it much more difficult to meet viewership goals.

C. Reducing or Eliminating Access Charges

One of the first steps a DBS licensee should take in the absence of an adequate quantity of programmers to occupy the DBS set-aside is to reduce or eliminate charges for access. While the Communications Act *permits* operators to recover 50 percent of their “direct costs of making such channel[s] available...,” it does not *require* them to charge for such access or assure DBS operators that they are entitled to charge any minimum amount.

47 U.S.C. §335 sets a ceiling on the price which may be charged for programmers’ use of the DBS set-aside. Section 335(b)(3) requires licensees to make access available “upon reasonable prices, terms, and conditions....” 47 U.S.C. §335(b)(4) implements this “limitation” by setting forth how the maximum price for access is to be determined:

- (4) LIMITATIONS--In determining reasonable prices under paragraph (3)--

(A) the Commission shall take into account the nonprofit character of the programming provider and any Federal funds used to support such programming;

(B) the Commission shall not permit such prices to exceed, for any channel made available under this subsection, 50 percent of the total direct costs of making such channel available; and

(C) in the calculation of total direct costs, the Commission shall exclude—

(i) marketing costs, general administrative costs, and similar overhead costs of the provider of direct broadcast satellite service; and (ii) the revenue that such provider might have obtained by making such channel available to a commercial provider of video programming.

It is important for immediate purposes to stress that Section 335, as implemented by the FCC at 47 CFR §25.701(c)(5),¹⁶ does not guarantee that licensees may recover any particular minimum amount from set-aside programmers, or otherwise set a minimum price of any kind. Instead, the FCC's regulations emphasize the nature of the price limitation by stating that "DBS providers cannot charge rates for the set aside "that exceed costs that are directly related to making the capacity available...." 47 CFR §25.701(c)(5)(i). *See also, Implementation of Section 25 of the Cable Television and Consumer Act of 1992*, 13 FCCRcd at 23309 (discussing "the 50 percent cap"). In fact, Section 25.701(c)(5)(iii) of the Commission's rules expressly permit parties to negotiate rates that will be charged, so long as they do not exceed the established cap.

I note that there are, in particular, many public colleges, community colleges and other state

¹⁶Section 25.701(c)(5) reads as follows:

(5) *Rates, terms and conditions.* (i) 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.

(ii) Rates for capacity reserved under paragraph (a) of this section shall not exceed 50 percent of the direct costs as defined in this section.

(iii) 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.

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

and local educational institutions which presently produce distance learning programming which they could make available to EchoStar if there were no significant costs associated with doing so. This programming is currently distributed via terrestrial public television systems and by point to multipoint microwave via the ITFS service established under Subpart I of Part 74 of the FCC's regulations. These and other operative distance learning services are especially well-suited for DBS distribution, but they often need financial assistance.

D. Purchasing and/or Subsidizing Programming

Another mechanism available to DBS operators is the purchase or subsidization of programming which meets the qualification requirements of Section 335. EchoStar can also enter into joint ventures to assist programmers; in fact, the FCC explicitly contemplated that such practices might be an effective means of generating public interest programming. *Implementation of Section 25 of the Cable Television and Consumer Protection Act of 1992*, 13 FCCRcd at 23291-92.

Many of the municipal and state distance learning services mentioned above would likely need start up funds and, perhaps, some additional ongoing subsidy, but would otherwise be able to transmit programming right away. For example, it is my understanding that one such service is CCCSAT, the California Community Colleges Satellite Network. This service was briefly on EchoStar's public interest set-aside, but CCCSAT was recently forced to stop its uplink because of California's current fiscal crisis.¹⁷

The FCC has held that the Communications Act permits DBS operators to purchase pro-

¹⁷Understandably, organizations such as CCCSAT regard service to their own communities and states to be their highest priority, and service to others to be secondary. One of the goals of creating a national set-aside is to make such programming available more broadly; EchoStar may have to provide financial assistance if that goal is to be accomplished.

programming for carriage on the DBS set-aside. *See Implementation of Section 25 of the Cable Television and Consumer Act of 1992*, 8 FCCRcd 1589, 1599 (1993). There is nothing in the statute, FCC rules or subsequent agency precedent which bars the subsidization of qualified programmers to assist their production of programming which would satisfy the set-aside obligation, and it is my opinion that such a practice would not only be permissible, but that it would be entirely consistent with the objectives of Section 335.

