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February 6, 2008

**BY ELECTRONIC FILING**

Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: ***MB Docket No. 07-18***

Dear Ms. Dortch:

In December 2007, WealthTV demanded that approval of the transaction proposed in this proceeding be conditioned on a requirement that DIRECTV set aside five percent of its capacity for “independent programming that is not affiliated with any MVPD or broadcaster.”<sup>1</sup> As DIRECTV pointed out in its response, that demand is not only transparently self-serving but also completely unrelated to the transaction under consideration – which will actually *decrease* the extent to which DIRECTV is vertically integrated with programming interests.<sup>2</sup> DIRECTV also pointed out that, even though it has been vertically integrated with both News Corporation and Liberty Media Corporation for nearly four years, “programming unaffiliated with either of those two companies comprises about 74% of DIRECTV programming, while programming unaffiliated with any broadcaster or MVPD (*i.e.*, ‘independent programming’ as defined by WealthTV) comprises about 42%.”<sup>3</sup>

WealthTV now requests clarification because it has been unable to replicate the calculations underlying DIRECTV’s figures, and concludes from its own analysis that the percentages of unaffiliated programming are lower than reported by DIRECTV.<sup>4</sup>

<sup>1</sup> Letter from Kathleen Wallman to Marlene H. Dortch (Dec. 13, 2007).

<sup>2</sup> Letter from William M. Wiltshire to Marlene H. Dortch (Dec. 21, 2007).

<sup>3</sup> *Id.* at 2.

<sup>4</sup> Letter from Kathleen Wallman to Marlene H. Dortch (Jan. 29, 2008).

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DIRECTV believes that the disparity can be explained fairly easily by the facts that WealthTV (1) has changed its definition of “independent programming,” and (2) inexplicably omitted a large number of independent channels from its analysis.

***1. WealthTV Has Changed its Definition of “Independent Programming.”***

WealthTV’s original demand was for DIRECTV to set aside capacity for channels unaffiliated with any MVPD or broadcaster. In its latest *ex parte*, however, WealthTV introduces several further limitations on what it deems to qualify as an “independent” channel. WealthTV now states that “independent channels” are not only unaffiliated, but must also be of “general appeal” – that is, “nationally available” and “not devoted to adult content, home shopping, non-English, PEG or religious programming.”<sup>5</sup> WealthTV bases its calculations on this newly-invented standard.

Of course, DIRECTV cannot be blamed for basing *its* calculations on WealthTV’s original standard rather than this latest formulation. Nor can WealthTV’s changed definition fairly serve as the basis for requesting a “clarification” of DIRECTV’s calculation.

More importantly, WealthTV’s newly-minted standard makes its December 2007 demand even more self-serving. By imposing its additional “general appeal” qualifications, WealthTV eliminates dozens of channels with which it competes for carriage, including regional sports networks (“RSNs”) – some of the most popular programming offered by any MVPD. Indeed, WealthTV has narrowed the definition of “independent programming” to the point where only a handful of channels – including, conveniently, WealthTV – would qualify.<sup>6</sup> At some point, WealthTV’s demand needs to be called what it is – a *de facto* government mandate for carriage of WealthTV, not a blow against media consolidation.

WealthTV’s new definitional strategy also has a much more disturbing consequence that should not be overlooked. It originally requested that the Commission impose a capacity set-aside for carriage of “independent programming” – a dubious legal proposition in and of itself. But it now seeks favored treatment for some forms of independent programming, including its own. It is one thing for a private party (such as WealthTV) to adopt its own editorial judgments to determine what “independent programming” is worthy of being counted for purposes of an academic analysis. It is quite another to invite the government to endorse such editorial judgments and implicitly

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<sup>5</sup> *Id.* at 2.

<sup>6</sup> Of over 200 channels carried by DIRECTV, WealthTV found that only 12 met its definition of an independent general interest channel – and two of those (Altitude and YES Network) are RSNs and therefore would not qualify.

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favor some types of “independent programming” over others. Such content-based regulation is both ill-advised as a matter of policy and indefensible as a matter of law. The Commission could not possibly advance a constitutionally-permissible rationale for favoring national, general entertainment “independent programming” over, say, a local independent news channel.

**2. *WealthTV has Failed to Account for DIRECTV Programming.***

WealthTV’s analysis also differs from DIRECTV’s because it has not included all of the programming listed on the DIRECTV Channel Lineup upon which its analysis is purportedly based.<sup>7</sup> Specifically, although WealthTV included some channels listed in the “Additional Programming” category on the Channel Lineup list, it omitted over 80 channels of gaming, premium sports, and international programming.

This omission is hard to explain, given that WealthTV did include other gaming, sports, and foreign language programming in its channel count. And because almost all of the omitted channels are independent under WealthTV’s original definition, their omission would necessarily result in a significant undercount of independent channel carriage.<sup>8</sup>

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<sup>7</sup> For ease of reference, a copy of that Channel Lineup card is attached hereto.

<sup>8</sup> There are any number of other oddities that call WealthTV’s methodology into question. For example, it included the Tennis Channel, Mid-Atlantic Sports Network (“MASN”), and New England Sports Network (“NESN”) among its list of “Adult, Shopping, Non-English, PEG and Religious Channels,” but did not include Home Shopping Network. It included two independent RSNs (Altitude Sports & Entertainment and YES Network) in its list of “Independent Channels,” but did not include two others (MASN and NESN) on that list. It listed C-SPAN and C-SPAN2 as affiliated with “Cable Company,” though (as the Commission has recognized) these channels are not owned or controlled by any MVPD. *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd. 2503, ¶ 21 (2006) (C-SPAN is “funded, but not directly owned or controlled, by MVPDs”). WealthTV also lists NBA TV as affiliated with Time Warner, when in fact the entire channel is owned by the NBA, though it recently hired Turner Broadcasting to produce programming beginning in the 2008-2009 season.

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Having changed the definition of a key term and omitted a large number of data points, it should come as no surprise that WealthTV's results did not track those of DIRECTV. In light of these facts, no further "clarification" is needed.

Respectfully submitted,

/s/

William M. Wiltshire

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