April 19, 2004

FILED ELECTRONICALLY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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

Dear Ms. Dortch:

On March 4, 2004, EchoStar Satellite LLC ("EchoStar") submitted an *ex parte* filing in the above-captioned docket proposing that the Commission:

> (a) require all network stations that have not completed construction of DTV facilities to grant waiver requests that will allow consumers in the relevant Designated Market Area ("DMA") to receive, by satellite, the High Definition ("HD") feed of the network in question; and (b) require all network stations that fail to replicate their analog Grade B contours to grant such waivers for households predicted as served by the station's analog signal but outside the station's community of license.[1]

On April 13, 2004, EchoStar filed a reply[2] to a critique of its proposal submitted by the National Association of Broadcasters on March 22, 2004.[3] EchoStar's reply, which purports to provide further justification for its proposal, in fact brings to light disturbing aspects of EchoStar's plan that run counter to the Communications Act and copyright law, including the proposed grant of permanent waivers to receive *distant* network service to households that already receive an

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[1] Letter from Pantelis Michalopoulas and Rhonda M. Bolton, Counsel for EchoStar Satellite LLC, Steptoe & Johnson LLP, to Michael K. Powell, Chairman, FCC, in MB Docket No. 03-15, RM 9832, at 1 (Mar. 4, 2004) ("EchoStar Mar. 2004 Letter").

[2] Letter from Pantelis Michalopoulas and Rhonda M. Bolton, Counsel for EchoStar Satellite LLC, Steptoe & Johnson LLP, to Michael K. Powell, Chairman, FCC, in MB Docket No. 03-15, RM 9832 (Apr. 13, 2004) ("EchoStar Apr. 2004 Letter").

[3] Letter from Marsha J. MacBride and Benjamin F.P. Ivins, National Association of Broadcasters, to Michael K. Powell, Chairman, FCC, in MB Docket No. 03-15 (Mar. 22, 2004) ("NAB Letter").

over-the-air signal from a *local* affiliate. In this letter, the ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the FBC Television Affiliates Association and the NBC Television Affiliates (collectively, the "Network Affiliates") set forth multiple reasons why the Commission should reject EchoStar's proposal outright:

- **EchoStar's proposal exceeds the Commission's grant of authority under the Satellite Home Viewer Improvement Act of 1999 ("SHVIA").**[4] In both its initial letter and its reply, EchoStar fails to disclose that the Commission previously rejected a nearly identical proposal it made about two years ago, finding it inconsistent with copyright law. The Copyright Office, too, last summer rebuffed EchoStar's efforts to define households unable to receive over-the-air digital signals of the relevant network as "unserved households" under the distant signal compulsory copyright license. Moreover, EchoStar's proposal that the Commission compel broadcasters to issue blanket waivers to EchoStar subscribers is inconsistent with the provisions of SHVIA, which set forth very specific criteria for the grant by broadcast stations of distant signal waivers and does not contemplate the "blanket waivers" suggested by EchoStar.

- **The solution EchoStar proposes is much broader than the "problem" it identifies, raising questions about EchoStar's true intent.** EchoStar does not intend the blanket waivers it proposes to be *temporary*, but has stated that it would keep "digital distant" households *permanently*, even after local stations serve those households with digital signals.[5] Furthermore, EchoStar would force any broadcaster that does not replicate its analog Grade B contour to grant the carrier a blanket waiver to provide a distant signal to any household outside of the station's community of license, even if that household receives an over-the-air local digital broadcast signal.

- **Current law does not prevent EchoStar from providing local digital signals to its subscribers.** EchoStar is permitted to, and could if it so desired, offer local digital signals to its subscribers now.

- **EchoStar's proposal would not advance the DTV transition and would run counter to the Commission's well-established goal of promoting localism.** Because EchoStar's plan would not ensure that digital sets capable

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[4] Pub. L. No. 106-113, 113 Stat. 1501, Appendix I (1999).

[5] *See* EchoStar Apr. 2004 Letter at 2 ("If the licensee subsequently builds or upgrades its facilities, the satellite carriers *will not* lose their right to serve households they have signed up.") (emphasis added); Testimony of David K. Moskowitz, Senior Vice President, EchoStar Communications Corp., Hearings before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Courts, the Internet and Intellectual Property, Feb. 24, 2004 ("Moskowitz Testimony").