I believe that if EchoStar were to attempt to purchase existing programming for the set-aside, there would be many offers to sell, at reasonable prices. Inasmuch as there is little additional cost associated with the sale of programming which is "in the can," cable networks and other suppliers might well be able to create attractive non-commercial offerings were EchoStar seeking to purchase such material. Similarly, EchoStar's willingness to enter into joint ventures with potential programmers would likely generate significant response from interested programmers.

E. Requesting Waiver of Non-Duplication Requirements of 47 CFR §25.701(c)

A primary means by which DBS operators can satisfy their set-aside obligations in the absence of adequate amounts of programming is to permit qualified programmers to have access to two or more programming channels. Because DVS and EchoStar have entered into a contract which limits EchoStar's right to afford access on EchoStar's DBS service to certain program providers which would otherwise be qualified programmers under Section 335, this contractual obligation would complicate EchoStar's ability to comply with Section 335 in the unlikely event that it were unable to satisfy those obligations through the mechanisms I have described.

It is my opinion that, under circumstances set forth below, if all other programming options were exhausted, there is a substantial likelihood that the FCC would waive its rules to permit EchoStar

to offer multiple programming services from qualified entities. It is also my opinion that there are several programmers which would wish to provide such multiple services, including C-SPAN¹⁸ and PBS.¹⁹

47 CFR §25.701(c)(4) provides that:

(4) *Non-commercial channel limitation.* 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.

The contract between EchoStar and Dominion effectively precludes EchoStar from affording access to certain otherwise qualified programmers. This presents the very unlikely, but hypothetically possible, circumstance that EchoStar could exhaust all other available means of filling its set-aside obligation. In that situation, I believe that EchoStar would be in a strong position to succeed in obtaining a waiver of the one programmer limitation of 47 CFR §25.701(c)(4). My assumptions are as follows:

- (1) EchoStar has made affirmative efforts to seek out qualified programmers that have not previously sought access through its current application process.
- (2) EchoStar has significantly reduced or eliminated its rates for access to set-aside programming and taken steps to publicize that fact.
- (3) EchoStar has sought out potential programmers and attempted to subsidize their start-up costs in preparing programming for carriage on the set-aside.
- (4) EchoStar has attempted to purchase programming to carry on the set-aside channel.
- (5) EchoStar has obtained the cooperation of an existing set-aside programmer so that

¹⁸CSPAN is the Cable Public Affairs Network. C-SPAN is a non-profit established by the cable television industry to provide full-time coverage of the United States House of Representatives and Senate, and for other related programming.

¹⁹PBS is the Public Broadcasting Service. PBS does not have any broadcasting stations of its own. Rather, its principal activity is to provide programming to local public TV stations, which choose to carry some or all of the PBS offerings and have discretion as to when such programming is carried. PBS has long sought to expand its own offerings on multi-channel programming services.

the waiver submission can include representations of the programmer's willingness to offer qualified and highly attractive programming that will diversify the perspectives and viewpoints available to EchoStar customers.

- (6) The likelihood of obtaining a waiver would be substantially increased if C-SPAN and/or PBS joined in the submission of the request.

The FCC frequently grants waivers of its rules. The Commission operates under a public interest standard which it will always consider special circumstances that justify departure from its basic regulatory structure. The leading case with respect to waivers under Title III of the Communications Act is *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). There, Judge Harold Leventhal wrote that waiver requests "must be given a 'hard look'":

The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.

The salutary presumptions do not obviate the need for serious consideration of meritorious applications for waiver, and a system where regulations are maintained inflexibly without any procedure for waiver poses legal difficulties. The Commission is charged with administration in the "public interest." That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the "public interest" for a broad range of situations, does not relieve it of an obligation to seek out the "public interest" in particular, individualized cases.

Id. (citations omitted).

It is my belief that an EchoStar waiver request, as described above, would be favorably received under the *WAIT* standard. In light of the objectives of Section 335, the opportunity to present high quality programming which would diversify the range of viewpoints and perspectives would merit attention. The alternative, which is to present several somewhat similar Christian programming services, would permit literal compliance with Section 25.701(c), but would not add significantly to the diversity of program offerings.²⁰

²⁰The waiver request could be, and should be, framed in viewpoint neutral terms. That is, it would be based on the relative similarity of offerings available absent the waiver. Providing diversity of program content would advance the goals of Section 335.

