

Marvin Rosenberg  
202 457 7147  
marvin.rosenberg@hklaw.com

September 22, 2004

**ELECTRONICALLY FILED**

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

Re: MB Docket No. 03-206

Dear Ms. Dortch:

Transmitted herewith on behalf of Dominion Video Satellite, Inc. ("Dominion") is the Partial Final Award issued by the American Arbitration Association on September 10, 2004. The Partial Final Award apparently came to the Federal Communications Commission's staff attention as a result of industry press coverage, and it is being submitted pursuant to the staff's request for inclusion in the above referenced proceeding.

Very truly yours,

  
Marvin Rosenberg

cc: Eloise Gore  
Rosalee Chiara

# 2269503\_v1



American Arbitration Association  
*Dispute Resolution Services Worldwide*

*Western Case Management Center*  
John M. Bishop  
Vice President

Jeffrey Garcia  
Assistant Vice President

6795 North Palm Ave, 2nd Floor, Fresno, CA 93704  
telephone: 877-528-0880 facsimile: 559-490-1919  
internet: <http://www.adr.org/>

September 10, 2004

VIA FACSIMILE and US  
MAIL

Cameron Fogle  
Holland & Knight, LLP  
2099 Pennsylvania Ave., N.W.  
Suite 100  
Washington, DC 20006

Ross W. Wooten, Esq.  
T. Wade Welch & Associates  
Seventh Floor  
2401 Fountainview, Suite 700  
Houston, TX 77057

Re: 77 181 Y 00326 03 KRLI  
Dominion Video Satellite, Inc.  
and  
EchoStar Communications Corporation

Dear Parties:

By direction of the arbitrator we herewith transmit to you the duly executed Award in the above matter. This serves as a reminder that there is to be no direct communication with the arbitrator. All communication shall be directed to the Association.

The financial information contained in the Award was calculated as of the date of the Award's preparation. Information on any adjustments to same caused by subsequent payments will be provided by the Association.

Please be reminded the Accelerated Exchange Program is terminated. All communications shall be directed to the Association.

We appreciate your selection of the AAA as your alternative dispute resolution provider in this matter. As always, please do not hesitate to contact me if you have any questions.

Sincerely,



Kristine L. Lindemann

Case Manager

559 490 1844

Lindemannk@adr.org

Noreen L. Garcia

Supervisor

559 490 1867

Garcian@adr.org

Enclosure: Award

cc: Michael L. Beatty, Esq.  
Cecil E. Morris, Jr., Esq.  
Samuel David Chervis, Esq.

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AMERICAN ARBITRATION ASSOCIATION

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**DOMINION VIDEO SATELLITE, INC.,**

Claimant,

Case No. 77 181 00326 03 KRLI

v.

**ECHOSTAR COMMUNICATIONS  
CORPORATION,**

Respondent.

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**PARTIAL FINAL AWARD**

Having heard the testimony and reviewed the evidence offered by the parties, and having reviewed the briefs and arguments presented by the attorneys, the Panel hereinafter finds, concludes, and orders as a Partial Final Award, supplementary to its Interim Awards, as follows:

**I. NON-EXCLUSIVITY UNDER 8.4(d)**

Section 8.4(d) provides an exception to the exclusivity provision of the Agreement that, if satisfied, allows EchoStar to carry a channel or one-time event, even if the content of the channel or one-time event is deemed to be a Christian program as that term is defined in Article 8.3 of the Agreement.

The right of Dominion to decline to carry programming under Article 8.4(d) of the Agreement carries with it the obligation to decide and to communicate to the programmer in a commercially reasonable time and manner, the decision whether or not to carry the programming. To satisfy this obligation, Dominion shall send a copy or other notification (at the

same time as the communication to the programmer) to EchoStar of any communication not to carry the programming. Dominion may not fail to respond or accept with unreasonable conditions and thereby prevent the channel or one-time event from being carried by EchoStar.

The parties agree, and the Panel finds, that technical conditions which Dominion cannot satisfy, but which EchoStar can (such as satellite location, full or partial CONUS, audience size, availability of encryption or pay-per-view technology), are not adequate or sufficient grounds for giving EchoStar the right to carry Christian programming under Section 8.4(d). The right of EchoStar to carry Christian programming under Section 8.4(d) stems only from a refusal by Dominion to carry the programming.

Dominion agrees, and the Panel finds, that Christian programming that Dominion declines to carry because (a) it is inconsistent with Dominion's mission or its Profession of Faith, or (b) any other reason, can be carried by EchoStar under Section 8.4(d). Likewise, the lack of availability of capacity for a particular Christian holiday broadcast may require Dominion to decline carriage and allow EchoStar to carry the event under Section 8.4(d).

