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March 22, 2004

The Honorable Michael K. Powell, Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: *Ex Parte - In the Matter of Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, MB Docket No. 03-15*

Dear Mr. Chairman,

We, the National Association of Broadcasters ("NAB"), urge you categorically to reject the entreaties of EchoStar Satellite LLC ("EchoStar"), contained in its letter to you dated March 4, 2004, to require network affiliated stations, under certain circumstances, to provide waivers that would permit EchoStar to import distant digital network affiliated stations into their local markets.

Before even addressing the purported "merits" of EchoStar's proposal, you should be clear what is, and what is not, its objective. Contrary to EchoStar's letter, its objective is not to in any way foster, facilitate or encourage the transition to digital television. Rather, EchoStar's objective is to permit it to deliver the digital broadcasts of the New York and Los Angeles ABC, CBS, Fox, and NBC stations to millions of households nationwide, even though (a) the households can receive the *same programming* over the air from their local station's analog signal and (b) in the overwhelming majority of cases, EchoStar or DirecTV already deliver the *same programming* via what SBCA, their trade association, describes as "a 100 percent, crystal-clear digital audio and video signal" retransmitted from the local station's analog broadcasts.

The simple greed behind EchoStar's proposal is clear, and the tactic familiar. In the 1990s, the DBS industry sought to offer network broadcast programming "on the cheap" by delivering the analog broadcasts of New York and Los Angeles stations nationwide -- completely bypassing the network/affiliate system that Congress and the Commission have worked so hard to foster. DirecTV and EchoStar then dug deep to find

technical solutions to enable them to offer *local-to-local* broadcast programming to the overwhelming majority of U.S. television households -- and soon to all of them. (They found these solutions, of course, only after repeatedly telling Congress and the FCC that the technical problems were unsolvable.)

EchoStar's current proposal is equally self-serving. EchoStar would enjoy a tremendous financial benefit from being able -- again "on the cheap" -- to deliver the digital broadcasts of the New York and Los Angeles ABC, CBS, Fox, and NBC stations to many millions of viewers nationwide. Instead of investing in delivering *local* digital broadcasts, as cable systems are gradually beginning to do, EchoStar could use a single, inexpensive *national* feed to deliver digital programming of a particular network around the country. Although this gambit would cost EchoStar virtually nothing, it would gain enormously, both in additional customers (at \$40, \$50 or more per month) and in selling additional network packages (at \$6 per month) to both old and new customers.

While the "distant digital" proposal would be a tremendous windfall for EchoStar, it would be a disaster for the Commission, the public, and broadcasters. As discussed in detail below, the supposed "factual" basis for this proposal -- that the broadcast television industry has not been diligent in pushing the digital transition -- is palpable nonsense. And as also described below, this gift to the DBS industry would come at a crippling cost in terms of Congress' and the Commission's public policy objectives.

**A. The Broadcast Industry Has Spent Enormous Sums and Dedicated Extraordinary Efforts to Implementing the Transition to Digital Broadcasting -- With Tremendous Success in Rolling Out Digital to the Vast Majority of American TV Households**

Contrary to EchoStar's false accusations, broadcasters have worked tirelessly to implement the transition to digital broadcasting. Thanks to the expenditure of billions of dollars and millions of person-hours, broadcasters have built -- and are on-air with -- digital television ("DTV") facilities in 203 markets that serve 99.42% of all U.S. TV households.<sup>1/</sup> Midway through the transition, almost three-quarters -- 73.7% -- of U.S. television households have access to *at least six* free, over-the-air digital television signals.<sup>2/</sup> Nationwide, 1380 television stations in 203 markets are delivering free, over-

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<sup>1/</sup> National Association of Broadcasters, *DTV Stations in Operation*, <http://www.nab.org/Newsroom/issues/digitaltv/DTVStations.asp> (last checked Feb. 19, 2004).

<sup>2/</sup> See Mark R. Fratrick, Ph.D, *Reaching the Audience: An Analysis of Digital Broadcast Power and Coverage* (BIA Financial Network, Oct. 17, 2003) (prepared for the Association for Maximum Service Television, Inc.) ("MSTV Study").

the-air digital signals today.<sup>3/</sup> More than 70 million households receive six or more DTV signals; 49 million households receive *nine* or more DTV signals; and a full 30 million households receive *12* or more DTV signals. More digital stations are resolving their obstacles and going on the air almost daily. The digital transition is working and moving ahead quickly, and the claims of the satellite industry to the contrary are empty rhetoric, not fact.