It is my understanding that EchoStar currently carries the C-SPAN I programming service as part of its set-aside offering, and that it carries C-SPAN II as part of its regular program service. C-SPAN has a third television feed, C-SPAN III, which is carried on many cable systems in the United States. This service is very well regarded, and focuses on longer form, more academic programming than the two other C-SPAN programming services. As such, I believe that a waiver based on the offering of the C-SPAN III service would be highly attractive to the FCC.

Similarly, it is my understanding that PBS provides a distance learning channel called PBSYOU on EchoStar's set-aside channels. During the rulemaking leading to the promulgation of the FCC's set-aside rules, PBS opposed the one programmer limitation described above, and indicated its desire to provide several full-time services on the set-aside. Indeed, its full-time children's TV channel, PBSKIDS was designed with that purpose in mind, and would be highly suitable for carriage on the set-aside via a waiver. Thus, it is quite possible that PBS would be willing to join with EchoStar in seeking a waiver if it had the opportunity to offer a second service on the EchoStar set-aside.

VI. PREEMPTION

It is my opinion that EchoStar would almost certainly be able to satisfy its program set-aside obligations without having to use programming which is covered by the exclusivity provision of the EchoStar/DVS contract. If EchoStar had exhausted all available avenues for obtaining such programming, I believe it is highly likely that EchoStar would then be able to obtain a partial waiver from the FCC relieving it of having to meet the 4 percent requirement of current FCC set-aside rules.

Under the highly improbable scenario that EchoStar could not acquire sufficient programming using these mechanisms, and that it was unable to obtain a waiver of its Section 335 obligations, then and only then would it be possible to argue that Section 335 preempted its contractual obligations

under the EchoStar/DVS contract. I believe the conditions of such preemption would not only be improbable, but also temporary.

To elaborate on these conclusions, I offer the following observations.

First, it is almost inconceivable that EchoStar could not easily obtain additional qualified programming by taking one or more of several simple steps described above. EchoStar would almost certainly receive more applications if it changed the financial terms of providing access, if it made its application process more transparent, if it extended the term of its contracts and/or if it gave its programmers adequate lead time, perhaps six months, before they would go on the air.

Second, as I have previously explained, I believe that under the circumstances I have described, there is a good chance that EchoStar could obtain a waiver permitting it to offer a second and even a third programming service from some of its current set-aside programmers.

Only if EchoStar had exhausted all of the other means I have described to generate additional programming and also failed in a good faith effort to obtain a waiver of its obligations under Section 335, would its contractual obligation to DVS come into direct conflict with its obligations to provide programming on the public interest set-aside. This highly unlikely and hypothetical condition would be temporary, as I believe that EchoStar would be under a continuing obligation to locate suitable qualified programming which did not require it to breach its contractual obligation to DVS. I believe that it would be only a short period of time, probably less than one year, before other qualified programmers would come forward to take advantage of the opportunity to offer programming using EchoStar's set-aside capacity at low cost or free of charge.

EXHIBIT A

ANDREW JAY SCHWARTZMAN



1978- *PRESIDENT AND CHIEF EXECUTIVE OFFICER, MEDIA ACCESS PROJECT*

present Director of nationally prominent foundation-funded public interest telecommunications law firm in program of litigation and public policy advocacy on telecommunications, Internet, mass media and First Amendment issues before the FCC, other state and federal agencies, and the courts. Clients are civil rights, civil liberties, environmental, consumer, and labor organizations. Frequent appearances before Congressional committees, professional conferences, and on TV and radio. Experienced appellate advocate; named one of the nation's thirty "leading communications lawyers" by *National Law Journal*.

1974- *ATTORNEY-ADVISOR, U. S. DEPARTMENT OF ENERGY*

1978 Staff attorney in Regulatory Litigation Division of Office of the General Counsel of DOE and predecessor agencies. Litigated petroleum pricing and allocation matters in the Federal Courts. Participated in drafting of regulations and interpretations, and in administrative appeals process. Assisted in internal investigations and in preparation of Congressional testimony. Member, Energy Department Transition Task Force.

1971- *STAFF COUNSEL, UNITED CHURCH OF CHRIST OFFICE OF COMMUNICATION*

1974 Legal advisor for social action program seeking to advance rights of listeners, and to promote minority participation in TV and radio. Rendered legal advice and filed FCC fairness doctrine complaints and license renewal challenges. Represented EEO project in successfully expanding and enforcing FCC regulatory mandate for affirmative action in broadcast industry employment.