As a practical matter, the Christian programmer should contact Dominion directly or be referred to Dominion by EchoStar so that Dominion will always have the exclusive opportunity to negotiate to carry the Christian channel or programming. Dominion, within a commercially reasonable period of time, must either communicate its acceptance and offer to carry the channel to programmer or programming, or communicate that it declines to carry the channel or programming to programmer. Acceptance of such offer by the channel or one-time event is not a requirement; only Dominion's offer to carry on terms consistent with its carriage of other third-party programming or channels. A commercially reasonable time to accept carriage of a channel is determined by the totality of the circumstances, including the term of the then-existing channel

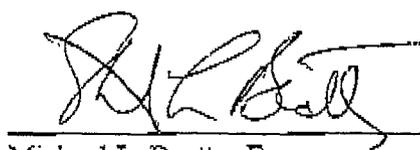
carriage agreements and the ability to free or add channel capacity at Dominion. Commercial reasonableness for one-time only programming is likewise determined by the totality of the circumstances, including the proximity of the planned event and the time necessary for EchoStar to schedule the programming in the event the one-time only program is declined by Dominion. The parties are reminded that good faith and reasonableness are required by both sides to make Article 8.4(d) work effectively.

The Panel does not address whether a channel or other programming may later revert to Dominion or whether declining to carry programming by Dominion constitutes a refusal for all time.

**II. CONTROL OF PROVISIONING AND UPLINKING**

There is no breach of the Agreement at this time by EchoStar regarding the transfer of control of provisioning and uplinking to Dominion. There has not been adequate testing or negotiation by and between the parties and CSG regarding development of a workable solution. The Panel declares that, consistent with its obligations under the Agreement, EchoStar shall permit CSG to complete the development and testing of the solutions it has previously presented to EchoStar.

Dated: 7/8/04   
Samuel D. Cheris, Esq.

Dated: 7/8/04   
Michael L. Beatty, Esq.

Dated: 7/8/04   
Cecil E. Morris, Jr., Esq.

## AMERICAN ARBITRATION ASSOCIATION

Case No. 77 181 00326 03 KRLI

**DOMINION VIDEO SATELLITE, INC.,**

Claimant,

v.

**ECHOSTAR SATELLITE CORPORATION,**

Respondent.

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**ORDER ON RECONSIDERATION OF INTERIM AWARD  
REGARDING PROMOTIONAL PROGRAMMING**

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Dominion requests the Panel to reconsider that portion of the Interim Award related to Echostar's broadcast of promotional programming. The Panel elects to reconsider its earlier Order as it relates to the term of the Agreement:

In the Interim Award, the Panel found that "The Agreement does not address the issue of promotional programming." In fact, the Agreement does address promotional programming.

Section 6.3.9 of the Agreement provides:

... either party shall have the right to market their respective programming packages to the other party's subscribers, pursuant to appropriate and reasonable terms and conditions to be established by the respective parties in good faith.

(Jt. Ex. 1 at ¶ 6.3.9)

This provision does not allow the Panel to impose any solution on the parties regarding what promotional programming may or may not be allowed. Thus, the role of the Panel in construing this provision is limited solely to a determination of whether the respective parties have acted in good faith in attempting to reach an agreement as to appropriate and reasonable

terms and conditions. Good faith depends on the particular facts of a given situation and the Panel elects not to make a finding regarding good faith on the evidence submitted in this arbitration.

Instead, the Panel notes that Echostar's Director of Programming, Michael Schwimmer, provides one potential solution to the specific fact situation raised in his case when he noted:

So a more practical way to go about it that serves everybody's interest, since if someone doesn't speak Korean, regardless of whether the programming is objectionable or not, there's really no reason to deliver Korean programming to someone who speaks Arabic.

So probably a better way -- and I would like to look into this -- but would just be to make that programming only available to the people that are part of the target market.

(Transcript of Arbitration, March 11, 2004, p. 1300: 18 - 1301:1)

The approach referred to by Mr. Schwimmer would obviously be in good faith. Promotional programming, by its own terms, is intended to promote particular programming. If there is no reasonable basis to believe that Dominion subscribers would subscribe to particular programming, there is no reason to direct material promoting that programming to them. Other solutions may be available. The Panel does not address those issues here, but reminds both parties of their obligations to act in good faith.

Dated: 7/8/04

  
Samuel D. Cheris, Esq.

Dated: 7/8/04

  
Michael L. Beatty, Esq.

Dated: 7/8/04

  
Cecil E. Morris, Jr., Esq.

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**AMERICAN ARBITRATION ASSOCIATION  
COMMERCIAL ARBITRATION TRIBUNAL**

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**DOMINION VIDEO SATELLITE, INC.,**

Claimant,

Case No. 77 181 Y 326 03 KRLI

And

**ECHOSTAR COMMUNICATIONS  
CORPORATION,**

Respondent.