> of receiving over-the-air digital signals are in subscribers' homes, it would not advance the transition. By permitting subscribers to continue to receive a distant network feed after they are able to receive a local digital signal from an affiliate of the same network, the plan also runs counter to the long-established Congressional and Commission goal of promoting and fostering localism.

The Network Affiliates therefore submit this response to EchoStar's April 13 letter and join with the National Association of Broadcasters in urging the Commission promptly to reject EchoStar's overreaching and unauthorized proposal.

I. ECHOSTAR'S PROPOSAL IS INCONSISTENT WITH SHVIA AND THE TERMS OF THE DISTANT SIGNAL COMPULSORY COPYRIGHT LICENSE.

In September 2001, EchoStar submitted to the Commission a proposal similar to the instant one, urging the Commission to condition its grant of DTV construction extension or waiver requests "**on the broadcaster granting digital distributors like EchoStar a distant network signal waiver** for the importation of that station's digital network feed."[6] The Commission declined to grant EchoStar's request, finding that the Copyright Act protects the rights of broadcast television stations "to control the distribution of the national and local programming that they transmit" and that SHVIA, in allowing satellite carriers to provide distant signal service to "unserved households" struck a careful balance between protecting the rights of broadcasters to serve their local communities and ensuring that households that truly could not receive an over-the-air network signal were not left without any network service.[7] In rejecting EchoStar's request, the Commission "decline[d] to adopt a policy here that would alter the scope of broadcasters' copyrights established so clearly by Congress."[8]

The Commission should reject EchoStar's current proposal for the same reason—the Copyright Act grants broadcasters certain rights with respect to protecting their local signals from distant signal importation by satellite carriers, and the Commission should respect this clearly established Congressional mandate. This analysis is bolstered by the Copyright Office's determination last summer, in response to EchoStar's assertion that the definition of an "unserved household" distinguishes between receipt of digital versus analog network signals, that "section 119 *does not* distinguish between retransmission of a digital or analog distant signal of an over-the-air television station. There is, therefore, no such thing as a digital network of

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[6] Letter from Charlie Ergen, Chairman and CEO, EchoStar Communications Corp., to Michael Powell, Chairman, FCC, in CS Docket No. 98-120 and MM Docket Nos. 00-39 and 87-268, at 1 (Sept. 20, 2001) (emphasis in original) ("EchoStar Sept. 2001 Letter"); *see also* EchoStar Mar. 2004 Letter at 1 ("This letter expands on a pervious proposal made by EchoStar.") (citing EchoStar Sept. 2001 Letter).

[7] *In re* Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, *Memorandum Opinion and Order on Reconsideration*, 16 FCC Rcd 20594, 20612-13 (2001).

[8] *Id.* at 20613.

CBS stations and a separate analog network of CBS stations for purposes of the section 119 license."[9] A Commission determination that EchoStar could provide distant HD network feeds to households that are served by an analog signal from a local affiliate but unable to receive a local digital signal over the air would therefore be inconsistent with the Copyright Office's determination that the distant signal compulsory copyright license does not distinguish between analog and digital signals for purposes of "unserved households."

In addition to the impermissibility of EchoStar's proposal under the Copyright Act, SHVIA does not authorize blanket waivers of the type suggested by EchoStar, nor does it contemplate that the Commission could compel broadcasters to grant such waivers. SHVIA established a clear procedure for the grant of waivers by broadcasters to satellite subscribers.[10] There is nothing ambiguous about the language of the statute—a waiver request must be initiated by a subscriber and passed through to a network station by that subscriber's satellite carrier on a subscriber-by-subscriber basis. Nowhere does the statute contemplate either that (i) the FCC could under any circumstances compel a network station to issue a waiver or (ii) a network station could issue a blanket waiver that applies to a category of subscribers. Because EchoStar's proposal is not authorized by SHVIA, it should be rejected.