EDUCATION

University of Pennsylvania, 1971 (J.D.); University of Pennsylvania, 1968 (A.B., Sociology)

OTHER PROFESSIONAL ACTIVITIES AND HONORS

Hall of Fame Inductee, Minority Media and Telecommunications Council (2002)

Advisory Board, National Entertainment and Media Law Institute, Southwestern University School of Law (2001-present)

Member, Working Group on Digital Broadcasting and the Public Interest, The Aspen Institute Communications and Society Program (1998)

Board of Advisors, Center for Democracy and Technology (1996-present)

Board of Directors, Minority Media and Telecommunications Council (1994-present)

Member, Communications Counsel's Forum, The Aspen Institute Communications and Society Program (1991-1996)

President, Safe Energy Communications Council (1991-present)

Recipient, Everett C. Parker Award for Service to the Public Interest in Communications (September 1991)

Member, Advisory Panel, "Communication Systems for an Information Age," U.S. Office of Technology Assessment (1986-1989)

TEACHING EXPERIENCE

Lecturer, Johns Hopkins University, Krieger School of Arts and Sciences, 2003-present; Lecturer, Fairleigh Dickenson University, College of Liberal Arts, 1972-73 ("Federal Communications Regulation"). Frequent guest presentations at the graduate and undergraduate level, including institutions such as Washington College of Law, The American University (Washington, DC); Annenberg School of Communications (Philadelphia, PA and Washington, DC); Fordham University (Bronx, NY); and Howard University (Washington, DC).

PUBLICATIONS (PARTIAL LISTING)

- "Access and Social/Political Rights" (Symposium)- 2002 Law Review of Michigan State University- Detroit College of Law 1 (2002)
- "Media Consolidation What Now?" 32 *Television Quarterly* 42 (2002)[with Michael Epstein]
- "Viacom-CBS Merger: Media Competition and Consolidation in the New Millennium," 52 *Federal Communications Law Journal* 513 (2000)
- "The First Amendment and the Media: Convergence--Necessary, Evil, or Both? The Legal, Economic, and Cultural Impacts of Mega Media Mergers" (Symposium)- 9 *Fordham Intellectual Property, Media and Entertainment Law Journal* 421 (1999)
- "Cable providers aim to tame the Net," *San Francisco Examiner*, July 18, 1999
- "Why Ratings Vary for TV and the Internet: Internauts Show TV How to Deal With Them"- *Legal Times*, October 13, 1997
- Encyclopedia of the Consumer Movement* (Brobeck, Ed.)(ABC-CLIO)(1997) - Broadcasting Contributor
- "Committee on Correspondence: Are Media Conglomerates Bad For Us?"- *Slate* (October 18-25, 1996) [<http://www.slate.com/COC/96-10-18/CoC.asp>]
- "Free the Media"- *The Nation*, June 3, 1966
- "Censorship of Cable Television's Leased and Public Access Channels: Current Status of *Alliance for Community Media v. FCC*" (Symposium)- 6 *Fordham Intellectual Property, Media & Entertainment Law Journal* 465 (1996)
- "Pretty Pictures or Pretty Profits: Issues and Options for the Public Interest and Nonprofit Communities in the Digital Broadcasting Debate"- *Benton Foundation Communications Policy Working Paper No. 13* (1995)[with Gigi B. Sohn]
- "Broadcast Licensees and Localism: At Home In The `Communications Revolution'" - 47 *Federal Communications Law Journal* 383 (1994) [with Gigi B. Sohn]
- "Fairness - Not Silence"- *Washington Post*, January 31, 1994 [with Gigi B. Sohn]
- "Telecommunications: Federal Communications Commission"- Chapter published in the Citizens' Transition Project's *Changing America: Blueprints For The New Administration* (Green, ed.) (Newmarket Press 1992) [with Nolan A. Bowie and Angela Campbell]
- Les Brown's Encyclopedia of Television* (Brown, ed.) (Gale 1992)- Law and Regulation Contributor
- "Open Access - The Fairness Doctrine: Does It Promote Free Speech?"- *ABA Journal*, November 1 1987
- "Unequal Opportunities: Unneeded, Undesirable and Unfair"- 2 *Comm/Ent Law Journal* 623 (1980) [with Heidi P. Sanchez]