In the top ten markets, covering 30% of U.S. households, all top four network affiliates are on-air – 38 with licensed full-power digital facilities and two New York city stations with Special Temporary Authority (“STA”) currently covering a significant chunk of their service areas and with plans to expand even more. In markets 11-30 (representing another 24% of U.S. households), 77 of 79 top four affiliated stations are on-air – 72 with full-power licensed digital facilities and five with STAs. Two other stations in that group have been stymied in their roll-out, but are reporting regularly to the Commission about their progress in overcoming the obstacles. Thus, virtually *all* ABC/CBS/Fox/NBC affiliates in the top 30 markets, representing 53.5% of all U.S. households, are on-air with DTV -- 110 stations with full power licensed digital facilities and seven with STAs.<sup>4/</sup>

Even as to smaller stations in these markets and stations in smaller markets – which have far fewer resources but equally high costs -- 1263 of 1569 stations are on air with digital,<sup>5/</sup> having overcome enormous challenges and in many cases mortgaging their stations to do so, despite having no immediate prospect of revenues to offset these huge investments.

Those who do not understand the digital transition sometimes claim that DTV stations operating with STAs broadcast with very low power. That is simply wrong. Many stations, particularly those outside the largest stations in the largest markets, are “DTV maximizers,” *i.e.*, are maximizing their power to greatly *exceed* their analog coverage. Many maximizers need only a fourth or less of their maximum (licensed) power to cover their entire analog service area. Maximizers operating at even much reduced power are still covering 70% or more of their analog service areas. Almost 19% of current DTV stations operating pursuant to STAs currently serve *more* than 100% of their analog service area with a digital signal.<sup>6/</sup> This number will expand exponentially as the transition continues. This high percentage is particularly striking given that there are still no FCC rules for digital translators or booster stations, which will further expand digital signals in rural areas (at still further cost to local broadcasters). Free, over-the-air broadcasters take seriously the potential for expanding their service area and diminishing

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<sup>3/</sup> See [www.fcc.gov/mb/video/dtvstatus.html](http://www.fcc.gov/mb/video/dtvstatus.html) (“FCC statistics”).

<sup>4/</sup> *Id.*

<sup>5/</sup> *Id.*

<sup>6/</sup> See MSTV Study, *supra*, at 16.

the very small number of households nationwide that cannot receive local signals, and the digital transition will provide an opportunity to increase nationwide broadcast service.

An authoritative study from last fall shows that on-air DTV facilities are serving 92.7% of the population served by the corresponding analog stations.<sup>2/</sup> The small percentage of viewers who do not yet receive a fully replicated digital signal of their local television stations is shrinking by the day as broadcasters work hard, at great expense, to expand the coverage of their digital stations.

On the programming side, broadcasters, both networks and local stations, are providing an extraordinary amount of high-quality DTV and high-definition television (“HDTV”) programming to entice viewers to join the digital television transition and purchase DTV sets to display the glory of dazzling HDTV programs and the multiple offerings of the growing DTV multicasts. Three networks offer virtually all their prime time programming in HDTV, as well as high-profile specials and sporting events. PBS is launching its HD Channel, in addition to its multicast channels of educational fare. WB is doubling its amount of HD programming this fall to account for more than half of its program schedule. PAX is multicasting on its digital channels, including prime time fare. And now many special effects, like the first-down marker and graphics, are also going high definition, to enhance the viewer experience and move the transition along faster and faster.

While it is local stations that bring these national HDTV programs to the vast majority of viewers, these local stations also are doing more and more on the local level to supplement the network HDTV and multicast fare. Examples abound of local HDTV and multicast broadcasts (at an enormous cost for full local HD production facilities):

- WRAL-TV produces its local news in HDTV
- Post-Newsweek’s Detroit station broadcast live America’s Thanksgiving Day Parade in HD
- WRAZ-TV in Durham NC broadcast 10 Carolina Hurricanes hockey games in HD last winter
- KTLA in LA broadcast last January’s Rose Parade in HD in a commercial-free broadcast simulcast in Spanish and closed captioned and repeated it throughout the day and distributed it on many Tribune and other stations
- Last April, Belo’s Seattle station KING-TV began producing its award-winning local programs Evening Magazine and Northwest Backroads in HDTV. Evening

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<sup>2/</sup> MSTV Study, *supra*, at i.

Magazine is daily. These programs are broadcast on Belo's other Seattle and Portland and Spokane stations

- KTLA last March broadcast live LA Clippers and the Lakers in HD. It was the third sports presentation by KTLA, which included two Dodgers games
- Many public TV stations are providing adult and children's education, foreign language programming and gavel-to-gavel coverage of state legislatures
- NBC and its affiliates are planning a local weather/news multicast service
- ABC is multicasting news/public affairs and weather channels at its KFSN station in Fresno, Calif. It plans to replicate this model at the nine other stations it owns.
- WKMG in Orlando plans to broadcast a Web-style screen with local news, weather maps, headlines and rotating live traffic views.

