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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

April 2, 2004

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VIA HAND DELIVERY

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

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

Dear Ms. Dortsch:

Pursuant to Section 1.1206(b)(1)(2) of the Federal Communications Commission's Rules, this to advise of a written ex-parte presentation by Dominion Video Satellite, Inc. ("Dominion") to W. Kenneth Ferree, Chief, Media Bureau and Rosalee Chiara, Public Interest Obligations of DBS Licensees, Media Bureau, on March 31, 2004. This letter was addressed to the Enforcement Bureau in response to letters submitted by Daystar and EchoStar. The responses of Daystar and EchoStar include matters presented in the above-referenced proceeding.

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Ms. Marlene Dortch
April 2, 2004
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Should any additional information be requested, please contact the undersigned.

Very truly yours,


Marvin Rosenberg

cc: W. Kenneth Ferree
Rosalee Chiara

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March 31, 2004

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VIA HAND DELIVERY

MAR 31 2004

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Deputy Chief
Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, SW – Room 3-B443
Washington, DC 0054

**Federal Communication Commission
Bureau / Office**

Re: EchoStar Satellite Corp. and Word of God Fellowship, Inc.
File No. EB-IH-0018

Dear Mr. Friedman:

Dominion Video Satellite, Inc. ("Dominion") hereby replies to the letters sent to the Enforcement Bureau ("Bureau") by the Word of God Fellowship, Inc. d/b/a the Daystar Television Network ("Daystar") on March 17 and 22, 2004, and to the letter sent by EchoStar Satellite L.L.C. ("EchoStar") on March 22, 2004.¹ The Daystar and EchoStar letters purport to respond to the Bureau's February 20, 2004 request that Daystar and EchoStar address the following issues:

- (1) Whether Daystar is improperly selling airtime and conducting other commercial activities on its non-commercial educational broadcast stations in violation of Section 73.621 of the Commission's Rules;

¹ Rather than submit three separate replies to Daystar's two letters and EchoStar's one letter, Dominion addresses all three in this reply.

- (2) Whether Daystar's commercial activities render it an unqualified entity to broadcast as a public-interest programmer on the 4% of channel capacity that a Direct Broadcast Satellite ("DBS") provider is required to set aside for noncommercial programming under Section 25.701(c) of the Rules; and
- (3) Whether, due to Daystar's commercial activities, EchoStar's broadcast of Daystar on its 4% set-aside capacity is improper.

(Feb. 20 letter, pp. 1-2.) Dominion responds to Daystar's and EchoStar's positions as set forth in their respective letters as follows:

1. Daystar's response letters do not address the Bureau's questions.

In its two response letters, Daystar sidesteps the Bureau's questions by attempting to draw a distinction between its status as a licensed operator of noncommercial educational broadcast stations and its qualifications as a public-interest programmer on the DBS set-aside capacity. In its March 17 letter, Daystar insists that because it is a 501(c)(3) entity, it is qualified to broadcast on the DBS set-aside capacity, period. In its March 22 follow-up letter, Daystar again claims that it is a qualified public-interest programmer pursuant to the DBS Public Interest Order and that it does not engage in commercial activities on capacity reserved for noncommercial uses. Even though it submitted two responses, however, Daystar seems to have missed the point of Dominion's allegations concerning Daystar's improper commercial use of its noncommercial educational station licenses and the noncommercial nature of programming to be broadcast on the DBS set-aside capacity.

First, Daystar does not address the Bureau's question concerning Daystar's sale of airtime on both its noncommercial broadcast stations and on the EchoStar set-aside capacity. In its *Opposition to Daystar's Request for Section 403 Inquiry and Declaratory Ruling* ("*Opposition*") filed on September 12, 2003, Dominion presented the Bureau with a sworn declaration of Daystar's President and CEO, Marcus Lamb, in which Lamb states that Daystar's removal from the DBS set-aside capacity would deprive it of significant revenue, including "advertising [and] revenue from the sale of air time to other programmers on the Daystar Network." (Exhibit 6 to *Opposition*, ¶ 13.) Dominion has also presented the Bureau various materials demonstrating that Daystar receives remuneration for airtime on its noncommercial stations and DBS public-interest channel, such as Daystar's statement that it "charges ministries \$3500," and the Daystar rate card for airtime sales. (*Id.*, Exhibits 7 – 9.) Given the evidence that Daystar sells airtime on both its noncommercial broadcast stations and its DBS public-interest channel, Daystar's "response" shows that it is either evading the Commission's questions, or is simply ignoring the existence of its own documents showing that it receives money in exchange for airtime under its noncommercial licenses.

