



1200 EIGHTEENTH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW.HARRISWILTSHIRE.COM

ATTORNEYS AT LAW

July 7, 2005

BY ELECTRONIC FILING

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

***Re: Notice of Ex Parte Communication in
MB Docket Nos. 05-49, 05-181; CS Docket Nos. 98-120, 00-96***

Dear Ms. Dortch:

Yesterday, representatives of DIRECTV, Inc. ("DIRECTV") met with Commission staff to discuss two proceedings related to the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"). Present on behalf of DIRECTV were Susan Eid and Stacy Fuller, as well as myself. Present on behalf of the Commission were Eloise Gore, Robert Nelson, Rosalee Chiara, Mary Beth Murphy, Evan Baranoff, Ron Parver, Marla Hackett, and Sarah Pahnke.

As discussed in more detail below, the discussion primarily reflected DIRECTV's comments and reply comments filed in MB Docket Nos. 05-49 and 05-181. DIRECTV also briefly discussed a recent development in CS Docket Nos. 98-120 and 00-96.

1. Significantly Viewed Rulemaking (MB Docket No. 05-49)

At the outset, DIRECTV raised a basic point about this proceeding: when Congress enacted the provisions entitled "cable/satellite comparability," it intended to give satellite carriers rights mirroring those cable operators have long enjoyed. By doing so, Congress intended to create a more level playing field that will enable satellite carriers to provide more robust competition to entrenched cable operators. In doing so, Congress also took reasonable steps to protect local broadcasters.

The Commission must understand, however, that if it adopts an overzealous interpretation of local broadcaster protections and thereby creates an unreasonably burdensome set of rules governing significantly viewed carriage, it will render satellite carriage of significantly viewed stations entirely uneconomic. DIRECTV will have no choice but to eliminate its existing plans to offer significantly viewed stations. The only winners in such case

Marlene H. Dortch
Page 2

will be cable operators – while the clear losers will be satellite subscribers who remain unable to view signals available to their neighbors. This is not the result Congress intended.

DIRECTV also made the following more specific points:

- “Equivalent bandwidth” was meant to protect local broadcasters from material discrimination by satellite carriers. When the provision was being drafted, the concern expressed was that a satellite carrier might, for example, import a significantly viewed HD signal while refusing to carry a local broadcaster’s HD (or full time multicast) signal.
- The term was never intended, however, to mean “the same bandwidth at all times.” Indeed, 47 U.S.C. § 340(i)(B) specifically provides that the equivalent bandwidth restriction does not “require a satellite operator to use the identical bandwidth or bit rate [for a significantly viewed station] as the local or distant broadcaster whose signal it is retransmitting.”
- DIRECTV cannot comply with broadcaster suggestions that satellite carriers correlate significantly viewed and local bandwidth on a minute-by-minute basis. This would create a logistical and technical nightmare when stations switch back and forth from HD to multicasting. DIRECTV is not now capable of monitoring thousands of station “pairs” across the country for minor differences in scheduling, and creating such capability (if even possible) would be extraordinarily burdensome and expensive. For this reason, DIRECTV is not able to black out (or downconvert) significantly viewed signals to account for such differences, as suggested by the broadcasters.
- Nor, for that matter, can DIRECTV change its carriage arrangements each time a local station alters its HD/multiplex allocation. DIRECTV must be able to compare its carriage of a local/significantly viewed pair of stations *once*, decide *once* whether it carries sufficient bandwidth of the local station in order to import the significantly viewed station, and rely on that determination unless and until either station makes substantial changes in its transmissions.
- The broadcasters’ suggestion that satellite carriers can avoid this problem by always retransmitting the “entire bandwidth” of local broadcasters is entirely unhelpful. Such a requirement would essentially make satellite multicast carriage a prerequisite to digital significantly viewed carriage. It would, in other words, force DIRECTV to severely limit the number of markets in which it will provide digital local signals in order to carry digital significantly viewed stations. The entire bandwidth provision was meant to be a shield – allowing satellite carriers to retransmit significantly viewed stations even if local stations chose not to use all of their digital spectrum. The broadcasters now seek to use it as a sword with which to obtain multicast carriage rights. Congress never intended – and, indeed, specifically disclaimed – such a result. *See* 47 U.S.C. § 340(i)(E) (providing that “entire bandwidth” shall not be construed “to affect the definitions of ‘program related’ and ‘primary video’”).