This ever-increasing variety of DTV and HDTV programming, being broadcast to the vast proportion of American households, will attract consumers to purchase DTV sets. Another major driver of the transition is the FCC's August 2002 Tuner Order, which requires all new television sets, on a phased-in basis and starting this summer with the half of the largest sets, to have a DTV tuner. As a result, DTV tuners will be available in an ever-increasing number of households, thereby further hastening the transition.

In short, the suggestion that broadcasters have somehow failed America in the transition to digital broadcasting is demonstrably false. Indeed, EchoStar's General Counsel, David Moskowitz, admitted as much in testimony before the Judiciary Committee in February: "I agree with you completely [that broadcasters can't be blamed for decisions by consumers not to invest in digital sets]. I'm not saying the NAB or the broadcasters are at fault."<sup>8/</sup>

The notion that EchoStar's proposal for forced waivers in purported "digital white areas" would *improve* matters is sheer fantasy. In fact, allowing EchoStar to deliver distant digital (or HD) signals to so-called "digital white areas" would set the stage for a consumer nightmare almost identical to what occurred in 1999, when hundreds of thousands of households had to switch from (illegally-delivered) distant signals to over-the-air reception of local stations.

The reason is simple: as Congress and the Commission painfully experienced from mountains of letters, emails, and phone messages in 1999, viewers who are

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<sup>8/</sup> Testimony of David Moskowitz before the Subcommittee on Courts, the Internet, And Intellectual Property of the House Judiciary Committee (Feb. 24, 2004).

accustomed to receiving all of their TV programming (including network stations) by satellite are often enraged when told that they must switch to a hybrid system in which they combine satellite reception with an off-air antenna or cable service. The import of the “distant digital” proposal is therefore clear: after EchoStar had “grabbed” customers with a distant digital signal, the costs to local broadcast stations of reclaiming those viewers would go sky-high, since stations would face not only the same financial costs they do now but *also* the high costs of confronting thousands of angry local viewers with the need to change their reception setup. EchoStar knows all of this, and it fully understands the implication: the “distant digital” plan would *not* encourage a smooth digital transition, and would *not* encourage stations to invest in the digital rollout, but would simply make it easy for EchoStar to hook customers on (distant) satellite-delivered digital signals and keep them forever.<sup>9/</sup>

If there were any doubt about EchoStar's tenacity in retaining distant-signal customers once they begin serving them – regardless of the legality of doing so -- EchoStar's behavior with regard to analog distant signals would eliminate it. As a District Court found last year after a 10-day trial, EchoStar was so determined to retain its illegal distant-signal customers that, “when confronted with the prospect of cutting off network programming to hundreds of thousands of subscribers,” the key “EchoStar executives, including [CEO Charles] Ergen and [General Counsel] David Moskowitz,” choose instead “to break Mr. Ergen's promise to the Court” that it would turn them off. *CBS Broad., Inc. v. EchoStar Communications Corp.*, 276 F. Supp. 2d at 1246, ¶ 46.

### **B. EchoStar's Proposal Is Unnecessary and Would Do Lasting Damage to Localism**

At all times since 1988, the purpose of the distant-signal license has been to make over-the-air broadcast programming available by satellite solely as a “lifeline” to satellite subscribers that had no other options for viewing network programming.<sup>10/</sup> The EchoStar proposal would do exactly the opposite: The Commission would override normal

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<sup>9/</sup> In his oral testimony in February before a subcommittee of the House Judiciary Committee, SBCA spokesman (and EchoStar General Counsel) David Moskowitz said that once DBS firms begin delivering a distant digital signal to a household, they should *never* have to turn off that signal. Far from encouraging stations to expand their digital service areas, this naked “land grab” would have the opposite effect: no matter what they did, stations would have forever lost many of the local customers to a distant signal.