SEMINAR AND CONFERENCE PRESENTATIONS (PARTIAL LISTING)

- McGannon Lecturer on Communications Policy and Ethics, Fordham University (April 2, 2004)
- Panelist, "The Media Ownership Debate: Behind the Headlines" - sponsored by American Constitution Society (December 2003)
- Plenary Luncheon Speaker, "The FCC's Media Ownership Ruling Reconsidered" - presented at The 31st Telecommunications Policy Research Conference at The National Center for Technology & Law, George Mason University School of Law (September, 2003)
- Panelist, "Rethinking Regulation of Media Ownership" - sponsored by the Association of the Bar of the City of New York (May 2003)

- Verizon Distinguished Lecturer, Carnegie Mellon University School of Computer Sciences (April, 2002)
- Perspectives on How Internet Access Affects the Broadcast Market: - presented at Conference on "New Media Replacing Old Media: Broadcast Media Deregulation and the Internet" at St. John's University School of Law (March, 2002)
- Panelist, "Telecommunications and Internet Policies: What's Hot and What's Not" - sponsored by the Association of the Bar of the City of New York (June 2001)
- Finals Judge, 2001 National Telecommunications Moot Court Competition, Catholic University School of Law (January 2001)
- "Competition, Convergence and the Constitution: Will Marketplace Changes Affect First Amendment Standards for Electronic Media?" - presented at "The Electronic Media and the First Amendment in the 21st Century," sponsored by The Freedom Forum (October 2000).
- Panelist, "Public Interest Programming By American Commercial Television" - presented at "The Future of Public Television," sponsored by Columbia Institute for Tele-Information (March 1998)
- Panelist, "Digital Television" - presented at Media Institute Communications Forum (January 1998)
- Speaker, "Spectrum Scarcity and the Power to Regulate" - presented to the Presidential Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (December 1997)
- Panelist, "Issue Advocacy Ads: How Much Disclosure?" - presented at "Stand By Your Ad," sponsored by Free TV for Straight Talk Coalition (September 1997)
- Panelist, "The Internet at the FCC: Connecting Cyberspace to the NII" - sponsored by Federal Communications Bar Association Ad Hoc Committee on Computer Networking (March 1997)
- Panelist, "Political Broadcasting: The Use of Electronic Media for Political Purposes" - presented at "Managing Political Campaigns: Implications of Campaign Finance Reform," sponsored by *White House Weekly* (March 1997)
- Panelist, "Beyond the Telcom Act: The Medium and the Message, One Year Later" - sponsored by The Freedom Forum (February 1997)
- Panelist, "Media Concentration and Competition in Program Markets," - presented at Annual Meeting of the National Association of Television Program Executives (January 1997)
- Panelist, "Communications Unleashed" - sponsored by Computer Scientists for Professional Responsibility (October 1996)
- Panelist, "De-Nationalizing the Airwaves: Property Rights and Free Market Principles in Spectrum Use and Allocation?" - presented at "Toward a Free and Competitive Communications Industry," sponsored by The Federalist Society Telecommunications and Electronic Media Practice Group (October 1996)
- Panelist, "Promoting Free Speech and Diversity on the Information Highway"- presented at "The Information Superhighway: Strategies for Workers," sponsored by Communications Workers of America (December 1995)
- Panelist, "The Future of Wireless Communication"- sponsored by Columbia Institute for Tele-Information (May 1995)
- Panelist, "Television Self-Regulation and Ownership Regulation: The American Experience"- sponsored by Columbia Institute for Tele-Information and Bertelsmann Foundation (March 1995)
- Panelist, Yale Law Journal Symposium, "New Communications Technologies and the First Amendment" (December 1994)
- Conferee, Aspen Institute Communications and Society Program Ninth Annual Telecommunications Policy Conference, "Strategic Alliances and Business Positioning in Telecommunications: Implications for Public Policy" (August 1994)
- Moderator, "20/20 Vision- The Development of a National Information Infrastructure"- sponsored by National Telecommunications and Information Administration and Northwestern University, Annenberg School of Communications Washington Program (March 1994)

Participant, "Conference on Presidential Debates"- sponsored by the League of Women Voters of the United States, held at Wye Plantation, Aspen Institute (March 1985)

ADMISSIONS: District of Columbia; New York; U.S. District Court, D.C.; U.S. Courts of Appeal for the 2nd, 4th, 7th, 8th, 9th and D.C. Circuits

