

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

EXCLUSIVE SERVICE CONTRACTS FOR
PROVISION OF VIDEO SERVICES IN
MULTIPLE DWELLING UNITS AND OTHER
REAL ESTATE DEVELOPMENTS

MB Docket No. 07-51

FURTHER REPLY COMMENTS OF DIRECTV, INC.

DIRECTV, Inc. (“DIRECTV”) hereby replies to comments concerning exclusive arrangements by Direct Broadcast Satellite (“DBS”) operators for service to Multiple Dwelling Units (“MDUs”).¹ The comments received to date confirm both that the Commission should not prohibit DBS MDU exclusive service agreements and that it cannot lawfully do so. The Commission should not prohibit such agreements because they *enable* MVPD competition, as opposed to cable exclusives which have long hindered such competition. And the Commission cannot prohibit such agreements because nothing in the Communications Act permits it to do so – not Section 628, not ancillary jurisdiction, and not any of the more creative sources now cited by the cable industry. Rather, as DISH Network has suggested, a better way to increase consumer choice would be to expand the “OTARD” rules governing over-the-air reception devices to empower those living in MDUs to deploy satellite antennas in common areas.

¹ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd. 20235, ¶ 32 (2007) (“Order”).

I. The Commission Should Not Prohibit DBS Exclusive Service Agreements.

In its initial comments, DIRECTV explained why the Commission should not reflexively treat DBS operators and cable operators alike with respect to MDU service. DBS operators are in a very different position than incumbent cable operators (or, for that matter, incumbent telephone companies). The DBS industry has barely made a dent in the MDU market; it has never had the advantages of incumbency; it is not already installed in nearly every MDU in America; and it has never been able to use exclusive arrangements to hinder competition. No commenter disputes any of this.²

Indeed, the *only* public policy rationale presented for addressing DBS exclusives is the notion that, “[f]rom a consumer perspective, the identity of the company that holds exclusive access rights is completely irrelevant because the effect is the same.”³ Not so. All too often, incumbent cable operators have exclusive MDU service rights not because they offer superior service at better prices, but because they were the only game in town at the time the exclusive arrangements were initiated, or because those arrangements roll over automatically, or because cable service could be provided without rewiring MDUs for video distribution. DBS operators have none of these advantages. Nor can they offer the “triple play” of video, voice, and Internet services. If a building owner chooses to grant exclusive rights to DIRECTV, it is only because DIRECTV’s video service stands head and shoulders above those of its competitors.

Thus, the “identity of the company that holds exclusive access rights” is not “completely irrelevant.” It is crucial. Cable exclusive service in MDUs has historically been associated with poor service. Satellite service has not. Indeed, exclusive service

² To the contrary, DISH Network confirms these points in some detail.

³ NCTA Comments at 2-3.

rights have enabled satellite carriers to begin providing some of the only competition to cable operators in the MDU space. Given the significant financial investment required to provide DBS distribution, and the higher capital cost relative to cable operators, exclusive service contracts play a key role in fostering increased DBS competition in the MDU market. The Commission should not adopt rules that would thwart this emerging competition.

II. The Commission Cannot Prohibit DBS Exclusive Service Agreements.

DIRECTV also explained in its initial comments why the Commission lacks jurisdiction to address DBS exclusives. Section 628 of the Communications Act plainly and deliberately applies only to “cable operators.” The Commission thus did not – and cannot here – prohibit service contracts entered into by “DBS providers” and others who it has already held “*are not subject to Section 628.*”⁴ And given the clear Congressional choice *not* to address DBS exclusives,⁵ the Commission cannot do so using some form of ancillary jurisdiction.

Having spent the better part of a year arguing that the Commission lacks jurisdiction to address exclusive service agreements between MDUs and cable operators,⁶ the cable industry nonetheless now argues that the Commission has jurisdiction to address exclusive service agreements between MDUs and DBS operators. But these

⁴ *Order*, ¶ 61 (emphasis added).

⁵ As the Commission found in its *Order*, “the House of Representatives considered and rejected a proposal, in the context of a more comprehensive amendment, that prohibited ‘any video programming vendor [owned or controlled by] a multichannel video system operator . . . from refusing to deal with any [MVPD] with respect to *the provision of video programming.*’” *Order*, ¶ 44 n.136 (citing 138 Cong. Rec. H6550 (July 23, 1992)) (emphasis in original).