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Second, even a cursory review of Daystar's programming reveals that Daystar is in fact conducting significant commercial activities on capacity that is expressly reserved for noncommercial programming. In its March 22 letter, Daystar claims that it "does not transmit in exchange for remuneration any programming promoting any service, facility, or product offered by any person who is engaged in such offering for profit; expresses the views of any person with respect to any matter of public importance or interest, or supports or opposes any candidate for political office." This bald denial does not respond to the substance of the Bureau's questions, or to the evidence of Daystar's commercial activities.²

Because Daystar does not address the evidence, it is difficult to discern its position on the specific commercial activities demonstrated by Dominion. It appears, however, that Daystar's position is that it is entitled to engage in commercial activities on its non-commercial stations and on the DBS set-aside capacity so long as it does not receive any remuneration for these broadcasts. (See Daystar March 22 letter.) If that is the case, then Daystar has a fundamental misunderstanding of what remuneration, or consideration, means.

The FCC has stated:

(c)onsideration is a broad term that denotes anything of value provided to the public broadcaster, licensee, its principals or its employees. Consideration, thus, encompasses the contribution of programming material and funds, goods and/or services used for programming, as well as in-kind contributions (e.g. studio equipment) which frees station funds for programming purposes. A public broadcaster is precluded from promoting an individual's or entity's goods, services or activities, where the broadcaster receives or reasonably anticipates the receipt of consideration from the individual or entity (other than a non-profit organization).³ Thus, a public broadcaster's decision to promote third parties must be based on public spirited determinations rather than economic considerations. Where consideration in the form of specific or in-kind contribution is provided, the public broadcaster is, however, required to acknowledge the donor under 47 C.F.R. § 73.1212. This donor acknowledgement may include such identifying information as the donor's logogram, and location, but may not promote the donor's goods, services or activities, unless the donor is

² Dominion has previously submitted tapes of Daystar programming during which for-profit entities are selling various commercial products and services. (Exhibit 17 to Opposition.) The Daystar programs on these tapes are no different from any other show-length commercial, or "infomercial."

³ The Commission will permit the broadcast of promotional announcements on behalf of non-profit organizations when a licensee in its good faith judgment determines it will serve the public interest. This is different than the sale of program time to a non-profit organization which is precluded by Section 73.621(d), particularly when a non-profit entity promotes the goods and services of profit entities.

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a nonprofit entity. *See Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, 90 FCC 2d 896, at ¶ 26 (1982).

A review of the Daystar programming submitted to the Commission reveals repeated announcements for products or services rendered by persons engaged in for-profit commercial activities. Daystar does not address this evidence. Nor does Daystar address whether it has received “remuneration” from any entities performing commercial activities on Daystar by, for example, selling the airtime in which the commercial activity occurred. Indeed, Daystar continues to engage in these blatantly commercial activities. As evidence of this, Dominion respectfully attaches as Exhibit 1 hereto a tape of a Daystar program entitled “Paula White Today” a program that was broadcast on February 21, one day after the Commission asked Daystar to address whether its practices violated Commission rules.

The “Paula White Today” program alone raises serious questions about Daystar’s compliance with Section 73.621. The program contains repeated offers to sell certain books during an interview with the author of those books. In the interview, the author makes several references to his commercial products and states that his products do not contain harmful elements that are included in competing products. This program raises significant questions, for example:

- How does the “Paula White Today” program differ from any other “infomercial”?
- Did Daystar sell the airtime for this program?⁴
- Did “Paula White Today” receive any consideration for the promotion of the books and products on behalf of a for-profit entity?
- Was a sponsorship identification announcement pursuant to Section 73.1212 required?
- Do the repeated announcements violate the requirement that the scheduling of announcements shall not interrupt regular programming?
- Does the promotion of the books violate the requirement that fundraising activity shall be for station operation only?
- Did Daystar request a waiver to engage in fund raising activity for an unrelated entity?

