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January 31, 2005

Via ELECTRONIC FILING

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

Re: **Notice of Ex Parte Presentation**
MB Docket Nos. 98-120, 00-96, 00-2

Dear Ms. Dortch,

Pursuant to Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206, EchoStar Satellite L.L.C. ("EchoStar") submits this letter to report that, on January 28, 2004, representatives of EchoStar met with William Johnson, Mary Beth Murphy, Rick Chesson, Eloise Gore, Ben Bartolome, and Rosalee Chiara of the Media Bureau.

EchoStar urged the Commission not to require satellite carriers to carry the high definition ("HD") television signal of local broadcast stations in high definition format ("HD must-carry"), but to instead only require satellite carriers to carry HD broadcast signals in a downconverted format. In EchoStar's view, requiring HD must-carry would likely be unconstitutional under the *O'Brien* test as applied in the *Turner* and *SBCA* cases.¹

¹ *United States v. O'Brien*, 391 U.S. 367 (1968) ("*O'Brien*"); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner P*"); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"); *Satellite Broadcasting and Communications Ass'n v. FCC*, 275 F.3d 337 (4th Cir. 2001) ("*SBCA*").

The *O'Brien* test applies to satellite carriage requirements as well as to cable must-carry, and any reliance on the Fourth Circuit's decision in *SBCA* for distinguishing the two is totally misplaced. In that case, the court clearly did not rule that the constitutional test in *O'Brien* was inapplicable to the "carry-one, carry-all" satellite must-carry regime. The Fourth Circuit specifically declined to so rule, despite the FCC's argument that *O'Brien* did not apply. Rather, the court held that, since the carry-one, carry-all regime was constitutional under *O'Brien*, it need not address the question of whether a more lenient standard should be applied.²

In addition, the Commission has already recognized that carriage of HD signals in a downconverted analog format is not precluded by the nondegradation requirements in the Communications Act, at least during the transition to digital television.³ Thus, the Commission has confirmed that the term "material degradation" is capable of different interpretations, as it has interpreted it both ways depending on the circumstances in the context of cable must-carry. The principle of avoiding an unconstitutional interpretation of an ambiguous provision is therefore in full force here.

Indeed, Congress has signaled that the Commission should interpret the satellite carriage requirements flexibly in the circumstances presented by satellite bandwidth constraints, and should therefore allow satellite carriers to use "reasonable compression, reformatting, or similar technologies."⁴ In any event, Echostar believes that an HD must-carry requirement would be unconstitutional under *O'Brien* for the reasons discussed above, regardless of the meaning of the nondegradation provision.

² *SBCA*, 275 F.3d at 355 ("Because, as we explain below, the carry one, carry all rule passes constitutional muster under *O'Brien*, we need not address the FCC and its' intervenors' argument that the rule should be evaluated under a more lenient standard.").

³ See *DTV Must-Carry Order* at 2630 ¶ 74 ("We do not believe the conversion of a digital signal to an analog format under these specific and temporary circumstances is precluded by the nondegradation requirement in sections 614(b)(4)(A) and 615(g)(2).").

⁴ See *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, 16 FCC Rcd. 1918, 1967 ¶ 113 (2000) ("The Conference Report noted that because of constraints on the use of satellite spectrum, satellite carriers may initially be limited in their ability to deliver must carry signals into multiple markets. . . . The Commission was urged, pursuant to its obligations under Section 338, or in any other related proceedings, 'to not prohibit satellite carriers from using reasonable compression, reformatting, or similar technologies to meet their carriage obligations, consistent with existing authority.'" (quoting Joint Explanatory Statement of the Committee of Conference on H.R. 1554, 106th Cong. ("Conference Report"), 145 Cong. Rec. H11795 (daily ed. Nov. 9, 1999)).

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Pursuant to Section 1.1206(b)(2) of the Commission's Rules, 47 C.F.R. § 1.1206(b)(2), one copy of this notice is being filed electronically in each of the above-captioned proceedings.

Respectfully submitted,

/s/

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Cc: (by electronic mail)

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