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CONFIDENTIAL

DIRECT BROADCAST SERVICE
TRANSPONDER LEASE,
CHANNEL USE AND PROGRAMMING AGREEMENT
BY AND AMONG
DOMINION VIDEO SATELLITE, INC.,
ECHOSTAR SATELLITE CORPORATION,
DIRECTSAT CORPORATION,
DIRECT BROADCASTING SATELLITE CORPORATION,
DIRECT BROADCAST SATELLITE CORPORATION
AND
ECHOSPHERE CORPORATION,
DATED JULY 18, 1996

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ARTICLE VIII

PROGRAMMING EXCLUSIVITY

8.1. Exclusive Programming. The parties agree that except as provided ~~below~~, the programming carried by Dominion and the DISH Group shall be mutually exclusive. In this regard, and without limiting the generality of the foregoing, except as set forth below, Dominion shall be entitled pursuant to this Agreement to transmit Christian Programs to Dominion Members and DISH™ subscribers on an exclusive basis and the DISH Group shall be entitled pursuant to this Agreement to transmit all other video (including but not limited to entertainment and business television programs), audio, data and other services, to Dominion Members and DISH™ subscribers on an exclusive basis.

8.2. Dominion's Secular Programming. Notwithstanding Section 8.1, Dominion shall have the right and option to transmit from the 61.5 Slot up to a maximum of approximately 15 advertiser supported (this would not include HBO and similar services, for example) secular programming originated by un-Affiliated third parties to Dominion Members (and DISH™ subscribers at the option of the DISH Group) if Dominion provides the DISH Group with at least sixty (60) days prior written notice of its intent to offer such advertiser supported secular programming, which notice shall state the identity of the programmer, and which shall promptly be revised to include such additional information as the DISH Group may reasonably request in order to fairly evaluate the opportunity, and EchoStar elects by written notice to Dominion not to provide such programming to Dominion Members from the 61.5 Slot. Dominion shall provide any such permitted secular programming only to Dominion Members, and to the DISH Group for resale as the DISH Group may desire, but to absolutely no others whether end use consumers, distributors, subdistributors or otherwise.

8.3. Christian Programs. Notwithstanding anything in this Article VIII to the contrary, Christian Programs currently offered by the DISH Group or their Affiliates pursuant to existing affiliation agreements may be offered by the DISH Group to DISH™ subscribers without restriction. The parties agree and acknowledge that the DISH Group has existing affiliation agreements with Eternal World Television Network ("EWTN"), Z Music, Focus On The Family and Trinity Broadcasting Network ("TBN"). However, in the event Dominion enters into an affiliation agreement with TBN or any other Christian programming provider whose programming is offered by the DISH Group, Dominion shall be permitted to, and shall, make such Christian programming a part of the Dominion Christian Program package. In addition, the parties agree and acknowledge that EWTN and Dominion are currently parties to an affiliation agreement and that Dominion shall be permitted to, and shall, make EWTN a part of the Dominion Christian Program package. For purposes of this Agreement, "Christian Programs" shall be defined as video programming which has, as its overriding focus, Christian religious content, and which is only marketed to appeal to the Christian theme and content.

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8.4. Non Exclusive Programming. The parties agree and acknowledge that no exclusivity is contemplated by the parties, and both Dominion and the DISH Group shall be free to offer to Dominion Members and DISH™ subscribers:

- (a) educational programming;
- (b) any original programming offered by either of the parties;
- (c) religiously oriented business television programming (which shall mean programming where it is most logical to assume the primary market for the programming would be churches and church-affiliated organizations); or
- (d) programming which the other party, following reasonable notice, declines to carry (not to exceed, with respect to Dominion, the 15 Broadcast Channel limitation in Section 8.2 above).

8.5. Limitations on Dominion Broadcast Channel Material. Notwithstanding anything elsewhere in this Agreement which could potentially be construed to the contrary, under no circumstance shall any Dominion Broadcast Channel include material which could reasonably be considered as:

- (a) disparaging any member of the DISH Group, or as damaging to any of their image or goodwill; or
- (b) directly or indirectly encouraging any actual or potential DISH™ subscriber, Dominion Member or any other person or entity to use the service of or purchase any video, audio, data or other programming from any actual or potential competitor of any member of the DISH Group (including but not limited to DirecTV, USSB, Tempo, AlphaStar, MCI, News Corp or any cable or wireless cable company).

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