Finally, Daystar claims in its March 17 letter that its status as a non-commercial educational licensee has no bearing on whether it qualifies as a public-interest programmer for the DBS set-aside capacity. (Daystar March 17 letter, p. 2, n.1.) Again, Daystar misses the point. The DBS public-interest order specifically incorporates the definition of “noncommercial educational television station” that is set forth in the rules relating to over-the-air television broadcasters. *See In the Matter of Implementation of Section 25 of the Cable Television Consumer Protection And Competition Act of 1992*, Report and Order, 13 FCC Rcd. 23254

⁴ For the Commission’s reference, Dominion attaches as Exhibit 5 hereto a web-page printout from the vendor that is offering the books and other products mentioned on “Paula White Today” for sale.

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(“DBS Public-Interest Order), ¶¶ 78 & 95, & n. 206. Footnote 206 incorporates the definition of advertisement found in 47 CFR § 73.621, a section applicable to noncommercial television stations. (*Id.* n. 206.) In other words, if Daystar is violating the requirements of Section 73.621, it follows that it is not qualified as a noncommercial programmer to broadcast on the DBS set-aside capacity. Thus, notwithstanding its summary denials, Daystar has not addressed the underlying issue — whether its commercial activities fall within those prohibited by Section 73.621.

Daystar’s non-response to the Bureau’s February 20 letter confirms that an investigation is necessary to determine whether Daystar’s sale of airtime and other commercial activities violate Commission rules relating to both its noncommercial educational broadcast stations and to its public-interest channel broadcast on EchoStar’s Dish Network’s set-aside capacity.

2. EchoStar’s contract with Daystar does not shield it from ensuring its own compliance with Commission rules.

In its response letter dated March 22, 2004, EchoStar seeks to establish an unprecedented Commission standard for a licensee. Under EchoStar’s interpretation of licensee conduct, a licensee is relieved of any responsibility for compliance with the Commission’s Rules once it enters into a contract with another party. (EchoStar March 22 letter, pp. 2-3.) According to EchoStar, it then becomes the contracting party’s obligation to conduct itself within the Commission’s Rules. (*Id.*) EchoStar is wrong — the cases holding that a licensee is responsible for compliance with the Commission’s rules regardless of any contractual arrangement or a delegation of duty are so numerous that it is unnecessary to cite precedent for this proposition.

Moreover, the DBS Public Interest Order, while allowing DBS Operators to rely on certifications from programming distributors, requires that “such reliance must be reasonable and cannot be an absolute shield against liability for violations of these rules.” DBS Public Interest Order, ¶ 26. The Commission has also recently reinforced that “licensees [may] demonstrate compliance with the public service obligations by relying on certifications from distributors that the obligations are being fulfilled, *provided the licensee’s reliance is reasonable.*” *In re Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 93-25, at ¶ 14 (March 25, 2004) (emphasis added). The Commission further specified that “licensees will not be required to verify compliance by distributors *unless there is evidence that the distributor is not complying with these rules or has falsely certified compliance.* *Id.* (emphasis added). Given that EchoStar has known for eight months that, according to Lamb’s declaration, Daystar sold airtime on the set-aside capacity, it is unreasonable for EchoStar to claim that it has no responsibility to ensure that Daystar’s broadcast complies with the Commission’s rules. Further, the most recent FCC order specifies that licensees are entitled to rely on certifications of distributors. Where, as here, EchoStar is both licensee and distributor, EchoStar cannot invoke its own “certification” that the programming is noncommercial and complies with Commission rules.

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Nor can EchoStar hide behind the editorial-control provisions of the public-interest rules. Those provisions expressly make “DBS providers ... responsible for ensuring that the obligations imposed by the statute are fulfilled,” and also provide that “if an abuse of the reserved channels by a particular programmer comes to the DBS provider’s attention, it can then take action to ensure that only qualified programs are carried on the reserved channels by that programmer in the future.” *Id.* ¶ 110. Accordingly, there is nothing in the DBS public-interest rules that excuses EchoStar from making an independent determination of whether Daystar’s commercial activities on the EchoStar set-aside capacity place EchoStar in violation of Section 25.701(c) of the Commission’s rules.

