February 11, 2008

EX PARTE PRESENTATION

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

Re: Ex Parte Presentation in CS Docket Nos. 98-120, 00-96

DISH Network submits this letter summarizing ex parte presentations from Friday, February 8, 2008 in the above-referenced dockets. The undersigned had a telephone conversation with Michelle Carey of Chairman Martin's office, and Monica Desai and Eloise Gore of the Media Bureau. Brad Gillen of DISH Network participated in the Media Bureau call as well. Both calls addressed DISH Network's concerns with the imposition of a digital HD must carry obligation on DBS providers.

Capacity Challenges. DISH Network currently offers local service in 174 markets. Our fleet of eight DBS satellites is at, or near, full capacity today. HD channels require between three and four times the bandwidth of standard definition channels. If DISH Network were required to carry all must-carry channels in HD, approximately three new, state-of-the-art satellites – with access to corresponding new spectrum – would need to be designed and constructed to meet those new burdens.[1] This is a four-year process with a price tag of over a billion dollars.

Notwithstanding this incredible burden on the satellite industry, imposing an HD must-carry obligation on DBS harms consumers. Indeed, many broadcast stations do not have either the equipment or content to broadcast in HD. Last year, we were forced to set aside valuable spectrum in Alaska and Hawaii in order to comply with a DBS must carry obligation. Because many stations are not delivering an HD signal, we have three empty satellite transponders sitting over Alaska and Hawaii. If this scenario were multiplied across the continental US, the "fallow bandwidth" being set aside for must carry stations would deprive many communities in America from receiving the popular HD channels delivered by the big four networks – including NFL football games and the 2008 Olympics. HD-hungry consumers would be forced to subscribe to higher-priced services, such as cable, when DISH Network offers the lowest-cost pay TV service and an award-winning digital video recorder (DVR).

[1] It should be noted that the burden on DBS would increase substantially if we were forced to carry must carry channels in both HD and SD in perpetuity. Such a dual carriage obligation would be constitutionally suspect, absent significant accommodation of the capacity constraints within DBS systems. Even with respect to cable, the Commission has previously found that "a dual carriage requirement appears to burden cable operators' First Amendment interest substantially more than is necessary." *Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, ¶ 3 (2001).

For these reasons, an HD must-carry obligation harms consumers and does not serve the public interest.

Timing. Nevertheless, if the Commission were to impose such a burdensome obligation, DISH Network would require sufficient time to implement any new requirements or regulations. Cable providers, for example, have known about their digital must carry obligation for seven years.[2] As a result, the cable industry has had adequate time to address any potential system issues or capacity challenges to meet this burden in February 2009.

Capacity Differences: A Heavier Burden Than Cable. When implementing an HD must-carry obligation, DBS companies are at a significant capacity disadvantage compared to cable companies. For cable, the Commission has explained that "transmission of digital signals requires far less bandwidth than that required for analog signals, so cable companies transmitting signals, including must-carry signals, in digital rather than analog will gain bandwidth."[3] By Time Warner's calculation, an analog signal occupies 6 MHz of cable capacity. With the transition, an HD digital signal will occupy 3 MHz, and a SD digital signal occupies 0.6 MHz on a cable system.[4] The shift to digital – even HD digital – therefore, provides cable companies with newfound capacity gains. The opposite holds for satellite, because the efficiencies of shifting from analog to digital are already reflected in DISH Network's current digital system. Specifically, an analog signal requires approximately 2 MHz on DISH Network, and a SD digital signal will require roughly the same amount of capacity. Thus, the same SD digital channel requires more than three times the bandwidth on satellite as it does cable (using the same MPEG2 compression technology). The disparity carries over to HD capacity as well even taking into account the more advanced MPEG4 compression used by DBS providers for HD services.

In sum, an HD must carry obligation would require significantly more capacity per broadcaster across 174 markets system-wide. The additional burden on satellite resulting from an HD obligation is substantial, and clearly distinguishable from the impact on cable companies. The Commission should ensure that this higher burden on satellite companies is reflected fully in its rules, and that the "practical and technical limitations of satellite operations now and in the future" are reflected in the final FCC rules. *FCC Written Response to the GAO Report on DTV* at 45. Concrete steps should be taken to ensure that the digital must carry rules on satellite can pass constitutional muster: it is clear that the imposition of cable carriage rules on satellite without modification would not.[5]

Continuity of Service. The DBS industry serves over 30 million households nationwide, and will play a critical role in the upcoming digital transition. DISH Network has already begun the process of preparing its ground infrastructure for the digital transition. For each of our 174 local markets,

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[2] *Carriage of Digital Television Broadcast Signals,* First Report and Order and Further Notice of Proposed Rulemaking, FCC 01-22 (2001).

[3] *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules,* Third Report and Order and Third Further Notice of Proposed Rulemaking , FCC 07-170, ¶ 62 (2007).

[4] Comments of Time Warner Inc., CS Docket No. 98-120, 6 (July 16, 2007).

[5] *See e.g., Turner Broadcasting Systems, Inc. v. FCC,* 512 U.S. 622 (1994) ("*Turner I*"); *Tuner Broadcasting Systems Inc. v. FCC,* 520 U.S. 180 (1997) ("*Turner II*"); *Satellite Broadcasting & Communications Ass'n v. FCC,* 275 F.3d 337 (4th Cir. 2001).

we will have to go physically to each local receive facility and switch out the analog equipment, test and troubleshoot each broadcaster's digital signal. This is a resource-intensive logistical challenge. Requiring our engineers to make further changes to our local receive facilities to accommodate more broadcasters or greater HD content – which would entail the expansion of local receive facility space and the acquisition of additional fiber backhaul facilities – would jeopardize that schedule, and would add unnecessary risk to the broadcaster/DBS transition. Continuity of service should be the Commission's focus in this proceeding for both must carry broadcasters and DBS providers.

Respectfully submitted,

/s/ Linda Kinney

Linda Kinney
Vice President, Law and Regulation

cc: Michelle Carey
Monica Desai
Eloise Gore