II. ECHOSTAR'S CRAFTING OF A BROADER SOLUTION THAN IS NEEDED TO REMEDY THE "PROBLEM" IT IDENTIFIES CASTS DOUBT ON ITS INTENTIONS

EchoStar paints its proposal as one that gives DBS providers "the right to import a distant HDTV network feed to households that do not receive local DTV service."[11] However, EchoStar, which has a long and storied history of illegally retransmitting distant signals to served households,[12] actually seeks to provide a distant digital network signal to subscribers who are capable of receiving the digital signal of the local network affiliate. It does this first by proposing that it be permitted to force any broadcaster that does not replicate its analog Grade B contour to grant the carrier a blanket waiver to provide a distant signal to any household outside of the station's community of license. However, most stations are providing digital service today that extends well beyond their communities of license, even if they are not yet fully replicating their analog Grade B contour in digital.[13] EchoStar asks that it be allowed to import distant

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[9] Letter from William J. Roberts, Jr., Senior Attorney, Library of Congress, Copyright Office, to David R. Goodfriend, Director, Legal and Business Affairs, EchoStar Satellite Corp., at 2 (Aug. 19, 2003) ("Copyright Office Letter") (emphasis added).

[10] *See* 47 U.S.C. § 339(c)(2).

[11] EchoStar Apr. 2004 Letter at 6.

[12] *See* NAB Letter at 1-2.

[13] *See id.* at 3 ("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. This number will expand exponentially as the transition continues."). EchoStar attempts to brush off the 70% figure as insignificant. However, a (continued...)

digital signals to these households, which are already capable of receiving a local digital signal over the air. Were EchoStar truly concerned about ensuring the availability of digital network signals and not about expanding its ability to deliver distant signals to subscribers, it would not need to propose a solution that is significantly broader than the problem it allegedly identifies.

Second, EchoStar has made clear that these waivers would be permanent.[14] Were EchoStar's true motivation to jumpstart the DTV transition by encouraging broadcasters to build out their digital signals, it should be asking for waivers that would remain in effect only until such time as subscribers could receive local digital signals over the air. The broad scope of EchoStar's proposal belies its true intent, which is to enable it to import distant signals in a manner that Congress never intended.

III. ECHOSTAR COULD, AT ITS OPTION, PROVIDE LOCAL DIGITAL SIGNALS TO SUBSCRIBERS.

In the March 2004 Letter, EchoStar asserts, and expects the Commission to take on faith its assertion, that DBS providers "today cannot provide local DTV stations."[15] In fact, EchoStar could, if it so desired, provide local digital signals in at least some markets across the country.[16] According to EchoStar's website, "After launching nine satellites, EchoStar has the capacity to offer over 500 digital video, data and audio channels of programming including local networks and HDTV."[17] EchoStar currently allocates 89 channels to on-demand services, including pay-per-view.[18] Similarly, it offers 10 Showtime channels, 8 HBO channels, 8 Starz channels and 5 Cinemax channels.[19] EchoStar could opt to use some of its more than 500

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station that covers 70% of its analog service area provides digital service to much more than just its community of license, serving many of the households that would be eligible to receive a distant network signal under EchoStar's proposal. *See* EchoStar Apr. 2004 Letter at 5.

[14] *See* EchoStar Apr. 2004 Letter at 2; Moskowitz Testimony.

[15] EchoStar Mar. 2004 Letter at 2.

[16] In its August 2003 letter to EchoStar, the Copyright Office confirmed that the distant signal compulsory copyright license covers EchoStar's retransmission of both analog and digital broadcast signals. *See* Copyright Office Letter at 2 ("Because Section 119, by its terms, does not distinguish between analog or digital over-the-air television signals, it appears that the license applies to secondary transmissions of both, provided, of course, that all other terms and conditions of the license are satisfied."). There is no reason to believe that the Copyright Office would reach a different result with respect to the Section 122 local-into-local compulsory copyright license.

[17] http://www.dishnetwork.com/content/aboutus/index.shtml (visited Apr. 16, 2004).

[18] *See* http://www.dishnetwork.com/content/programming/ppv/index.shtml (visited Apr. 16, 2004) (stating that Dish On Demand is available on channels 450-539).

[19] *See* http://www.dishnetwork.com/content/programming/movies/index.shtml (visited Apr. 16, 2004).

channels for local digital broadcast service.[20] For example, it could choose to devote fewer than 100 channels to on demand and premium movie services and instead use that capacity to provide local digital signals. That EchoStar chooses not to do so is a business decision that it is well within its rights to make; however, EchoStar should not look to the Commission to confer upon it additional rights that the Commission lacks authority to convey merely because EchoStar would prefer to allocate its capacity for premium services rather than for carriage of local digital signals. And the Commission, even if it had authority to grant EchoStar's request, should not penalize broadcasters by allowing the importation of distant digital signals because EchoStar has opted to use its resources to provide more national programming channels rather than local digital signals. In fact, rejecting EchoStar's proposal would give the carrier the incentive to hasten its efforts to find ways to provide *local* digital service to subscribers.