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**FINAL AWARD**

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and dated July 18, 1996, and having been duly sworn and having duly heard the proofs and allegations of the parties, and having previously rendered an Interim Award dated April 15, 2004, AWARD as follows:

**PRIOR AWARD**

The Panel issued a Partial Final Award on July 8, 2004, dealing with non-exclusivity under Section 8.4(d) and control of provisioning and uploading. That Partial Final Award is attached hereto as Attachment A and incorporated into this Final Award for all purposes.

**I. EXCLUSIVITY**

As the programming on those channels is currently constituted, the channels FamilyNet, DayStar, and Educating Everyone have as their overriding focus a Christian religious content and are only marketed to appeal to the Christian theme and content.

As such, they meet the definition of Christian programs as defined in Article 8.3 of the Direct Broadcast Service Transponder Lease, Channel Use and Programming Agreement (“Agreement”).

On the facts presented, EchoStar’s performance of the Agreement is not excused by: (i) the federal law and Federal Communications Commission (“FCC”) regulations relating to public interest programming; (ii) as a matter of legal impossibility; or (iii) preempted by those laws and regulations.

Therefore, EchoStar has been and is currently in breach of the Agreement by its carriage of those channels as public interest programming.

The Panel finds that irreparable harm has and will continue to occur in the absence of injunctive relief and awards an injunction prohibiting EchoStar from broadcasting FamilyNet, DayStar and Educating Everyone, as the programming on those channels is currently constituted. The injunction is effective as of the date of this Final Award. In addition, the Panel awards damages in the amount of \$2,438,178.00 for past economic damages suffered by Dominion up to the date of this Final Award. Because the injunction is aimed at future actions of EchoStar, the monetary damage award does not constitute a double recovery. The Panel further declares that injunctive relief is appropriate with respect to any other breach by EchoStar, should it broadcast any other channels which have as their overriding focus a Christian religious content and are only marketed to appeal to the Christian theme and content, except for the channels specifically permitted in the Agreement between the parties.

## **II. EDUCATIONAL PROGRAMMING PURSUANT TO SECTION 8.4(a)**

The Panel declares that for purposes of Section 8.4(a), educational programming is found to include:

- (1) Academic instructional programming;
- (2) Instructional programming for K-12, college or licensure which qualifies for credit toward a degree, certificate or other educational requirement; or
- (3) Any seminars or training in secular topics.

Educational programming does not include Christian ministerial programming.

### **III. STIPULATION REGARDING DOMINION SUBSCRIBERS**

Without waiving any right to recover costs if requested to do so again, EchoStar agrees to provide to Dominion a list of the subscribers (including name, address, contact information, receiver numbers, and smart card numbers) for all people who have ordered Sky Angel programming, currently have Sky Angel programming and all receivers currently activated for Sky Angel programming.

### **IV. PROMOTIONAL PROGRAMMING**

The Panel has issued an Order on Reconsideration of Interim Award Regarding Promotional Programming. That Order on Reconsideration is attached hereto as Attachment B and incorporated into this Final Award for all purposes.

### **V. ATTORNEYS' FEES**

The Panel awards reasonable attorneys' fees, on a net basis, to Dominion in the amount of \$748,000.00.

### **VI. CONTINUING JURISDICTION**

The Panel retains jurisdiction of this arbitration for 90 days from the date of this Final Award to address matters arising from this award or other continuing issues, if any.



**VII. OTHER CLAIMS AND DEFENSES**

The administrative fees of the American Arbitration Association ("the Association") totaling \$14,600.00 and the compensation and expenses of the Arbitrator totaling \$25,582.00 shall be borne equally. Therefore, EchoStar shall pay to Dominion the sum of Seven Thousand and No / 100 Dollars (\$7,000.00), representing Dominion's share of deposits previously advanced to the Association.

This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are, hereby denied.

Dated: 9/9/04

Samuel D. Chervis  
Samuel D. Chervis, Esq.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Michael L. Beatty, Esq.

Dated: \_\_\_\_\_

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Cecil E. Morris, Jr., Esq.

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Post-It Fax Note	7671	Date	9/9/04	# of pages	1
To	Kristine Lindemann	From	Sam Chervis		
Co./Dept.	AAA	Co.			
Phone #		Phone #	303-632-7212		
Fax #	303-490-1915	Fax #	301-638-1571		

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Dated: \_\_\_\_\_

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Samuel D. Cheri, Esq.

Dated: 9/9/04 \_\_\_\_\_

  
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Michael L. Beatty, Esq.

Dated: \_\_\_\_\_

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Cecil E. Morris, Jr., Esq.

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Dated: \_\_\_\_\_

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Samuel D. Cheris, Esq.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Michael L. Beatty, Esq.

Dated: SEPT 10, 2004

  
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Cecil E. Morris, Jr., Esq.

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