Finally, in its programming agreement with Daystar, EchoStar has the right to terminate Daystar’s broadcast at any time without notice if Daystar’s programming fails to qualify as public-interest programming, or if Daystar violates any Commission rules. (Exhibit 2 hereto, § 2.2.1.) According to the contract, the determination of whether the programming complies with Commission rules is a determination to be made in “EchoStar’s sole and absolute discretion.” (*Id.*) Thus, far from being able to hide behind its contract with Daystar, the contract shows that EchoStar contemplated that it would have the duty and right to investigate Daystar’s programming to determine whether it is noncommercial or violates the public-interest rules, making EchoStar ultimately responsible for Daystar’s broadcast on the set-aside capacity.

3. EchoStar’s comments regarding the redundancy of local-into-local broadcasts are misplaced.

Even though the Bureau directed that EchoStar not comment on the issues raised in Docket No. MB 03-206 — specifically whether Daystar traded must-carry rights for public-interest carriage — EchoStar nevertheless argues that Daystar’s trade of must-carry rights in exchange for public-interest carriage is not material because Daystar’s national feed is identical to its local stations’ broadcasts, making the local-into-local broadcasts of these stations redundant. (EchoStar March 22 letter, p. 4.)⁵

Although the issue is not before the Enforcement Bureau, Dominion is compelled to briefly address EchoStar’s misapprehension of the requirements related to local broadcast stations. First, EchoStar simply does not address Section 73.621(a)’s requirement that local noncommercial stations must broadcast material “primarily to serve the educational needs of the community.” If Daystar’s programming on its national feed and on its local stations is identical,

⁵ With respect to Daystar’s trade of must-carry rights for public-interest carriage, EchoStar claims that “this waiver has not served as an enticement to EchoStar for selecting Daystar over other programmers.” (EchoStar March 22 letter, p. 4.) In an attachment, EchoStar’s Vice President of Programming, Eric Sahl, declares under oath that all the representations in EchoStar response are accurate. (*Id.* at 6.) Sahl, however testified under oath at a deposition in January of this year that Daystar’s must-carry waiver was indeed a factor in choosing Daystar over other public-interest programmers. (Exhibit 3 hereto.)

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then what programming does Daystar broadcast on its local stations as required by Section 73.621(a)?

Second, EchoStar's position on the redundancy of local broadcasts is directly at odds with its own stated concerns about local-into-local carriage, and particularly its recognition of the importance of carrying a truly *local* station and not a simply a national satellite feed of some programming that may appear on the local station. For example, in EchoStar's *Opposition to Complaint* filed with the Commission on September 25, 2003 in the case of Arkansas 48, Inc. KYPX(TV), Cambden, AR v. EchoStar Communications Corp., CSR 6234-M, DA 03-4044, it articulated the importance of localism in satellite broadcasting:

Since this is the first instance whereby EchoStar has been asked to take a satellite feed of a local signal, EchoStar further needs assurance that what it will receive will be the actual KYPX signal, and not some "central-casted" multi-station hybrid feed which does not contain all of the local content of KYPX (including EAS warnings). To require EchoStar to carry anything less than the true local signal of KYPX is antithetical to the concept of "local-into-local" signal delivery contemplated by Congress in SHVIA.

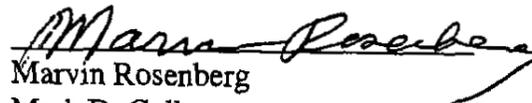
Opposition to Complaint, p. 8 (Exhibit 4 hereto.) As EchoStar's own statements to the Commission indicate, carrying Daystar's local-into-local stations along with a national feed is far from redundant. Indeed, EchoStar's former position is the right one — allowing EchoStar to escape its must-carry responsibilities by simply carrying a Daystar national feed "is antithetical to the concept of 'local-into-local' signal delivery contemplated by Congress in SHVIA."

Because EchoStar, like Daystar, has failed to provide any substantive response to the Bureau's questions contained in its February 20 request letter, Dominion respectfully submits that a complete investigation of Daystar's and EchoStar's practices with respect to noncommercial educational licenses and the DBS set-aside capacity is warranted.

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Respectfully submitted,

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