- Because broadcasters affiliated with the same network will, broadly speaking, offer similar programming (and make similar HD/multicast allocation choices), instances of “material discrimination” (*i.e.*, refusal to provide equivalent bandwidth) will be easy for the Commission to identify and remedy on a case-by-case basis.
- Broadcasters should not be able to block the receipt of third-party significantly viewed stations when they withhold retransmission consent – a right they do not have with respect to cable operators. The broadcasters say that a subscriber must be receiving *same-network affiliate signals at all times* she receives a significantly viewed signal. But SHVERA does not say this. It says only that subscribers must receive local service before getting significantly viewed.
- While DIRECTV’s conditional access system can now “recognize” five-digit zip codes, and will soon be able to recognize counties, it cannot and will not be able to recognize municipal borders or unincorporated areas. With respect to existing significantly viewed areas, this means that DIRECTV will likely not be able to provide signals to all subscribers eligible for such signals. With respect to future areas, however, the Commission need not replicate this problem. It should instead use zip codes or county borders to delineate new significantly viewed areas.

2. Alaska-Hawaii Rulemaking (MB Docket No. 05-181)

Here, DIRECTV first raised a basic point about constitutionality: because 47 U.S.C. § 338(a)(4) rests on untested constitutional ground, the Commission should be very careful not to interpret its provisions to increase the burden on satellite operators – especially where those burdens would not apply to dominant cable operators. DIRECTV also made the following more specific points:

- Section 338(a)(4) states that satellite carriers must first retransmit analog signals in Alaska and Hawaii, and must retransmit digital signals in those two states eighteen months later. This, however, says nothing about whether they must continue retransmitting analog signals after launching digital signals. One possibility is that satellite carriers must carry analog signals until the end of the digital transition. Another plausible reading, however, is that satellite carriers can replace analog signals with digital signals. Where, as here, there are two plausible readings of the statute, the Commission should choose the less constitutionally burdensome reading. This reading, moreover, will not harm Alaska-Hawaii subscribers. The retransmission of a single programming stream of digital signals in SD format will nearly always be identical to the retransmission of analog signals and the SD signals would continue to be available to all of DIRECTV’s Alaska-Hawaii subscribers.
- Section 338(a)(4) applies (at most) in non-contiguous states in which a satellite operator has subscribers. For DIRECTV, this is Alaska and Hawaii. The statute’s plain language does not reach DIRECTV Latin America (“DTVLA”), which provides a totally separate

Marlene H. Dortch
Page 4

service in Puerto Rico and has fewer than 5,000,000 subscribers. Nor should DTVLA be “imputed” to DIRECTV – the statute does not apply to satellite carriers “and their affiliates,” and DTVLA, in any event, is an entirely separate business from DIRECTV.

* * *

At the end of the meeting, DIRECTV briefly discussed an “either/or” retransmission consent proposal that DIRECTV understands may be under consideration in CS Docket Nos. 98-120 and 00-96. We discussed the fact that, because many retransmission consent agreements are effective for more than three years, such an approach to carriage elections would unfairly alter the market-driven agreements carefully struck between broadcasters and satellite operators.

In accordance with the Commission’s *ex parte* rules, 47 C.F.R. § 1.1206, I am filing a copy of this letter electronically in each of the relevant dockets.

Respectfully submitted,

/s/ _____

Michael Nilsson
Counsel to DIRECTV, Inc.