⁶ DIRECTV has not taken a position on the Commission’s jurisdiction to address cable MDU exclusive service agreements.

arguments simply cannot be squared with the positions cable has taken, and the vigor with which it has taken them, in recent months.

- The cable industry recently accused the Commission of ignoring “obvious legislative intent” and instead “straining credulity” when it sought to apply Section 612(g) of the Act to circumstances other than leased access.⁷ Yet it now suggests that Section 335 of the Act permits the regulation of DBS MDU exclusive service agreements⁸ despite the fact that both the plain language and the legislative history of that statute makes clear that its “purpose [was] to define the obligation of [DBS operators] to provide a minimum level of educational programming.”⁹
- For years, the cable industry has justified the so-called “terrestrial loophole” based on the narrowest possible reading of Section 628 of the Act.¹⁰ Yet it now suggests that Section 628 can be read expansively to regulate the programming contracts between cable-affiliated programmers and DBS operators.¹¹
- Just last year, the cable industry argued in this proceeding that “[n]othing in Title VI or anywhere else in the Communications Act gives the Commission authority to restrict contracts between cable operators (*or other MVPDs*) and owners of MDUs.”¹² Yet it now suggests that “the Commission has ample authority to extend these rules to any company that holds a license under Title III of the Act.”¹³
- The cable industry has filed pages upon pages disputing the Commission’s ancillary jurisdiction to address cable MDU exclusive service agreements. Yet it now suggests (however reluctantly) that the Commission has ancillary authority to address DBS MDU exclusive service agreements.¹⁴

⁷ Letter from Kyle E. McSlarrow, President, NCTA, to FCC Commissioners, at 2 (Nov. 13, 2007) (on file in MB Docket No. 06-189).

⁸ NCTA Comments at 4; *see also* Charter Comments at 5.

⁹ 138 Cong. Rec. H8308 (1992) (Joint Explanatory Statement of the Committee of Conference), 138 Cong. Rec. H8308, at *H8333 (LEXIS).

¹⁰ *See, e.g.*, Reply Comments of Comcast at 29, MB Docket No. 07-29 (filed Apr. 16, 2007).

¹¹ Charter Comments at 5.

¹² *See* Comments of NCTA at 3, MB Docket No. 07-51 (July 2, 2007) (emphasis added).

¹³ NCTA Comments at 3.

¹⁴ *See* NCTA Comments at 4 (“Moreover, given the Commission’s finding that it had ancillary authority to impose the prohibition on cable operators under Title I and Title III – a finding that NCTA disputes – it follows that it may use that ancillary authority with respect to other MVPDs that are not Commission licensees.”).

The cable industry's latest legal positions are not merely inconsistent with earlier positions. They are also obviously wrong. Section 335 of the Act directed the Commission to conduct a rulemaking to require DBS operators to reserve capacity for qualified programming and to implement certain political broadcasting rules.¹⁵ Even if the first sentence of Section 335(a), which references "public interest or other requirements," might be read in isolation to apply broadly to other subjects, the legislative history makes quite clear that Section 335 does not permit the Commission to enact any sort of regulation on DBS operators that it might deem to be in the "public interest." The legislative history makes clear that "[t]he purpose of [Section 335] is to define the obligation of [DBS operators] to provide a minimum level of educational programming."¹⁶ This has nothing whatsoever to do with MDUs.

Likewise, although vertically integrated cable programmers are surely subject to Section 628 of the Act,¹⁷ the Commission cannot simply instruct them not to sign contracts with DBS operators. Section 628 applies only to certain conduct (unfair

¹⁵ See 47 U.S.C. § 335(a) ("The Commission shall, within 180 days after [October 5, 1992], initiate a rulemaking proceeding to impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming. Any regulations prescribed pursuant to such rulemaking shall, at a minimum, apply the access to broadcast time requirement of section 312(a)(7) [of this title] and the use of facilities requirements of section 315 [of this title] to providers of direct broadcast satellite service providing video programming. Such proceeding also shall examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under this act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service."); see also *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992; Direct Broadcast Satellite Public Interest Obligations*, 13 FCC Rcd. 23254 (1998).

¹⁶ 138 Cong. Rec. H8308 (1992) (Joint Explanatory Statement of the Committee of Conference), 138 Cong. Rec. H8308, at *H8333 (LEXIS).