<sup>10/</sup> *E.g.*, SHVIA Conference Report, 145 Cong. Rec. H11792 (“the specific goal of the 119 license, which is to allow for *a life-line network television service to those homes beyond the reach of their local television stations*, must be met by *only* allowing distant network service to those homes which cannot receive the local network television stations. Hence, the ‘unserved household’ limitation that has been in the license since its inception.” *Id.* (emphasis added).

copyright principles to permit DBS companies to transmit distant network stations to many millions of additional households, even though (1) the households get a strong signal from their local stations over the air and (2) in most cases, the DBS firm already offers the local analog broadcasts of the same programming, in crisp, digitized form, as part of a local-to-local package. The suggestion that the Commission needs to step in to offer a “lifeline” under these circumstances is baffling.<sup>11/</sup>

The consequences of this radical proposal, if adopted, would be likely to be grave. According to EchoStar, for example, if a station (through no fault of its own, *e.g.*, because of a local zoning obstacle) has been unable to go on-air with a digital signal, *every household in that station’s market* would be considered “unserved” -- and therefore eligible to receive a retransmitted signal from the New York or Los Angeles ABC, CBS, Fox, and NBC affiliates’ digital broadcasts. In these markets, EchoStar would take us back to the dark days of the mid-1990s, when, before courts began to intervene, the DBS firms used national feeds to deliver ABC, CBS, Fox, and NBC network programming to any subscriber who asked for it.<sup>12/</sup> And they would do so even though, in most cases, the DBS firms are themselves already delivering the same programming by satellite from the local stations. With DBS penetration already at more than 20 million households nationwide, and with the highest levels of DBS penetration in smaller markets, the impact on the viability of local broadcasters could be devastating.<sup>13/</sup> Worse yet, based on the misconduct of EchoStar in their retransmission of distant analog signals, once EchoStar has begun delivering distant digital stations, it will take enormous efforts (and years of struggle) to get them to ever stop doing so, even if they have “promised” to do so, and even if the law squarely requires them to do so.

Adopting EchoStar's proposal, at the expense of local broadcasters (and ultimately at the expense of local over-the-air audiences), would also have profoundly negative long-term consequences for the continued progress of the satellite industry. Over-the-air broadcasting is a *local* phenomenon, and the right way to deliver local stations is on a

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<sup>11/</sup> You should be aware that, in the guise of a letter seeking advice about how to fill out a Copyright Office form, EchoStar sought last year to obtain from the Copyright Office a statement that the Copyright Act *as now in force* already recognizes the “distant digital” concept. *See* Letter from David Goodfriend, EchoStar Communications Corp. to David O. Carson, General Counsel, Copyright Office (June 18, 2003). The Office swiftly, and properly, rebuffed that back-door effort. Letter from William J. Roberts to David Goodfriend (Aug. 19, 2003).

<sup>12/</sup> In other markets, while stations have gone on-air with their digital signals, their coverage area is temporarily reduced for reasons entirely beyond their control -- such as the destruction by terrorists of the World Trade Center and its broadcasting facilities.

<sup>13/</sup> Of course, the tiny number of *genuinely unserved* households (*e.g.*, those unable to receive Grade B intensity analog signals over the air) can receive either an analog or a digital signal from a distant affiliate of the same network. *See* Letter from William J. Roberts, U.S. Copyright Office, to David Goodfriend (Aug. 19, 2003).

local-to-local basis. In their drive to compete with cable, and with each other, DirecTV and EchoStar are likely to devise ingenious technical solutions to enable them to carry digital broadcasts on a local-to-local basis, just as they have -- despite their gloomy predictions -- found a way to do so for analog broadcasts. But adopting EchoStar's proposal to provide a cheap, short-term, government-mandated "fix" will take away much of the incentive that would otherwise exist to continue to find creative technological solutions. Congress wisely refused to abandon the bedrock principles of localism and free market competition in the 1990s, when the satellite industry made similar proposals, and the Commission should do the same now.

EchoStar's proposal would also sabotage another key objective of the SHVIA, namely minimizing unnecessary regulatory differences between cable and satellite. If EchoStar could deliver an out-of-town digital broadcast to anyone who does not receive a digital broadcast over the air, they would have a huge (and wholly unjustifiable) leg up on their cable competitors, which are virtually always barred by the FCC's network non-duplication rules from any such conduct. *See* 47 C.F.R. §§ 76.92-76.97 (1996).

Finally, it would be particularly inappropriate to grant EchoStar what in effect would be a vastly expanded compulsory license *when they have shown no respect for the rules of the road that Congress placed on the existing license*. If the Commission were to adopt this ill-conceived proposal, it can expect more years of controversy, litigation, and - - ultimately -- millions of angry consumers complaining to Congress and the Commission when their "distant digital" service is eventually terminated. The Commission should rebuff the invitation to participate in such a reckless folly.

### **C. What The Commission Should Do**

For the reasons set forth above the Commission should categorically reject EchoStar's digital white area proposal. Instead, what the Commission should do is to move expeditiously to adopt rules requiring DBS to carry the entire digital signal, including all multicast signals, of every station in every market where they provide local into local service.