IV. ECHOSTAR'S PROPOSAL WOULD NOT ADVANCE THE DTV TRANSITION AND IS COUNTER TO LOCALISM.

EchoStar asserts that adoption of its proposal would advance the digital transition by providing viewers with more digital signals and encouraging broadcasters to build out maximized facilities. In fact, EchoStar's proposal would not advance the transition. It would not, for example, ensure that digital receivers capable of receiving over-the-air digital signals are available in the market, as EchoStar's set-top box downconverts digital signals for viewing on analog sets and in most cases does not include a DTV tuner to ensure that subscribers with digital sets can also receive over-the-air digital signals.[21] This means that "households will be no more capable of receiving DTV signals if EchoStar retransmits distant digital signals than they are today."[22] Furthermore, EchoStar's quick objections to carrying the local signals of digital-only broadcasters belie its statements of commitment to hastening the transition.[23]

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[20] HD+ Associates has described spectrum-saving technologies that would allow a DBS operator to "offer all local stations in all markets in HDTV using a single Ka-band orbital slot each." HD+ Associates, Local HDTV Satellite Plan at 1 (Jan. 19, 2004), submitted as an attachment to *Ex Parte* Notice of Capitol Broadcasting Co. in CS Docket No. 98-120 & MB Docket No. 03-15 (Feb. 5, 2004).

[21] *See* Letter from Alan Frank, Chairman, Network Affiliated Stations Alliance, to Michael Powell, Chairman, FCC, in CS Docket No. 98-120 and MM Docket Nos. 00-39 and 87-268, at 2 (Oct. 22, 2001) ("NASA Letter"); http://www.dishnetwork.com/content/products/ receivers/HD/index.shtml (visited Apr. 16, 2004) (showing that only two of EchoStar's highest-end receivers come equipped with over-the-air digital tuners).

[22] NASA Letter at 2.

[23] *See, e.g.*, *In re* Lenfest Broadcasting, LLC v. Echostar Communications Corp., Request for Carriage of Station WMCN (TV), Atlantic City, New Jersey, *Memorandum Opinion and Order*, CSR-6248-M, DA 04-632 (Mar. 9, 2004); *In re* Guenter Marksteiner v. Echostar Communications Corp., Request for Carriage of Station WHDT-DT, Stuart, Florida, *Memorandum Opinion and Order*, 18 FCC Rcd 396 (2003).

Moreover, EchoStar's proposal runs counter to the principle of localism, which SHVIA sought to preserve and promote. When Congress enacted SHVIA and the local-into-local compulsory copyright license, it recognized "the importance of protecting and fostering the system of television networks as they relate to the concept of localism."[24] It explicitly stated that one of the purposes of SHVIA was to preserve the principle of localism[25] and "to encourage and promote retransmissions by satellite of *local* television broadcast stations to subscribers who reside in the *local markets* of those stations."[26] By permanently bringing distant network signals into local markets, EchoStar's proposal would have the opposite effect, drawing viewers away from their local network affiliates in favor of national network feeds, which is contrary to Congress's intent in adopting SHVIA.

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For these reasons, the Network Affiliates urge the Commission promptly to reject EchoStar's proposal that broadcasters be compelled to grant blanket waivers so that it may permanently retransmit distant high definition network feeds to its subscribers. EchoStar's professed concern about advancing the digital transition cannot compensate for the fact that its proposal is not authorized under law and is overinclusive, permanent and unnecessary.

Respectfully submitted,

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[24] H.R. Conf. Rep. No. 106-464, at 92 (1999).

[25] *See id.* ("[T]he Conference Committee reasserts the importance of protecting and fostering the system of television networks as they relate to the concept of localism.").

[26] *Id.* (emphasis added).

cc: Chairman Michael C. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Mr. Jonathan Cody
Ms. Stacy Fuller
Mr. Jordan Goldstein
Ms. Catherine Bohigian
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