¹⁷ 47 U.S.C. § 548(b) ("It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.").

practices and the like) by certain parties (cable operators and cable-affiliated programmers).¹⁸ It does not apply to unfair practices by other parties. Nor does it apply to “fair practices” by covered parties. Thus, even if the Commission were to conclude (erroneously) that exclusive MDU service contracts are always unfair, Section 628 does not allow the Commission to prohibit DBS operators from entering into them. And, because programming contracts between cable-affiliated programmers and DBS operators are presumptively “fair,” Section 628 does not permit the Commission to regulate them (absent an adjudicated program access complaint).

Nor does the public interest requirement associated with DBS licenses provide a vehicle for Commission regulation.¹⁹ To begin with, it is hard to see how such a requirement might work for licenses that have already been granted, and thus already determined to be in the “public interest.” In any event, DIRECTV assumes that the cable industry – radio licensees themselves – would be the first to object to any attempt to condition such licenses on conduct unrelated to the license itself and unsupported elsewhere in the Communications Act.²⁰ Just as the Commission “must act pursuant to *delegated authority* before any ‘public interest’ inquiry is made under § 303(r),”²¹ so too

¹⁸ *Id.*

¹⁹ See 47 U.S.C. § 309(a) (“Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 [of this title] applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.”).

²⁰ See, e.g., Applications and Public Interest Statement of Adelphia Communications Corp., Comcast Corp., Time Warner, Inc., MB Docket No. 05-192, at 21 n.56 (filed May 18, 2005) (“Notably, the FCC licenses involved in the Transactions in the CARS, Business Radio and Private Operational Fixed services do not constitute a material aspect of the Parties’ cable television operations. The Parties urge the Commission to be mindful of its tenuous jurisdiction in this matter . . . [and] do not waive their rights to challenge the Commission’s jurisdiction to review these Applications . . .”).

²¹ *Motion Picture Ass’n of America Inc. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) (emphasis in original).

must it act pursuant to delegated authority before any “public interest” license condition is imposed pursuant to Section 309(a).

Finally, the Commission does not have ancillary jurisdiction to prohibit DBS MDU exclusives. As DIRECTV observed in its initial comments, Congress deliberately chose to write Section 628 to exclude DBS operators.²² The Commission cannot impose regulatory obligations that Congress has specifically declined to impose itself.²³

III. The Commission Should Expand the OTARD Rules.

DISH Network argued in its initial comments that, if the Commission truly seeks to provide more robust competition to MDU residents, it could do so most effectively by addressing shortcomings in the OTARD rules.²⁴ DIRECTV agrees.

Millions of potential satellite subscribers live in MDUs without “property within the[ir] exclusive use or control” such as a balcony or patio.²⁵ Millions thus have no ability under the OTARD rules to access any alternative to their incumbent cable operator.²⁶ The Commission should expand the OTARD rules to permit MDU residents to install receive equipment in common areas, such as rooftops.

²² FCC, *supra* note 5.

²³ Thus, for example, Section 706 of the Communications Act provides that the Commission shall “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” 47 U.S.C. § 157 nt. But the Commission itself has held that Section 706 “does not constitute an independent grant of forbearance authority or authority to employ other regulating methods.” *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 24011, ¶ 69 (1998).

²⁴ DISH Network Comments at 5.

²⁵ *Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, 11 FCC Rcd. 19276, ¶¶ 48, 52 (1996).

²⁶ DIRECTV disagrees, however, with DISH Network’s apparent suggestion that the OTARD rules might *prohibit* individuals from installing satellite dishes in common areas. *See* DISH Network Comments at 6 (“Indeed, the OTARD rules do not ‘permit a viewer to install a [OTARD] device on common or restricted access property.’”) (quoting *Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services*, 13 FCC Rcd. 23874, ¶ 35 (1998)). If an

CONCLUSION

DBS operators are in a very different position than cable operators when it comes to MDU service. The Commission should resist calls to reflexively treat them the same. It should not prohibit DBS providers from entering into exclusive MDU service agreements, and cannot do so lawfully. It should, however, revise the OTARD rules to enable more MDU residents to access competing MVPD services.

Respectfully Submitted,

William M. Wiltshire
Michael Nilsson
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, DC 20036
(202) 730-1300

Counsel for DIRECTV, Inc.

March 7, 2008

/s/ _____
Susan Eid
Senior Vice President, Government Affairs
Stacy R. Fuller
Vice President, Regulatory Affairs
DIRECTV, INC.
444 North Capitol Street, NW, Suite 728
Washington, DC 20001
(202) 715-2330

individual MDU owner chooses to allow residents to install satellite dishes in common areas, nothing in the OTARD rules prohibit it.