DirecTV and EchoStar have brilliant engineers who constantly find ways to deliver more programming in the same spectrum. Nevertheless, in policy debates in Washington, the two firms regularly assure Congress and the Commission that no further technological improvement can be achieved. To mention one example: even as DirecTV was doubling its "compression ratio" between 1998 and 2001 -- enabling it to carry twice as many channels in the same amount of spectrum -- it repeatedly told the FCC that it had hit a brick wall as far as any further progress in compression technology:

- July 31, 1998: "DIRECTV has *substantially reached current limits* on digital compression with respect to the capacity on its existing satellites. Therefore, the addition of more channels will necessitate expanding to additional satellites ...."

- Aug. 6, 1999: “DIRECTV has *substantially reached current limits* on digital compression with respect to the capacity on its existing satellites.”
- Sept. 8, 2000: “DIRECTV has *substantially reached current technological limits* on digital compression with respect to capacity on its existing satellites. Although there are potentially very small gains still possible through the use of advanced algorithms, such technological developments can neither be predicted nor relied upon as a means of increasing system channel capacity.”
- Aug. 3, 2001: “DIRECTV has offered digitally compressed signals from its inception, and *has substantially reached current technological limits* on digital compression with respect to capacity on its existing satellites. Although there are potentially very small gains still possible through the use of advanced algorithms, such technological developments can neither be predicted nor relied upon as a means of increasing system channel capacity.”<sup>14/</sup>

In deliberations over the requirements that should be imposed on satellite operators regarding the carriage of digital broadcast signals, the Commission has yet again heard from the DBS firms that they have no hope of significantly expanding their capacity. For example, we heard from DirecTV and EchoStar that they will never be able to carry the digital signals of local television stations, and that they should instead be given crutches to help them compete with cable. In fact, the satellite firms have available to them a wide range of potential new techniques for massively expanding their capacity, including:

- spectrum-sharing between DirecTV and EchoStar;
- use of Ka-band as well as Ku-band spectrum;
- higher-order modulation and coding;
- closer spacing of Ku-band satellites;

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<sup>14/</sup> See, e.g., Comments of DIRECTV, Inc., [1998] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 98-102, at 5 (filed July 31, 1998); Comments of DIRECTV, Inc., [1999] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 99-230, at 9 (filed Aug. 6, 1999); Comments of DIRECTV, Inc. [2000] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 00-132, at 16 (filed Sept. 8, 2000); Comments of DIRECTV, Inc. [2001] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 01-129, at 16 (filed Aug. 3, 2001) (emphasis added in all cases).

- satellite dishes pointed at multiple orbital slots;
- use of a second dish to obtain all local stations;<sup>15/</sup> and
- improved signal compression techniques.

If the Commission allows the power of American technical ingenuity to continue to move forward, we can expect to see DirecTV and EchoStar continue to make tremendous progress in doing more with the same resources. Just as today's desktop computers are unimaginably more powerful than those available just a few years ago, we can expect similar quantum improvements from America's satellite engineers – if the Commission leaves the free market to do its magic, and leaves necessity to continue to be the mother of invention.

### CONCLUSION

Ever since the original Satellite Home Viewer Act of 1988 ("SHVIA"), Congress and the Commission have worked to ensure *both* (1) that free, over-the-air network broadcast television programming will be widely available to American television households, *and* (2) that satellite retransmission of television broadcast stations will not jeopardize the strong public interest in maintaining free, over-the-air local television broadcasting. Those two goals remain paramount today.

EchoStar's proposal -- by a company with a long track record of lawlessness -- is a recipe for mischief. It would give DBS a government-provided crutch that would set back for years what would otherwise be a market-driven race between DirecTV and EchoStar -- further spurred by competition from cable -- to deliver digital signals on a local-to-local basis. And when local stations later sought to reclaim their own local viewers from the distant digital transmission, there would be a consumer firestorm much

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<sup>15/</sup> The SHVIA permits a satellite carrier to offer *all* local stations via a second dish, but not to split local channels into a "favored" group (available with one dish) and a "disfavored" group (available only with a second dish).

The Honorable Michael K. Powell, Chairman

March 22, 2004

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like what occurred when two major satellite carriers were required to turn off (illegally-delivered) distant analog signals to millions of households in 1999.

Respectfully submitted,

**NATIONAL ASSOCIATION OF  
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A handwritten signature in black ink that reads "Marsha J. MacBride". The signature is written in a cursive, flowing style.

Marsha J. MacBride

Benjamin F.P. Ivins

cc: Commissioner Kathleen Q. Abernathy  
Commissioner Michael J. Copps  
Commissioner Kevin J. Martin  
Roy Stewart, Chief, Mass Media Bureau  
W. Kenneth Ferree, Chief, Cable Services Bureau